FEDERAL MARITIME COMMISSION

DOCKET NO. 77-26

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE
E. L. MOBLEY, INC.

Licensee found to have violated Commission regulations governing activities of independent ocean freight forwarders but permitted to retain license subject to certain conditions.

***Edward T. Brennan, Alan F. Wohlstetter* and *Edward A. Ryan* for respondent.**
***John Robert Ewers, Joseph B. Slunt* and *John W. Angus* as Hearing Counsel.**

REPORT AND PARTIAL ADOPTION OF INITIAL DECISION

March 12, 1979

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

The Commission instituted this proceeding by Order served June 28, 1977, pursuant to sections 22 and 44(d), Shipping Act, 1916 (46 U.S.C. 821 and 841b) to determine whether the freight forwarder license of E. L. Mobley, Inc. should be suspended or revoked.

The proceeding came before the Commission on exceptions to the Initial Decision of Administrative Law Judge, John E. Cograve in which he concluded that E. L. Mobley, Inc. (Licensee), had violated: (1) section 510.23(h) of the Commission's Rules (46 C.F.R. 510.23(h)) by the actions of its qualifying officer, Mr. E. L. Mobley, in forging the signature of another freight forwarder on a fabricated letterhead for purposes of securing the release of freight money held under a letter of credit in a freight forwarding transaction; and (2) section 510.23(f)) of the Commission's Rules (46 C.F.R. 510.23(f)), the so-called payover rule, by failing to refund overpayments of freight charges to shippers and by failing to pay over to carriers freight money obtained from shippers within the time limits prescribed. The Presiding Officer found the act of falsification of a record by Mr. Mobley to be a "momentary lapse of judgment" and an "isolated instance," and the corporate violations of the payover rule to be not willful and that steps had already been taken to ensure they would not reoccur; thus he found that Mr. Mobley continued to be fit to be the qualifying officer of E. L. Mobley, Inc. and that the license of E. L. Mobley, Inc. should not be suspended or revoked.

POSITION OF THE PARTIES

In its Exceptions to the Initial Decision, to which the Licensee has replied, the Commission's Bureau of Hearing Counsel (Hearing Counsel) challenged the finding of fitness made by the Presiding Officer. However, in light of the fact that the forgery was the personal act of Mr. Mobley and not the corporation, and that another individual has since been named as the authorized qualifying officer, Hearing Counsel takes the position that the corporate license should not be suspended or revoked so long as Mr. Mobley is prohibited from participating in the day-to-day management of the business for a period of 60 to 90 days.

In support of its position, Hearing Counsel argues that Mr. Mobley cannot be expected to realize the impact of his clearly unlawful acts absent a finding that his conduct renders him unfit to serve as qualifying officer of E. L. Mobley, Inc., at least for some period of time. Several Commission decisions are cited as authority for the proposition that section 44, Shipping Act, 1916, and the Commission's regulations impose a "high standard" not only in assessing a forwarder's technical abilities but his moral character and integrity, as well.[1] Hearing Counsel is of the view that, because an act of forgery involves fraud and moral turpitude, mere assurances that such incidents will not reoccur are insufficient to support a finding of present and continued fitness, within the meaning of section 44 of the Act.

In reply to Hearing Counsel's Exceptions, E. L. Mobley, Inc. readily admits the seriousness of the forgery incident but argues that the record of the case fully supports the Presiding Officer's ultimate findings. It explains that Mr. Mobley is aware of the seriousness of his acts and the possible consequences and is determined to prevent any reoccurrences of them. The cases cited by Hearing Counsel are distinguished and other authorities are cited for the proposition that suspension or revocation of the corporate license is warranted only in situations of a continuing pattern of illegal conduct or premeditated schemes to evade regulation.[2] The Licensee contends that the record indicates no such scheme or pattern, but rather, a 13 year unblemished record of service, and therefore punitive actions against Mr. Mobley are unwarranted.[3] It is also argued that because the Presiding Officer's findings are based on substantial evidence of good character and the observed demeanor of Mr. Mobley and the witnesses testifying on his behalf, the finding of fitness cannot be overturned.[4]

[1] *Harry Kaufman, Independent Ocean Freight Forwarder*, 16 F.M.C. 256, 271 (1973); *Independent Ocean Freight Forwarder License Application, James J. Boyle & Co.*, 10 F.M.C. 121, 127 (1966); *Dixie Forwarding Co., Inc., Application for License*, 8 F.M.C. 109 (1964).

[2] *Independent Ocean Freight Forwarder Application-Alvarez Shipping Co., Inc.*, 16 F.M.C. 78, 81 (1973); *Independent Ocean Freight Forwarder-Lesco Packing Co., Inc.*, 16 S.R.R. 1023, 1029 (1976).

[3] Although it is true that the record does not reveal a scheme to evade regulation, Hearing Counsel correctly points out that the forgery incident was the culmination of a long series of events. Additionally, the violations of the payover rule involved 42 violations. I.D. at 9.

[4] In its Reply to Exceptions, Licensee argues that because this proceeding is analogous to criminal sentencing in court, the trial judge's decision should not be disturbed on appeal "except on a plain showing of abuse." Alternatively, it is contended that, because the decision of the Presiding Officer rests in part on the credibility of witnesses, including Mr. Mobley's, it should be affirmed unless "clearly erroneous." These arguments overlook the fact that an initial decision is only a recommendation without the force of law until adopted by the Commission. *Dixie Forwarding Co., Inc., Application for License, supra* at 112. Also, the decision of the Commission in this case is not based upon a disagreement with the Presiding Officer as to the credibility of the witnesses but rather a policy decision as to what sanctions are necessary, for deterrence purposes, to insure future compliance with Commission regulations by other licensees as well as the respondent in this case.

Discussion And Conclusions

The underlying findings of fact contained in the Initial Decision are not in dispute, and are therefore adopted and incorporated herein by reference. The issue presented on exception is whether Presiding Officer was correct in his ultimate findings that Mr. E. L. Mobley possesses the required degree of fitness to continue as the qualifying officer of an independent freight forwarder and that no penalty should be imposed for the violation found. While we concur in the Presiding Officer's finding that the individual acts of Mr. E. L. Mobley and the nature of the violations of the payover rule do not warrant the suspension or revocation of the corporate freight forwarder license, we do not agree with his conclusion that no sanctions or remedial actions are warranted.

An act of forgery in a freight forwarding transaction is an act of moral turpitude and an egregious violation of the Commission's regulations which directly reflects upon a licensee's fitness to conduct such business. This is true even if the offending official—whether an employee, officer, director or, in certain circumstances, a shareholder of a corporate licensee—is intimately involved in the actual freight forwarding operations of the corporation. Administrative sanctions should not, however, be blindly or automatically imposed and even in cases where the violation is clear, evidence of mitigation will be considered in tailoring the sanctions to the facts of the specific case.[5] Section 44 and its regulations are based on an underlying remedial public interest purpose[6] and the sanctions imposed must serve such a purpose and not be punitive in character.[7] While significant evidence of mitigation has been presented in this case, we do not believe that it warrants the total result recommended by the Presiding Officer.

Accordingly, we have determined to allow E. L. Mobley, Inc., to retain its corporate license on the condition that Mr. E. L. Mobley step down as a qualifying officer and not participate in the management or operation of the business in any manner whatsoever nor receive any salary or other compensation for managerial or operational services for a period of six months. We do not believe that the 60 to 90 day period suggested by Hearing Counsel is adequate. It is our opinion that the six month period prescribed is more appropriate. Furthermore, to ensure full compliance with such ruling, an additional condition on the corporate license will be imposed requiring the other qualifying officer, Mr. Richard E. Mobley, on behalf of the corporate licensee, to certify monthly that Mr. E. L. Mobley has not participated in the management or operation of the business of the corporation directly or indirectly, nor financially benefitted therefrom as a result of any form of managerial or operational services during the term.

Similarly, while we agree that the violations of the payover rule as presented herein do not warrant suspension or revocation of the corporate license, they do reflect systemic defects in the freight forwarding operations of the Licensee that

[5] *Cf. Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 130 (1962); *Independent Ocean Freight Forwarder License Application-Guy G. Sorrentino*, 15 F.M.C. 127, 139 (1972).

[6] *Dixie Forwarding Co., Inc., Application for License*, *supra* at 117–118.

[7] *Gilbertville Trucking Co. v. United States*, *supra* at 129–130.

require some type of remedial actions being imposed to ensure future compliance. A reasonable and previously recognized response to such circumstances[8] is to require the corporate licensee to submit monthly financial accounting as to its full compliance with the payover rule for a period of one year.

THEREFORE, IT IS ORDERED, That E. L. Mobley, Inc. retain its corporate license as an independent ocean freight forwarder subject to the following conditions:

1. That Mr. E. L. Mobley not participate in the management or operation of the business of the Licensee in any respect whatsoever nor derive any salary or other compensation for managerial or operational services for a period of six months from the date of this Order;

2. That until the condition in paragraph (1) above is met, the qualifying officer of E. L. Mobley, Inc. file with the Secretary of the Commission on a monthly basis, an affidavit attesting to the fact that the above stated condition has been fully complied with by the Licensee and by E. L. Mobley personally;

3. That for a period of one year from the date of this Order the Licensee file with the Secretary of the Commission on a monthly basis and in affidavit form, a monthly financial accounting as to its compliance with the requirements of 46 C.F.R. 510.23(f).

Finally, It is Ordered, That, except to the extent modified herein, the Initial Decision issued in this proceeding, is adopted.

(S) FRANCIS C. HURNEY
Secretary

[8] *Dixie Forwarding Co., Inc., Application for Freight Forwarding License*, 8 F.M.C. 167 (1964).

FEDERAL MARITIME COMMISSION

No. 77–26

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE
E. L. MOBLEY, INC.

Partially Adopted on March 12, 1979

Applicant found fit, willing and able to properly carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, and the requirements, rules and regulations of the Commission.

Edward T. Brennan, Alan F. Wohlstetter and *Edward A. Ryan* for respondent.
John Robert Ewers, Joseph B. Slunt and *John W. Angus* as Hearing Counsel.

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

The Commission by order dated July 1, 1977, instituted this proceeding to determine whether the independent ocean freight forwarding license of E. L. Mobley, Inc., should be suspended or revoked for certain alleged violations of the Shipping Act and the Commission's regulations. On September 17, 1977, after postponement of previously scheduled prehearing conferences, counsel for respondent informed me that he was requesting the Commission's permission "to negotiate the penalties to be imposed upon respondent for the alleged violations" set out in the Commission's order.[2] Counsel requested that I stay the proceedings before me to avoid the expenditure of time and effort and money which might in the end prove useless. Hearing Counsel supported respondent in his request and I stayed the proceeding pending Commission action upon request.

On May 18, 1978, the Commission in ruling upon respondent's request pointed out that respondent was seeking to settle "all issues raised in the Order of Investigation including . . . respondent's 'fitness' to continue operating as an independent ocean freight forwarder and the matter of revocation or suspension." The Commission went on to say that while the Commission was agreeable to a negotiated settlement of the monetary penalties that might attach to respondent's past violations of the Act,

> The impact of the allegations raised in the June 28th Order [of Investigation] on the Respondent's continued fitness to be licensed as a freight forwarder does not, however, lend itself to negotiation or settlement.

[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] General Order 30 (46 CFR §§505.1 et seq.) sets forth the procedures for the collection and compromise of civil penalties.

Consequently, while leaving respondent free to "commence negotiations with the Office of General Counsel . . . for any monetary claims . . . " the Commission denied respondent's request and ordered the hearing on the question of the revocation or suspension of respondent's license for lack of fitness to commence no later than June 30, 1978, because of the lapse of time since the proceeding was initiated.

Hearing was held on June 7, 1978. Additionally, a compliance check of respondent's operations was conducted by two investigators assigned to the Commission's Savannah, Georgia, office. This check was conducted between June 20 and June 26, 1978. The evidentiary record was then closed. A briefing schedule was set.

Findings of Fact

On April 26, 1965, Mr. E. L. Mobley was issued an independent freight forwarder license, FMC No. 1064. Subsequently, on January 20, 1972, the license was transferred from a sole proprietorship to a corporation named E. L. Mobley, Inc., and license No. 1064-R was issued. E. L. Mobley is President, Treasurer, and a Director of E. L. Mobley, Inc., and in 1976 owned 66⅔ percent of the outstanding shares of the corporation. Mr. Mobley conducts, manages and supervises the operations of E. L. Mobley, Inc., and has done so throughout the years 1972 to the present.

Mrs. Virginia J. Mobley, wife of E. L. Mobley, was Vice President, Secretary, and a Director of the corporation and in 1976 owned 33⅓ percent of the outstanding shares of the corporation. Mrs. Mobley is no longer Vice President of the corporation and the position is now occupied by Richard A. Mobley. From January 1972 to February 1978, Mr. and Mrs. Mobley were the only officers and shareholders of E. L. Mobley, Inc.

Some time prior to March 24, 1976, Blue Ridge Carpet Mills of Ellijay, Georgia, negotiated an agreement with Haji Ali Bin Ahmed Bukanan and Sons of Bahrain for the sale of some carpeting—the exact amount is not relevant to any issue in the case. On March 24, 1976, The British Bank of the Middle East, State of Bahrain, issued a letter of credit with Blue Ridge as beneficiary and the Citizens and Southern National Bank, Altanta, Georgia, as the advising bank. The purpose of the letter of credit was to fund the sale and shipment of the carpeting. The letter of credit was numbered BAH #761092 and was due to expire on July 24, 1976. By letter dated April 7, 1976, Citizens and Southern advised Blue Ridge that the letter of credit has been opened. Copies of the letter of credit were enclosed. In a letter dated April 7, 1976, (not a part of the record), Blue Ridge requested Haji Ali Bin to make certain amendments to the letter of credit. On May 1, 1976, Haji Ali Bin acknowledged the request for the amendments and informed Blue Ridge that they had been made.

On May 11, 1976, E. L. Mobley received a letter from Norman E. Gibbs, Executive Vice President and General Manager of Blue Ridge in which Gibbs told Mobley he was forwarding, among other things, the British Mid East letter of credit. In the letter Gibbs asked Mobley whether he "saw any problems" in the papers enclosed—however apparently through oversight a portion of the letter of credit to fund the Blue Ridge shipment was not enclosed. This error was discovered by Blue Ridge, and on May 14, 1976, Mobley received a letter from Blue Ridge supplying the missing pages of the letter of credit. The portions of the letter of credit which had previously been omitted in Gibbs' letter of May 11, 1976, contained the restrictive clause which gave rise to the episode here in issue. Some time in the period between May 14, 1976, and May 20, 1976, Mobley became aware of the restrictive clause which provided:

Note No. 2:—The credit amount represents the FOB value of the goods. You are permitted to make excess drawings to cover ocean freight against the actual signed receipt of Charleston Overseas Forwarders Inc., P.O. Box 550, Charleston, South Carolina, 29401, which must accompany the documents.[3]

On the page of the letter of credit containing the restrictive clauses appears the notation "To be amended per N. Gibbs" and on the cover letter forwarding the missing pages appears the notation:

5/20/76	N Gibbs asking for amendment to L/C. He expects to have in time to ship on
10:30	Velocity ETD Charleston 6/21/78 (Rate $90.00 + 20%)

The notations were the result of a phone call made by Mobley to Gibbs on May 20, 1976, in which Mobley brought to Gibbs' attention the clause requiring the "actual signed receipt" of Charleston Forwarders. Mobley told him that the clause would create a problem because Charleston was no longer a licensed freight forwarder.[4] Mr. Mobley suggested that the letter be amended to delete the requirement of a receipt from Charleston Forwarders. It was Mobley's recollection that Gibbs told him the needed amendment would be made in time to ship the cargo aboard the "Velocity" on June 21, 1976.

As this point there appears to have been some confusion as to which amendment Gibbs and Mobley, respectively, were talking about. On the basis of what transpired later it seems that Mobley was referring to an amendment in the Charleston clause and Gibbs was alluding to previously requested amendments concerning "samples" and shipment of the cargo in two equal lots. In any event an amendment to the letter of credit was issued on May 30, 1976, which provided:

The above mentioned letter of credit is amended as follows:

1) Partial shipments not allowed

2) Note 3 of Documentary Credit to read—Goods must include six color cards of Nu Rugged Floor: and invoices must so certify

3) Delete No. 4 of Document Credit.[5]

On June 9, 1976, the Citizens and Southern National Bank advised Gibbs that the amendment had been issued and sent the amendment to Gibbs on that date. The amendment was received by Mobley on June 18, 1976. Mr. Mobley did not at that time check the amendment to the letter of credit. The standard office procedure at that time would have been for one of the "export girls" to place the

[3] Two other conditions were contained in the letter of credit. Notes 3 and 4 specified that "six sets of shipment samples" must accompany the shipment and that the shipment was to "be effected in two equal lots."

[4] On February 27, 1976, Charleston Overseas Forwarders, Inc., changed its name to International Forwarders Inc., and as of that date Charleston was no longer a licensed forwarder.

[5] Note 4 provided that shipment must "be effected in two equal lots."

amendment in the pre-existing file until "legalization" of the documents and certain other things had been done.[6]

On June 24, 1976, the documents, including the amended credit were sent to New York for legalization and on June 26, 1976, the vessel with the carpet aboard left Charleston for Bahrain.

On July 6, 1976, Mobley received the letter of credit from New York. It was not until four days later, on July 10, 1976, that Mobley first became aware that the Charleston clause had not been deleted from the letter of credit. On that day, a Saturday, Mobley, created a letterhead bearing the name Charleston Overseas Forwarders, Inc., by photocopying an advertisement onto blank stationery. On this stationery, Mobley executed two receipts, one a copy of the other, for freight monies from Blue Ridge Carpet Mills, and signed the name of Charleston's President, A. N. Manucy, to the receipt. The amount of the receipt was $5,085,00. At the time the receipt was created by Mobley he was without authority of any kind to use the name of A. N. Manucy.

One of the letters was mailed to the Citizens and Southern National Bank of Georgia and the other was sent to Blue Ridge Carpet Mills. The purpose for the creation of the receipt was to secure the release of the $5,085.00 in freight money to Blue Ridge from the Citizens and Southern Bank. This was subsequently done on the basis of the bogus Charleston receipt prepared by Mobley.

On December 10, 1976, Commission investigator George B. Harry began a routine compliance check of E. L. Mobley, Inc. The compliance check revealed a number of violations of the Commission's so-called payover rule (46 CFR 510.23(f)).[7]

During the compliance check, a random examination of the files disclosed 10 instances out of 23 shipments checked in which Mobley had failed to pay over to the carrier the freight money within the period required by the payover rule. On six of the ten shipments payment was made within 7 to 20 days of receipt from the shipper and on the remaining 4 payment was made 20 days or longer after receipt.

The compliance check further revealed two instances of where the shipper had overpaid Mobley, the overpayment had not been refunded to the shipper. Both instances involved shipments by Coronet Carpets. Transportation Manager John F. Barnes, Jr., testified on behalf of Mobley. When questioned about the two instances (involving a total $3,068.43) Mr. Barnes said he had lodged no complaint about the incidents and that Coronet "always owe him (Mobley) more money than he owes us at any given time."

Mobley testified that he did not know how the two instances occurred but could only assume that it was due to an error on the part of one of his employees. His best guess was that because the company also did some export business with Coronet that the overpayment somehow got posted to the "wrong card" or otherwise improperly comingled. The money was promptly repaid when the incidents were brought to his attention.

---

[6] "Legalization" merely refers to the processing of the document by the U.S. Arab Chamber of Commerce and the Saudi Arabian Consul.

[7] The payover rule requires the forwarder to pay over to the ocean going common carrier all sums advanced to the forwarder within seven days of the receipt of the funds or within five days of the departure of the vessel whichever is later. The time limits exclude Saturdays, Sundays and legal holidays.

Pursuant to arrangements made at or shortly before the hearing two Commission investigators conducted a more complete compliance check of E. L. Mobley, Inc., between June 20, 1978 and June 26, 1978. The investigators reviewed some 255 shipments, 124 of which were collect shipments and were only partially reviewed. The remaining 131 shipments were reviewed in full and on 32 of these, respondent failed to pay the carrier freight money within the time required by the Commission's payover rule. On 99 shipments payments to the carrier were made within 7 days of receipt from the shipper; on 19 shipments payments were made within 7–20 days; and on 13 shipments payments were made over 20 days of receipt of the money from the shipper.

In conducting this compliance check Commission investigator Harry stated that he and his colleague looked at "twice, maybe three times the number of shipments that we normally review," and that the results of this compliance check when compared to other licensees they had checked showed that Mobley's compliance with the payover rule was "much more satisfactory than most investigations that I (Harry) have done." (Ex. 8, pages 28–29, 38–39).

Mobley testified that in order to prevent the recurrences, or at the very least minimize future payover violations, he had extensively revamped office procedures. The steps taken include the hiring of additional employees, conversion to a computerized bookkeeping system, and the retention of a new CPA firm.

Mr. Charles L. Clow, Chief of the Office of Freight Forwarders, testified that since April 26, 1965, when Mobley was first licensed, there has not been a single complaint lodged against Mobley for late payments or failure to remit funds.

The foregoing constitutes the evidence of record relevant to the violations alleged in the Commission's order instituting this proceeding. The testimony of the character witnesses will be discussed later when the question of "fitness" is taken up.

Discussion and Conclusions

The Commission's jurisdiction over ocean freight forwarders is provided for in section 44 of the Shipping Act, 1916. The section establishes a program of licensing which is designed to insure that shippers and carriers are guaranteed services from forwarders who maintain high standards of responsibility, integrity and moral character as well as technical ability. Dixie Forwarding, Inc. Application for License, 8 F.M.C. 109, 116 (1964), Fabio A. Ruiz d/b/a Far Express Co., 15 F.M.C. 242 (1972). In administering the licensing program established by Congress the Commission shall issue a license,

> . . . if it is found by the Commission that the applicant is fit, willing and able properly to carry on the business of forwarding and to conform to the provision of [the Shipping] Act and the requirements, rules, and regulations of the Commission issued thereunder . . . . (46 U.S.C. §841b(b))

In determining the fitness of a licensee to retain his license consideration may be given to any past violations committed by the licensee. Lesco Packing Co. Inc., 16 SRR 1023 (1976).

It is alleged that E. L. Mobley, Inc., violated section 510.23(h) of the Commission's rules governing the conduct of licensed freight forwarders. That rule provides:

(h) No licensee shall file, or assist in the filing of any affidavit, letter of indemnity, or other paper or document, with respect to a shipment handled, or to be handled by such licensee, which he has reason to believe is false or fraudulent.

Clearly when E. L. Mobley fabricated the Charleston Overseas, Inc., letterhead and signed A. N. Manucy's name to the receipt appearing under that letterhead, he violated section 510.23(h). Mobley has admitted this violation. It is equally clear that Mobley has on some 42 occasions violated section 510.23(f), the so-called payover rule. Mobley does not quarrel with this either. Concerning the payover rule violations, Hearing Counsel is of the view that "These violations do not seem to indicate such a lack of fitness [as] to warrant a revocation or suspension of the license."

Hearing Counsel, however, takes a different stand on the violation involving the "fraudulent receipt." Calling it an act of "commission rather than omission," Hearing Counsel goes on to say:

> Standing alone and absent the unique factors which have been educed through this investigation and hearing, we would urge that this action would indicate such a lack of the requisite fitness as to warrant revocation of the corporation license. We do not do so for the following reasons. . . .

The reasons given by Hearing Counsel are: (1) that while Mobley's actions are attributable to the corporation, they were "clearly of his own doing, and as such bear more upon his own fitness . . . than upon the corporation's fitness"; (2) Mobley was first licensed in 1965 and in his 13 years as a licensee, with the exceptions of the violations here, has had a clean record; (3) that while Mobley might have handled the Blue Ridge shipment differently "it is apparent that he was 'caught in a jam' and chose an incorrect means to extricate himself"; (4) that it is unlikely that personal gain was Mobley's motive for his action; and (5) that there are others who depend upon the license of E. L. Mobley, Inc., for their livelihood.

All this together with the testimony of the many witnesses and affidavits presented in Mobley's behalf lead Hearing Counsel to conclude:

> In spite of these facts, and the contrition of Mr. Mobley, the Commission has a duty to ensure that actions such as those which violate Rule 510.23(h) do not occur in the future. While Hearing Counsel do not urge that Respondent's license should be revoked, we suggest a suspension is in order. First, we wish to emphasize that this suspension is not purely punitive. Our recommendation is urged solely as a result of the actions of Elton Mobley, which reflect adversely upon his fitness as the qualifying officer for a freight forwarder license. *We do not believe a revocation of license is necessary to ensure that he does not repeat those actions, or commit other violations in the future. Rather, we urge that the remedial effect of a suspension would be sufficient to assure his future compliance with the rules and regulations of the Commission, and laws of the United States.*[8] (Emphasis is mine.)

I find myself in disagreement with Hearing Counsel's recommendation which appears to me somewhat inconsistent in its premises. But before dealing with the specific recommendation a review of relevant Commission precedent is in order.

Hearing Counsel begins with the obvious proposition that the power to revoke or suspend a license is remedial in nature. *Application of Guy G. Sorrentino*, 15 F.M.C. 127, 128 (1972); *Federal Highway Administration v. Safeway Trails*

[8] Hearing Counsel, however, would not urge that the corporate license of E. L. Mobley, Inc., be suspended "if there were another individual within the corporation who could qualify for licensing." By letter dated September 27, 1978, Mr. Charles L. Clow, Chief, Office of Freight Forwarders, advised Mr. Richard E. Mobley, Vice President of E. L. Mobley, Inc., that he had been approved as a qualifying officer. Official notice is taken of this fact. Consequently I conceive Hearing Counsel's recommendation would now be that only Elton Mobley's license be suspended.

Inc., 113 MCC 815, 831 (1971). In other words, while there will always be an element of punishment, in any suspension or revocation, the real purpose underlying the imposition of those sanctions is the protection of the public by insuring that actions injurious to the public do not reoccur. In dealing with remedies of the Interstate Commerce Act, the Supreme Court in *Gilbertville Trucking Co. v. U.S.*, 371 U.S. 115 (1962), said at page 130:

> [The] duty is to give "complete and efficacious effect to the prohibitions of the statute" with as little injury as possible to the interests of the private parties or the general public.

Generally, the sanction of revocation (or the denial of an initial license) has been invoked only when the conduct of the licensee has been such that the Commission has been convinced that it could not rely on the honesty and integrity of the licensee, or applicant, to the extent necessary to insure future conduct within the confines of the statutes and regulations. For example a license was denied in Lesco Packing Inc., 16 SRR 1023 (1976), where the applicant had pleaded guilty to criminal violations, made false statements to an FMC investigator, had export privileges revoked by the Department of Commerce because of export control law violations, had engaged in an ongoing scheme for him to operate without a license, falsely obtained "grandfather rights," had one FMC license revoked and another application denied and was generally uncooperative during the Commission's investigation. Clearly not a course of past conduct which would instill confidence as to future actions under the law. *See also, e.g., International Freight Services, Ltd.*, 16 SRR 989 (I.D. adopted by Commission August 26, 1976); *Alvarez Shipping Co. Inc.*, 16 F.M.C. 78 (1973). Where, however, even though the Acts are intentionally done they do not involve "elements of fraud or moral turpitude" denial or revocation of a license is not warranted. *Fabio A. Ruiz dba Far Express Co.*, 15 F.M.C. 242 (1972); Air-Mar Shipping Inc., 14 SRR 1250 (1974).

Finally the Commission itself in *Application of Carlos H. Cabeza*, 8 F.M.C. 130 (1964), said at page 131:

> . . . The determination of the fitness, willingness, and ability of the applicant must be by application of the Commission's sound discretion. It is well recognized that discretion may not be exercised in an arbitrary or capricious manner and in licensing or refusal to license consideration must be given to constitutional and lawful safeguards of individuals and their right to make a living. *Archer v. SEC*, 133 Fed. 2d 795, cert. denied 319 U.S. 767.

Suspension though a lesser sanction should still be governed by the same principle, the balancing of injury to the private interest against the protection of that segment of the public dealing with the licensee. Which brings me to Hearing Counsel's specific recommendation. As noted earlier, Hearing Counsel urge "that the remedial effect of a suspension would be sufficient to insure [Mobley's] future compliance with the rules and regulations of the Commission . . . " I could agree with this reasoning if (1) there was something in Mobley's current operation which could only be corrected by ceasing operations for some period; or (2) Hearing Counsel had some other problem with Mobley's fitness which could be cured by a suspension. However, Hearing Counsel does not really question Mobley's fitness at least not in any way I can discern.

In *Sorrentino, supra*, at page 136, the Commission concluded that a finding of "fitness" was nothing more or less than a determination that the licensee "can be relied upon and trusted to carry on the profession of freight forwarder in an honorable and responsible fashion . . . ." The Commission went on to say that in making that determination "we should look to all the circumstances of the [licensee's] case as they presently exist and not only on the part of the overall conduct and business operation which failed to meet the required standards."

On the question of Mr. Mobley's honesty, integrity and responsibility the record before me removes any doubt on my part that Mr. Mobley can be relied on in the future to carry on the profession of freight forwarding in an honorable and responsible fashion. Some examples of testimony of witnesses who appeared on behalf of Mr. Mobley should give an indication of the high regard he enjoys in Savannah.

John L. Karr, a Vice President of Atlas N Tell International of Dalton, Georgia, was previously with West Point Pepperill and before that with World Carpets. He has been in the export business most of his business career and has known Elton Mobley since 1972. Roughly speaking, he would estimate that the companies he has worked for handled anywhere from $150,000 to $250,000 in billings per year through Elton Mobley's office, both at Savannah and other ports. Mr. Karr testified (Tr. 41):

> Q. Mr. Karr, based upon your relationship with Mr. Mobley, would you state what kind of reputation he has for integrity, efficiency, and honesty in the business community.
>
> A. In the business community, quite well known, quite well respected, in the export community, and in the carpet industry, in which I am involved, his name is one of the premier or first on the list.

Mr. Karr on occasion has used other freight forwarders but he switched completely over to Mobley's services because of "personalized service, going the extra step in all instances . . . " (Tr. 42). Mr. Karr has sent clerical help from his office down to Mobley's office for a training period. "Our confidence level was so high in Mr. Mobley and his organization that we sent people down to be trained and to be taken under his wing for short periods of time to be indoctrinated." (Tr. 42). Mr. Karr further testified that a suspension or revocation of Mr. Mobley's license would have a severe adverse impact on his business.

Frank Jones is Assistant Vice President and Transportation Director of Southwire Company of Carrollton, Georgia, a company with eight or nine separate manufacturing facilities and about 45 redistribution facilities. The company employs 3200 people at Carrollton, Georgia. Mr. Jones estimated that the Carrollton company paid $2,000,000 last year on export ocean freight.

Mr. Jones has known Elton Mobley for 14 years and has utilized his services over the years. Mr. Jones testified (Tr. 50):

> Q. Now, based upon your relationship with Mr. Mobley's company and your knowledge of him and your knowledge of the business during the time you have known him, what has been your experience with him as far as integrity, honesty, and efficiency of operation?
>
> A. I think in every way he has been beyond reproach. We have found him to be completely above-board, honest, and worthy of our doing business with.

As far as comparing Mr. Mobley's operation to that of other freight forwarders, Mr. Jones states (Tr. 51):

> A. We have found his operation is superior and other operations have not been—we have not been as comfortable with other operations as we have been with his.

Mr. Jones testified that every person in his international section has been down to Mr. Mobley's office for indoctrination and orientation more than once. Mr.

Jones testified that the loss of license by Mr. Mobley would have a very negative effect on his business.

Mr. Jones further testified (Tr. 54):

> We have not at Southwire Company that I know of found any reason to complain about E. L. Mobley or any of his staff doing the job we have asked them to do. They have never indicated in any way they would do anything that had even a shade of illegality attached to it, and we have never asked them to do so.
>
> Frankly, I do not think he would do it. In my opinion, he would not do it even if we asked him to do something that was not exactly right. So, I think that we must say in all fairness that this broker and freight forwarder had done such a job for us that we would not be willing under any circumstances to exchange his services for any other brokerage or freight forwarding firm that we have knowledge of. We are just that positive that he is ethical to the extent that he would not wrongly do anything that he should not do. Given a set of circumstances, in order to get the job done, I suspect that any of us might do what has occurred in this instance that we are hearing now. I am very high on him. We intend to continue doing business with him and his staff down there. We have no reservations about him whatsoever.

Several witnesses noted that Mobley has conducted a valuable training program for exporters seeking to familiarize their employees with the intricate export regulations. The witnesses all attested to E. L. Mobley, Inc.'s unblemished reputation in the shipping community for honesty, integrity and efficiency. All of these witnesses appearing on behalf of E. L. Mobley did so at their own expense.

The testimony of these witnesses who appeared at the oral hearing is buttressed by the sworn affidavits of seven additional individuals on behalf of exports using the services of E. L. Mobley, Inc. The remarks of Mr. J. K. Ebberwein, which are typical of the comments of all affiants, illustrate the high regard with which Mr. Mobley is held in the community. Mr. Ebberwein states:

> To the best of my knowledge there has never been any question about Mr. Mobley's good character or reputation in the community. He has been active in maritime affairs and succeeded me as President of the Independent Freight Forwarders and Custom House Brokers Association of Savannah. In addition to being active in the maritime community, Mr. Mobley has also been noted and recognized for his dedication and service to his church.

In addition to the above testimony, E. L. Mobley personally testified and accepted responsibility for the violations. With regard to the violations of the "pay-over rule," he has already taken several remedial steps to insure that they would not recur (or would be minimized) including the changeover to a computerized bookkeeping system, the hiring of additional employees and the retention of a more active CPA firm.

With regard to the violations of the "false statement rule," Mr. Mobley discussed in detail the circumstances which resulted in his unfortunate decision to sign the name of Mr. Manucy. He sincerely regrets that he took such action. He made clear that his momentary lapse of judgment was an isolated instance and that he would never even consider taking similar action again.

Having observed Mr. Mobley on the witness stand I have no reservation concerning his assurances that an incident such as the false receipt will not occur again. Concerning the payover rule violations I am equally sure that the overhaul in office procedures should go a long way toward eliminating future violations. In short I conclude that E. L. Mobley is fit to continue the practice of his profession as a freight forwarder licensed by the Commission.

Finally, it is my further conclusion after balancing the potential harm to the public against the loss to Mr. Mobley, that no useful purpose would be served by the suspension of his license. Indeed, accepting Hearing Counsel's recommendation would be to ground a suspension on the notion that it is needed to prevent future violations on Mr. Mobley's part. Presumably by bringing home to him the seriousness of his acts. I can find no such need. The record here convinces me that Mr. Mobley is more than aware of the seriousness of his actions and is equally determined to prevent any reoccurrence of them.

Under the terms of the Commission's order, I do not feel called upon to make any recommendations as to monetary penalties.

ULTIMATE CONCLUSIONS

1. E. L. Mobley, Inc., through the actions of Elton Mobley has violated Rule 502.23(h).
2. E. L. Mobley, Inc., has violated Rule 502.23(f).
3. Elton L. Mobley is fit to carry on the business of an independent ocean freight forwarder.
4. The independent ocean freight forwarders license of E. L. Mobley, Inc., should not be suspended or revoked.

The proceeding should be discontinued.

(S) JOHN E. COGRAVE
Administrative Law Judge

WASHINGTON, D.C.
November 6, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-3

ORGANIC CHEMICALS (GLIDDEN-DURKEE)
DIVISION OF SCM CORP.

v.

FARRELL LINES, INC.

SETTLEMENT AND DISMISSAL OF COMPLAINT

March 14, 1979

The Commission, by order served January 25, 1979, in this proceeding enunciated conditions under which it would permit settlement of claims arising under section 18(b)(3) of the Shipping Act, 1916. It was determined that the proposed settlement which had been submitted to the Administrative Law Judge in this proceeding met all but one of these conditions. The parties were afforded 30 days to meet the final conditions by submitting an affidavit setting forth the reasons for the settlement and attesting that the settlement is a *bona fide* attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916.

The parties to this proceeding have now timely submitted an affidavit which meets the final condition. Accordingly, the October 26, 1978, order of the Administrative Law Judge denying the Joint Motion for Approval of the Settlement is vacated. Settlement under the terms agreed by the parties is permitted and the complaint in this proceeding is dismissed with prejudice.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

[DOCKET 78-57; GENERAL ORDER 41]

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES
PART 544—Financial Responsibility for Water Pollution Outer Continental Shelf

March 19. 1979

ACTION: Final Rule

SUMMARY: The Federal Maritime Commission is hereby issuing regulations affecting persons who own and operate vessels carrying oil from offshore facilities above the Outer Continental Shelf. The Outer Continental Shelf Lands Act Amendments of 1978 (P.L. 95-372) imposes upon such vessel owners and operators a new liability for damages and removal costs resulting from discharges of oil. Vessel operators are required to demonstrate that they are financially able to meet such potential liability, up to certain limits, before their vessels may lawfully engage in any segment of the transportation of oil from an offshore facility above the Outer Continental Shelf. These regulations set forth the manner by which financial responsibility can be demonstrated to the Commission in accordance with the new law, and provide for the issuance of Certificates of Financial Responsibility which must be carried aboard vessels and presented to officials of the U.S. Coast Guard, or its designees, upon request.

DATES: March 20, 1979

SUPPLEMENTARY INFORMATION:

On January 3, 1979 (44 *Fed. Reg.* 915), the Commission proposed the issuance of regulations (a new Part 544 to Title 46 of the Code of Federal Regulations) to implement the vessel certification and financial responsibility provisions of the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA). Comments from the public were invited with respect to those proposed regulations.

Comments were received from (1) LeBoeuf, Lamb, Leiby & MacRae, which serves as General Counsel in the United States for the Underwriters at Lloyd's (Lloyd's); (2) the American Institute of Marine Underwriters (AIMU), the member insurance companies which are said to write over 90 percent of the marine insurance business written in the United States; (3) the American Institute of Merchant Shipping (AIMS), an association of 26 companies owning or operating United States flag oceangoing vessels; (4) the American Institute of Certified Public Accountants (AICPA); (5) the Offshore Operators Committee (Operators Committee), an organization of 70 companies engaged in oil and gas exploration and production in the Gulf of Mexico and Atlantic offshore area; (6) Continental Oil Company, North American Production Operations (Continental Oil); and (7) Exxon Company, U.S.A. (Exxon).

Continental Oil asserted that the Commission has an obligation to avoid the "expensive and unnecessary duplication of coverage" which will be the result of the Commission maintaining three separate sets of regulations requiring evidence of financial responsibility for water pollution: 46 CFR 542 revised, implementing section 311(p)(1) of the Federal Water Pollution Control Act; 46 CFR 543, implementing section 240(c) of the Trans-Alaska Pipeline Authorization Act; and the instant regulations, 46 CFR 544, implementing section 305(a)(1) of the OCSLAA.

Because those three sets of regulations are mandated by three separate statutes, each with its own unrelated liabilities, defenses, conditions and exclusions, there are no areas of duplication other than those which have been eliminated in these final regulations.

Section 544.1 —Scope

Comments concerning this section were submitted by AIMS, the Operators Committee, Continental Oil and Exxon. Generally, their comments are that the proposed language of that section, if taken alone, is too broad and could be misread as applying to all vessel operations involving the movement of any oil from offshore facilities, including fuel oil. More descriptive language, such as that used by the Commission in section 544.3(d) of the proposed regulations, i.e., "oil that has been produced by an offshore facility," is suggested.

In order to avoid a misunderstanding of the "Scope," we will adopt new language designed to make it clear that the regulations apply only to vessels carrying Outer Continental Shelf-produced oil which has not yet been brought ashore. Exxon, the Operators Committee and AIMS, however, would have the Commission further amend the scope of the regulations so as to exclude even vessels which carry Outer Continental Shelf-produced oil (1) loaded as a result of containment and removal operations after an oil spill; (2) carried in small amounts on an occasional basis for purposes of laboratory analysis; (3) mixed with drilling mud and being transported on an occasional basis for proper disposal; and (4) loaded due to failure of a facility's pipeline system. (This last exclusion was suggested only by AIMS.)

As to the first of the above numbered suggestions, the Commission finds merit in further clarifying the "Scope" by specifically excluding from these financial responsibility regulations, vessels which carry Outer Continental Shelf-produced oil solely as a result of spill containment and removal operations. It was not our intent to make such vessels subject to these regulations because vessels engaged in cleanup activities do not fall within the OCSLAA's definition of vessel.[1] Moreover, as Exxon correctly points out, the number of vessels immediately available for cleanup work should not be limited to vessels which have obtained OCSLAA Certificates from the Commission.[2]

The second suggested amendment to the "Scope" is the exemption of vessels carrying Outer Continental Shelf-produced oil in small amounts for purposes of laboratory analysis. The "small" amounts suggested by Exxon and the Operators Committee are 110 gallons per container, with no more than two containers (220 gallons) suggested by the Operators Committee and without limit in the case of Exxon's comments. The fact that those comments are not supported by any reference to the statute or legislative history whereby the Commission would be authorized to provide such exemption is, we think, controlling. The Commission has already addressed a similar question involving "small" amounts of oil carried by vessels subject to the Federal Water Pollution Control Act. In that instance, the Commission determined that it had no authority to exempt the carriage of even one barrel of oil. The Commission likewise finds no statutory basis for the exemption under this Act.

The third suggested amendment to the "Scope" is the exemption of vessels carrying Outer Continental Shelf-produced oil mixed with drilling mud being transported for proper disposal. Again, the comments failed to point out anything in the OCSLAA or legislative history which would authorize the Commission to provide such an exemption. To the contrary, one of the clear purposes of the law is to balance development of the Outer Continental Shelf with protection of the environment by assuring reimbursement to parties damaged by oil spills in connection with all activities on the Outer Continental Shelf. The pollution damages that could result from vessels carrying, in bulk, thousands of pounds of Outer Continental Shelf-produced oil mixed with drilling mud do not appear to be capable of exclusion from these regulations.

The fourth and last suggested amendment to the "Scope" is the exemption of vessels carrying Outer Continental Shelf-produced oil as the result of a failure of a pipeline system. Again, the Commission is without authority under the law to exempt such vessels from these regulations

After considering the four above discussed comments, the Commission has decided to amend and clarify the proposed wording of section 544.1 by adopting the following language:

(a) These regulations (Part 544 of Title 46 of the Code of Federal Regulations) implement the vessel financial responsibility requirements of the Outer Continental Shelf Lands Act Amendments of 1978. These regulations apply to all vessels engaged in any segment of the transportation of oil produced from an offshore facility on the Outer Continental Shelf when such vessels are operating in the waters above submerged lands seaward from the coastline of a State or the waters above the Outer Continental Shelf.

(b) Vessels having on board Outer Continental Shelf-produced oil after that oil has been brought ashore, or loaded as a result of removal operations after an oil spill, do not thereby become subject to the regulations in this Part.

[1] The key phrase in the OCSLAA's definition of "vessel" found in section 301(5) is " . . . and which is transporting oil *directly from an offshore facility.*" (Emphasis added.)

[2] It also should be noted that vessels used in cleanup work, if they exceed 300 gross tons, already would be in possession of Certificates issued by the Commission under the Federal Water Pollution Control Act requirements, 46 CFR 542 revised

Section 544.2(d)—Cargo

Continental Oil asserts that the Commission's proposed definition of "cargo," i.e., " 'cargo' means oil carried on board a vessel for purposes of transportation, in any quantity and under any conditions," should be amended to mean only Outer Continental Shelf-produced oil in order to comport with the OCSLAA.

First, no amendment is necessary because the word "cargo" is used only in the insurance, bond and guaranty Forms FMC-193 through 195, and then only in direct connection with the words "Outer Continental Shelf-produced oil."

Second, nothing in these regulations should be construed as meaning that only those pollution incidents involving Outer Continental Shelf-produced oil are covered by the herein required evidence of financial responsibility. We are unable to find anything in the OCSLAA or its legislative history that would exclude liability for economic loss resulting from, for example, spills of fuel or bunker oil, provided that the vessel causing the spill was subject to the OCSLAA. The carriage of Outer Continental Shelf-produced oil is merely one prerequisite to the possible applicability of these regulations as set forth in the "Scope." (See also, the discussion of section 544.2(n)—Oil.)

The definition of "cargo" in these final regulations will remain as proposed.

Section 544.2(h)—Damages

The definition of "damages" in the proposed regulations reads, in pertinent part, as follows: " 'Damages' means economic loss arising directly or *indirectly* from oil pollution, including . . . *reasonable costs associated with preparation and presentation of natural resource damage claims*." (Emphasis added.)

Lloyd's, AIMS and Continental Oil take exception to the Commission's use of the word "indirectly," as underlined above, alleging that it could be construed as having a broader meaning than the actual wording used in the OCSLAA: ". . . economic loss, *arising out of* or directly resulting from oil pollution. . . " (Emphasis added.) It is possible that the proposed words "directly or indirectly" could be held to have a broader meaning than the words in the statute—"arising out of or directly." The wording of the statute will be used in the final definition.

Lloyd's also takes exception to the other above underlined wording in the proposed definition concerning certain "preparation and presentation" costs. While Lloyd's is correct in pointing out that such wording is not included in section 303(a) of the OCSLAA, we inserted that wording in the proposed definition because of the clear legislative history underlying section 303(a) of the statute:

"In addition, it is intended that reasonable costs associated with the preparation and presentation of natural resource damage claims are intended to be recoverable as part of each claim." (Conference Report No. 95-1091, accompanying S.9, at page 131.)

Accordingly, the contested "preparation and presentation" wording will remain a part of the definition of "damages" in the final regulations.

Finally with respect to the Commission's proposed definition of "damages," Continental Oil asserts that the definition must be amended to include certain issues involving contributory negligence of the claimant, damages resulting from willful actions of a claimant, claimant's responsibilities to mitigate damages, claims for loss of oil and gas reserves still in the ground, and claims for loss of tax revenue. We see no basis for enlarging the definition beyond that clearly set forth in the statute and the legislative history.

Section 544.2(l)—Insurer

Lloyd's suggests that the proposed definition of "insurer" be expanded to specifically state that "domestic, foreign and alien" insurance companies, rather than just "insurance companies," could be found acceptable to the Commission; and that the words "associations of insurers" be expanded to read "associations of individual insurers."

The proposed definition is almost a verbatim rendition of the Commission's definition of "insurer" in existing Parts 542 revised (FWPCA) and 543 (TAPAA) of this title (the inconsequential difference of one word is not pertinent to Lloyd's comment). Moreover, as in the case of Parts 542 revised and 543, the proposed definition in fact includes "domestic, foreign and alien" insurers, as well as associations of "individual" insurers. No change, therefore, will be adopted at this time.

Section 544.2(n)—Oil

The proposed definition of "oil" reads as follows: "'Oil' means petroleum, including crude oil or any fraction or residue therefrom, whether or not carried on board a vessel." Continental Oil objects to that definition because it is not limited to Outer Continental Shelf-produced oil, and states that the definition must be so limited in order to fulfill the intent of the OCSLAA.

As discussed above in connection with the definition of "cargo," we disagree with Continental Oil's assertion. The OCSLAA and its legislative history point to the intention of Congress to include oil spills involving more than just Outer Continental Shelf-produced oil (e.g., bunker oil), provided, of course, that, in the case of a vessel, the vessel was carrying Outer Continental Shelf-produced oil and was operating in a manner which made it subject to the "Scope" of these regulations, i.e., the scope of Title III of the OCSLLA.

It would have been stated or implied somewhere in the statute or legislative history that economic loss resulting only from spills of Outer Continental Shelf-produced oil was covered by the OCSLAA, if that were the case. Instead, Congress chose to use obviously broad definitions of "oil" and "oil pollution" in the statute and, in section 101(12) of the statute, found that "funds must be made available to pay for the prompt removal of *any* oil spilled or discharged as a result of activities on the Outer Continental Shelf. . . ." (Emphasis added.) Similarly, in section 102(8) of the statute, entitled "Purposes," Congress used the words "and oil spilled." It did not limit it just to Outer Continental Shelf-produced oil.

In section 301(22) of the OCSLAA, removal costs are defined to include, among other costs, costs incurred under subsections (c), (d) or (l) of section 311 of the Federal Water Pollution Control Act. That Act, without question, concerns costs resulting from spills of any and all types of oil including, of course, bunker and other fuel oils. In short, we come to the inescapable conclusion that "oil" as defined in the OCSLAA and, therefore, in these regulations cannot be limited to Outer Continental Shelf-produced oil. No change to the proposed definition will be made.

Section 544.2(o)—Oil Pollution

The definition of "Oil Pollution" in the proposed regulations begins as follows: "'Oil pollution' means: (i) the presence of oil, either in an unlawful quantity or which has been discharged at an unlawful rate." Continental Oil, although recognizing that the phrase was taken directly from the OCSLAA's definition of "oil pollution," requests the Commission to define the words "unlawful quantity" and "unlawful rate."

The Commission believes that the words in question refer primarily to section 311(b)(3) of the Federal Water Pollution Control Act which makes provision for the determination of the amounts of oil which, when discharged into the navigable waters of the United States or the Contiguous Zone, among other waters, would be considered unlawful. This does not come within the authority delegated to this Commission. Rather, it comes within the jurisdiction of the Environmental Protection Agency and is addressed in its regulations in Part 110 of Title 40 of the Code of Federal Regulations.

Section 544.2(s)—Person

The Commission's definition of "person" includes a "joint venture," as does the statutory definition. The word "person" is used in these regulations and in the statute in connection with, among other things, the definitions of vessel owner and operator. A vessel owner or operator, therefore, can be a joint venture.

Continental Oil suggests that a vessel owner which is a joint venture be allowed to demonstrate financial responsibility in proportion to each party's respective ownership of a vessel. We must reject that suggestion because, first, it would be impractical as the parties to the joint ventures are jointly and severally liable for the obligations of the venture, notwithstanding the financial responsibility requirement. Second, the same end can be reached by the vessel owner parties to a joint venture under the proposed regulations. Third, we do not believe that adoption of the suggestion would be in accord with the intent of the OCSLAA.

Section 544.2(y)—Vessel

Exxon and AIMS suggest that the proposed definition of "vessel" be amended to make it clear that a vessel is not a "vessel" within the meaning of the regulations unless, in addition to other criteria, it is carrying Outer Continental Shelf-produced oil.

As noted above in connection with the clarification we adopted involving the "Scope" of the regulations, we do not wish to make these regulations appear broader in scope than the underlying statute.[3] Accordingly, the words "Outer

[3] In the Joint Explanatory Statement of the Committee on Conference (Conference Report No. 95-1091, accompanying S.9, at page 128) the following is noted:

> The Senate bill includes within the scope of the oilspill title, a 'vessel' transporting OCS oil, whether in the waters above the OCS or in the navigable waters. The House amendment is limited to the waters above the OCS. The conference report provides for the scope to be for vessels operating in all 'offshore waters,' that is in the waters above the OCS and above the submerged lands.

Continental Shelf-produced" will appear between the words "of" and "oil" in the final definition of "vessel."

Section 544.3—General

Continental Oil suggests that paragraph (a) of the section should restate the exceptions and defenses to liability which section 304 of the OCSLAA provides to vessel owners and operators and that the "third party" defense should be discussed.

We see no justification in restating in the regulations what the OCSLAA states, unless vital to an understanding of the regulations. That is not the case here. Nor do we wish to add a lengthy section to these regulations without good cause. No change, therefore, will be made to section 544.3(a).

Section 544.5—Time to Apply

Lloyd's, the Operators Committee, Continental Oil and Exxon are concerned that vessel operators, through no fault of their own, will not have time to file applications, fees and evidence of financial responsibility in time for the Commission to process the paperwork and issue Certificates by March 17, 1979, the date set forth in the proposed regulations.

The Commission is aware that time constraints did not permit issuance of these regulations in sufficient time to allow for full compliance by the effective date of March 17, 1979. However, the clock with respect to liability cannot be stayed. Nevertheless, the Commission and its staff will endeavor administratively to assist vessel operators, if any, who will be transporting Outer Continetal Shelf-produced oil on or immediately after the March 17, 1979, effective date.

The staffs of this Commission and the Coast Guard have devised a procedure to satisfy the statute and avoid the latter's enforcement of section 305(a)(2) of the OCSLAA (i.e., denial of entry into the navigable waters of the United States and detention) in emergency cases where vessel operators are not in possession of Certificates, through no fault of their own, on March 17, 1979. Specifically, if in such cases the vessel operators have at least submitted acceptable evidence of financial responsibility to the Commission in accordance with Part 544, the Commission's Office of Water Pollution Responsibility and the Coast Guard can expand the existing joint enforcement program, which concerns two other oil pollution laws, to encompass the OCSLAA as well. By that means, the Office of Water Pollution Responsibility is able to respond immediately to telephonic enforcement inquiries from Coast Guard field officials and confirm that a particular vessel is at least covered by evidence of financial responsibility, thus avoiding enforcement action by the Coast Guard due to the fact that a Certificate is not on board.

The joint Coast Guard/Commission telephonic enforcement program is in effect 7 days per week, 8:30 a.m. to 5:00 p.m., except national holidays.

Therefore, vessel operators who expect to load Outer Continental Shelf-produced oil and who otherwise will be subject to these regulations should immediately arrange for their underwriters to submit evidence of financial responsibility to the Commission. Application forms and the required amount of fees may be submitted as soon as possible thereafter so that Certificates can be issued.

There are a number of vessel operators who currently are covered by self-insurance for purposes of Part 542 revised of this Title 46, CFR, but who, in their previous submissions, have failed to demonstrate sufficient working capital and net worth to cover the added amounts of working capital and net worth required by these Part 544 regulations. In those cases, if the vessel operators will be subject to Part 544, revised statements of net worth and working capital should be submitted immediately by the appropriate financial officers of the companies. In cases where such self-insurers report on a consolidated financial basis, and thus are required to have an independent Certified Public Accountant audit the schedules of working capital and net worth, we will temporarily waive that requirement. Such schedules, therefore, will be accepted from the appropriate financial officers of the companies, without audit by an independent Certified Public Accountant. Those unaudited schedules must be replaced by audited schedules at the time the next annual financial statements fall due, i.e., 120 days after the close of the self-insurer's fiscal year. We will allow guarantors the same latitude in order not to discriminate against vessel operators who will be subject to Part 544 on March 17, 1979, and who are now covered by guaranties under Part 542 revised.

Rather than amend the "Time to Apply" section of the regulations, the Commission's staff is hereby directed to compensate for the statutory time constraints imposed upon applicants by means of expanding the existing joint enforcement program with the Coast Guard to encompass these OCSLAA requirements as well. To better reflect this decision, however, the Commission will amend a related provision of the regulations (paragraph (d) of section 544.3—General) by deleting the phrase "Before March 17, 1979," and changing the words "shall have submitted" to "shall submit as soon as possible."

Moreover, for the above mentioned reasons, we find good cause to make these regulations effective upon publication in the *Federal Register* rather than after the usual 30-day period.

Section 544.6—Applications, General Instruction

Paragraph (b) of this section provides that only vessel operators may apply for Certificates. Continental Oil comments that, "Because of the duplicate liability of 'owner or operator,' this should be amended to protect the owner if the owner and operator are not the same." Unfortunately Continental Oil provided no explanation to its comments. Therefore, we are not able to discern any reason for changing paragraph (b).

Paragraph (c) of this section provides that the application form shall be signed by an authorized official of the applicant, whose title shall be shown in the space provided on the application. Otherwise, a written statement proving authority to sign shall be required. Continental Oil recommends that "a general corporate policy statement should be adequate to prove authority in the person who signs the application." If the "general corporate policy statement" so authorizes a corporate official, then the regulations are broad enough to accommodate this comment. Therefore, no change will be made.

Paragraph (d) of this section provides that if, prior to the issuance of a Certificate, the applicant becomes aware of a change in any of the facts contained in the application or supporting documentation, the applicant shall notify the Commission in writing within 5 days of becoming aware of the change. Continental Oil suggests that 5 days be changed to 15 days.

The reason for paragraph (d) is to encourage applicants to correct, promptly, any misstatements on the application so that the Commission will not issue an incorrect Certificate. Incorrect Certificates result in the necessity for applicants to pay $20 recertification fees and may lead to detention of the involved vessels. Accordingly, we see no justification for the suggested change.

Section 544.7—Renewal of Certificates

This section requires certificants to apply for a new Certificate at least 21 days, but no earlier than 90 days, prior to the expiration date of the existing Certificate. Such applications are required to be made in writing, but not by submitting a new application Form FMC-192, unless the Certificant for some reason wishes to submit a new form rather than a letter. Continental Oil asserts that 21 days may not be sufficient and suggests that an expired Certificate and a copy of the renewal application "should be adequate to protect the owner or operator while awaiting such renewal Certificate."

We are of the opinion that the time period provided, i.e., 21 to 90 days, is more than sufficient time to obtain a renewal Certificate from the Commission. Moreover, we would have great difficulty in requesting the Coast Guard to accept an expired Certificate just because it was accompanied by what purports to be a copy of a renewal application. The Commission and the various enforcement agencies (in this case, the Coast Guard) have or can quickly enter into flexible arrangements whereby vessel operators need never fear *unjustified* vessel detentions under any of the Commission's vessel certification regulations. No change will be made to section 544.7.

Section 544.8(b)(3)—Self Insurance

The AICPA, Exxon and Continental Oil submitted comments with respect to proposed section 544.8(b)(3)(i).

All of the AICPA's comments are concerned with technical clarification of section 544.8(b)(3)(i) and will be adopted by the Commission in the final regulations. For example, "statement of income" will be expanded to read "statement of income, retained earnings and changes in financial position," which description is technically more correct. Similarly, "certified by an independent Certified Public Accountant" will be changed to read "audited by an independent Certified Public Accountant."

The comments made by Exxon and Continental Oil with respect to section 544.8(b)(3)(i) are concerned with the substance of that section, except for Exxon's suggestion that the term "balance sheet" be changed to "statement of financial position" in order to avoid confusion over terminology.[4]

Both Exxon and Continental Oil take exception to the provision in section 544.8(b)(3)(i) which requires that, in the case of a corporate self-insurer, only the Treasurer may certify to the accuracy of certain "additional" financial information. The same provision appears in section 544.8(b)(3)(ii).

[4] The chance that confusion would result from use of the term "balance sheet" seems remote. In any case, the changes in terminology made as a result of comments submitted by AICPA should avoid any such confusion.

The assertion is made that other appropriate officials of a corporation should be allowed to so certify. We agree with that position and will change the relevant portion of sections 544.8(b)(3)(i) and 544.8(b)(3)(ii) to read "Treasurer (or equivalent official)." That change will make section 544.8(b)(3)(i) coincide with its counterpart provision in Part 542 revised of Title 46, CFR.

The change does not apply to cases where self-insurers submit consolidated financial statements. In such cases, section 544.8(b)(3)(i) requires that the supplemental financial information be audited by an independent Certified Public Accountant. Exxon would have the Commission delete that requirement and allow an appropriate official of the self-insurer to submit the information without an audit by an independent Certified Public Accountant.

The Commission rejects Exxon's suggestion as being contrary to the long-held policy of not accepting annual financial data from self-insurers unless the data has been audited by an independent Certified Public Accountant. While we will accept certain financial data from, for example, a corporate Treasurer or equivalent official, such data is always based upon financial statements of a single company audited by an independent Certified Public Accountant. In the case of consolidated financial statements, the Certified Public Accountant does not break out and audit the financial position of the self-insuring company alone. Therefore, except for the temporary period discussed above under "Time to Apply," we will continue to require audit by an independent Certified Public Accountant in connection with the supplemental financial data accompanying consolidated statements.

Continental Oil asserts that section 544.8(b)(3)(ii) could present a problem for "smaller" companies. That section requires the submission of a semi-annual affidavit from a self-insurer whose net worth is not at least ten times the amount required to qualify as a self-insurer. The affidavit must state only that working capital and net worth have not fallen below the amount required to qualify as a self-insurer.

Since the same requirement appears in Part 542 revised of Title 46, CFR, and Continental Oil did not explain the nature of the problem it referred to, we will not eliminate the requirement.

Exxon and Continental Oil take exception to the time limits in section 544.8(b)(3)(iv). Those time limits (i.e., three months after the close of a self-insurer's fiscal year for annual financial statements and one month after the close of such year for semi-annual affidavits) govern the submission of the financial reports specified in sections 544.8(b)(3)(i) and 544.8(b)(3)(ii). The time limits are the same as in Part 542 revised of Title 46, CFR.

Both Exxon and Continental Oil assert that the time limits should be changed to four months for annual statements and two months for semi-annual affidavits. Neither party requested such expanded time limits in connection with Part 542 revised of Title 46, which is a much more comprehensive set of regulations enacted just last year and which set the standard for these regulations. If the Commission were to expand the time limits in these regulations, a self-insurer subject to both Part 542 revised and this Part 544 would still be governed by the shorter time limits in Part 542 revised, thus gaining no benefit from the change in these regulations. Further, section 544.8(b)(3)(iv) provides for the granting of extensions of the time limits in cases of necessity, and such extensions would provide more time than is being requested here.

Accordingly, no change will be made to section 544.8(b)(3)(iv).

Section 544.8(b)(5)—Other Methods

This section prohibits an applicant from choosing any method of demonstrating financial responsibility not specified in the regulations (i.e., Insurance Form FMC-193, Surety Bond Form FMC-194, Guaranty Form FMC-195 or self-insurance), and prohibits any modifications to such methods.

Continental Oil asserts that the Commission "could severely hamper operations by smaller companies," which is contrary to the intent of the OCSLAA, unless other methods, modifications of the methods and combinations of the methods are permitted to protect the interests of small companies.

First, acceptable combinations of the specified methods already are allowed by section 544.8(b). Second, "other" methods are not allowed because the OCSLAA, in section 305(a)(1), specifies the methods which the Commission may accept, and those methods are allowed by the regulations. Third, if the Commission were to permit "modifications" to the methods, it would, in effect, be allowing any method any party wished to establish, which was not intended by the OCSLAA.

Obviously, there would be no reason for Congress to mandate regulations governing the permitted methods if such regulations could be disregarded under the guise of "modifications." The permitted methods have been designed to comport as precisely as possible with the requirements of the underlying law. Accordingly, no change will be made.

Section 544.8(c)—Forms—General

This section provides, in pertinent part, that, "If more than one insurer, guarantor, or surety joins in executing an insurance, guaranty, or surety bond form, such action shall constitute joint and several liability on the part of such joint underwriters."

Continental Oil asserts its belief that no underwriter would agree to be *both* jointly and severally liable and (as required by the OCSLAA) subject to direct suit by a damaged party.[5] It correctly points out, however, that while the OCSLAA requires underwriters to be subject to direct suit, the law makes no mention of a joint and several liability requirement on the part of underwriters.

Lloyd's also commented upon the proposed joint and several liability provision stating that the concept was not contained in the OCSLAA and was objectionable from an insurer's point of view because it is contrary to normal underwriting practices. Lloyd's explained that the concept was incompatible with underwriting insurance in layers and with pooling arrangements whereby co-signing insurers are liable only for their respective shares of such insurance. While Lloyd's has joined in underwritings submitted to the Commission on a joint and several liability basis under Part 542 revised, it recommends that the

[5] Continental Oil's contention is incorrect, as evidenced by the submission of jointly executed insurance forms to the Commission under Part 542 revised of Title 46, CFR. Those insurance forms contain both joint and several liability and direct suit provisions.

joint and several liability provision in these Part 544 regulations be deleted in order to encourage greater insurance capacity for purposes of OCSLAA risks.

We believe that the last mentioned point should be given substantial weight. Unlike the Part 542 revised regulations, no United States insurer has confirmed that it will underwrite vessel risks under the OCSLAA, and Congress obviously was concerned with the matter, as evidenced by section 305(d) of the statute. That section requires a study to determine, among other things, "whether adequate private oil pollution insurance protection is available."

In order not to impede the underwriting industry's willingness to write OCSLAA pollution coverage, and because there is no specific requirement in the law for joint and several liability on the part of underwriters, that proposed provision will be deleted from section 544.8(c), with respect to insurers and surety companies, and from the insurance and surety bond forms which are appended to and made part of the regulations in Part 544.

Accordingly, if more than one insurer or surety company joins in executing an Insurance Form FMC-193 or Surety Bond From FMC-194, each insurer or surety company will be liable only to the limits of its agreed coverage *as stated on the insurance or bond form*. No such form will be fully acceptable, of course, unless, in the aggregate, either 100 percent coverage is indicated or no individual percentages or layers are indicated. In the latter case, each insurer or surety will be presumed to be jointly and severally liable for the total amount of the risk, unless it can show the contrary.

We wish to emphasize that by deleting the contested provision we do not intend any change in our definition of "insurer" for purposes of these or any of the Commission's other water pollution regulations. Insurance entities such as the Underwriters at Lloyd's are considered to be single insurers for the limited purposes of liability under such regulations. That is, nothing contained herein should be construed as meaning, for example, that a claimant must proceed against each "underwriter" of each "syndicate" participating in a "Lloyd's" undertaking as a result of the deleted provision.

We also wish to note that the provision was not deleted with respect to guarantors. They are, in effect, self-insurers on behalf of (and, in some cases, in union with) vessel operators, and usually are closely affiliated companies. We see no justification in permitting a situation where artificial corporate shields could insulate vessel operators from compensating claimants up to the full amount of the financial responsibility required by the OCSLAA.

Section 544.9—Issuance of Certificates

Paragraph (d) of this section requires a certificant to notify the Commission in writing within five days after becoming aware ofa change in the facts contained in the application or supporting documentation which lead to the issuance of a Certificate. Examples of such changes include vessel name changes or a change of address.

Paragraph (e) of this section requires a certificant to complete the reverse side of a voided Certificate and return it to the Commission within 10 days after the Certificate becomes void. The usual reason for a Certificate becoming void is cessation of the operator's responsibility for the vessel named on the Certificate.

Continental Oil asserts that the respective 5 and 10 day time limits in paragraphs (d) and (e) are too short and should be tripled to 15 and 30 days. In view of the fact that the proposed 5 and 10 day time limits are not key elements of the regulations, we have no objection to granting more time. Because, however, updating of information should be done as promptly as possible we will double rather than triple the paragraph (d) time limits and make it 10 days. The paragraph (e) time limit will be tripled to 30 days as requested.

Section 544.11 —Denial or Revocation of Certificates

Paragraph (b) of this section identified four situations where denial or revocation of a Certificate shall be imediate and without prior notice. For example, a Certificate is automatically voided when the certificant sells the vessel named thereon to a new operator. Similarly, denial of issuance of a Certificate occurs automatically in a case where an applicant sells the vessel for which the applicant had submitted an application in expectation of operating the vessel.

Continental Oil asserts that such immediate revocation or denial is patently outside due process. We disagree. The regulations do not in all cases, provide for *immediate* revocation or denial. We would refer Continental Oil to the last sentence in paragraph (b) which requires the Commission to advise the applicant or certificant in writing of the reason for an intended denial or revocation in any case where such action is necessary to avoid an inappropriate denial or revocation. No change will be made to paragraph (b).

Paragraph (c) of this section concerns a situation where the Commission has written to a certificant warning it that its Certificate will be revoked because it failed to submit required financial statements or affidavits. In such case, the intended revocation would become effective 10 days after the date of the warning letter, unless the certificant demonstrated prior to revocation, that the financial statements or affidavits had been timely filed.

Continental Oil recommends that the 10 day time limit be lengthened to 20 days.

We again point out that a self-insurer subject to regulations in this part would almost certainly be a self-insurer under the existing Part 542 revised regulations as well. Since the Part 542 revised regulations also contain the 10 day time limit, nothing would be gained by extending the time limit in these regulations, i.e., the 10 day time limit would still apply to the certificant under Part 542 revised.

If a self-insurer cannot readily demonstrate its ability to meet its statutory liability, it should not be permitted to maintain its status as a self-insurer. To that end, the Commission must ensure that it can determine the financial condition of each self-insurer, insofar as the built-in delays of the self-insurance reporting method permit, at least annually. If a self-insurer cannot, in a timely fashion, meet its reporting requirement, especially in view of the 45-day time extensions available under the regulations, it should not be necessary for the Commission to solicit compliance. No change, therefore, will be made to paragraph (c).

Paragraph (d) of this section provides that in certain cases an applicant or certificant may request a hearing to show that an intended denial or revocation is unwarranted. Continental Oil endorses that provision but believes that paragraph (b) must be amended to allow for it. We would again refer Continental Oil to the last sentence in paragraph (b) whereby *the Commission must, in certain cases,* give written notice of its intention to deny or revoke. Such written notice is the "intended denial or revocation" mentioned in paragraph (d) and is the catalyst for the request for a hearing provided for in paragraph (d). No amendment is necessary.

Section 544.12—Fees

Paragraph (e) of this section establishes a $20 certification fee "for each Certificate issued." Continental Oil is unable to determine whether that $20 fee would apply in a case where an applicant paid its $100 application fee and was applying for only one Certificate. The answer is affirmative.

Section 544.13—Enforcement

Paragraph (a) of this section establishes a civil penalty of not more than $10,000 for failure to comply with these Part 544 regulations, and provides that such penalty "may be assessed and compromised by the Federal Maritime Commission pursuant to the provisions of section 312(a) of the Act."

Continental Oil asserts that in order to satisfy both the statute and constitutional due process, paragraph (a) must be amended to note that section 312(a) of the statute requires the giving of notice and opportunity for a hearing before a penalty is assessed.

While Continental Oil's assertion is incorrect, we have no objection to amending paragraph (a) as requested and will do so.

Section 544.14—Service of Process

This section requires each applicant and underwriter to designate a United States agent for service of process on the application, insurance, bond or guaranty form it submits. Each designation must be acknowledged in writing by the designated agent unless that agent has furnished the Commission with a "master" concurrence. A "master" concurrence is an agreement to act as agent for service of process for any applicant or underwriter who designates such agent, provided that such applicant or underwriter meets certain conditions. An insurance adjusting firm, for example, may furnish a "master" concurrence to act as agent for any vessel operator insured by a particular insurer.

Continental Oil asserts that no United States company should have to designate an agent for service of process. Companies domiciled in the United States may appoint themselves as agent, as is stated on Part IV of the application form. No change will be made in this section of the regulations.

We urge all United States agents for service of process who have "master" concurrences on file with the Commission for purposes of Part 542 revised and/or Part 543 of this title, to either revise those documents to incorporate this Part 544 or file separate "master" concurrences for that purpose.

Insurance Form FMC-193

Lloyd's and AIMU submitted comments with respect to this Form.

Lloyd's noted correctly, that in certain cases the OCSLAA places unlimited liability on a *vessel owner and operator*. It then goes on to state, however, that insurers are also subject to the unlimited liability and thus will not be inclined to write OCSLAA insurance coverage under these regulations because knowledge of the total risk exposure is an essential basis for any underwriting.

We do not believe that either the statute or the terms of proposed insurance Form FMC-193 impose such unlimited liability on the *insurer* as well as the owner and operator. We can find nothing in the statute which would lead us to such an interpretation of mandatory unlimited liability on the part of an underwriter.[6] Nor is there anything in the language of Insurance Form FMC-193 which would place such unlimited liability on the insurers who execute that form. To the contrary, in two places on the first page of that form the insurer's liability is limited, specifically, to $300 per gross ton or $250,000, whichever is greater, per incident. That specifically limited amount of liability in the insurance form is based on the wording in section 305(a)(1) of the OCSLAA which cannot be read as requiring financial responsibility in an amount greater than $300 per gross ton or $250,000, whichever is greater, despite the fact that the *vessel owner or operator* can become liable for a greater amount in certain situations. No amendment to the insurance form is necessary.

The comment submitted by the AIMU recommends an amendment to the proposed wording in the third paragraph of the insurance form, which now reads in part as follows:

"The insurer shall be entitled to invoke only the rights and defenses permitted by Title III of the Act to the vessel *operator* and the defense that the incident was caused by the willful misconduct of the vessel *operator*." (Emphasis added.)

The AIMU refers to the fact that section 305(c) of the OCSLAA makes available to an underwriter not only the rights and defenses permitted by the statute to the vessel operator, but the rights and defenses permitted to the vessel *owner* as well. The intent of the OCSLAA is the same, the AIMU points out, with respect to the defense that an incident was caused by the willful misconduct of the vessel owner; not just the vessel operator.

The AIMU also points to the fact that the operator may include the owner as an assured on the underlying insurance policy, frequently at the urging of the owner. Thus, in a case where a claim is asserted directly against an underwriter, it is important that the underwriter not be denied the right to invoke the defense that the incident was caused by the willful misconduct of the *owner*.

The position taken by the AIMU is correct (even if an owner was not named on any underlying insurance policy). It was not our intent to limit the defenses available to underwriters under the statute. This can be seen from a reading of section 544.8(d) of the regulations which is meant to govern the insurance, bond and guaranty forms, and which purposely makes no mention of owners or operators. It should be obvious, moreover, that because under the OCSLAA any liability incurred by a vessel owner is also the liability of the vessel operator, equitably, any defense available to the owner also would be available to the operator—and, therefore, to the underwriter in a case of direct action against the underwriter.

[6] We assume Lloyd's is not referring to an underwriter's default under section 307(j)(5) of the OCSLAA whereby a "defendant" may lose the right to limit liability. We do not, in any case, read that section as meaning that an underwriter could be subjected to unlimited liability.

The reason why we did not specifically mention vessel owners in the above quoted language of the insurance form is based on our intention not to burden underwriters with the *requirement*[7] to name the often uninsured vessel owners on the forms. (See item number four under the "Supplementary Information" section in our January 3, 1979, Notice of Proposed Rulemaking.) Thus, only the assured operators need be named on the forms and the language of the forms is geared to the assured operators as applicants for Certificates. It would make for awkward construction and confusing reading to suddenly mention in the forms the role of some unnamed and perhaps uninsured owners with respect to defenses, while having remained silent in the forms concerning the role of such owners with respect to liability and other matters. By expanding the content of the forms in order to address such other matters (e.g., the inability of an owner to add or delete vessels) the forms would become unduly long and complex.

We agree with the position of the AIMU concerning the intent of the OCSLAA, but we do not believe it is desirable or necessary to amend the forms in order to protect that position. Since this matter of available defenses is important to all underwriters, the correct construction of the forms as to defenses will be specifically ordered below.

NOW, THEREFORE, IT IS ORDERED, That, effective upon publication in the *Federal Register*, Subchapter B of Chapter IV of Title 46 of the Code of Federal Regulations is amended by the addition of a new Part 544, as set forth below; and

IT IS FURTHER ORDERED, That the insurance, bond and guaranty forms appended hereto shall be construed as entitling underwriters to invoke the rights and defenses permitted by Title III of the Outer Continental Shelf Lands Act Amendments of 1978 to both vessel owners and vessel operators, as well as the defense that an incident was caused by the willful misconduct of the vessel owners or vessel operators, whether or not owners are named as joint assureds on such forms or on any underlying insurance policies; and

IT IS FURTHER ORDERED, That the provision in section 544.8(b)(3)(i) which requires supplemental schedules to be audited by independent Certified Public Accountants is temporarily waived. Such supplemental schedules shall be acceptable if prepared by an appropriate financial officer of the self-insurer or guarantor. The hereby ordered waiver shall be applicable only to those persons who on the date of this Order are approved self-insurers or guarantors under Part 542 revised of Title 46 of the Code of Federal Regulations. This waiver shall terminate without further notice at the time new financial statements are due in accordance with section 544.8(b)(3)(iv).

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

---

[7] Underwriters are free, of course, to name both owners and operators as assureds on the insurance, bond and guaranty forms. By doing so, however, an underwriter would remain at risk with respect to the named owner even after the named operator was relieved of its operator status. Such risk would continue under the form until the date the owner sold the involved vessel (assuming an incident had not occurred prior to sale) or the date the risk was terminated pursuant to all of the terms of the form, whichever date occurred first.

PART 544—FINANCIAL RESPONSIBILITY FOR OIL POLLUTION— OUTER CONTINENTAL SHELF

AUTHORITY: This Part 544 is issued under section 305(a)(1) of the Outer Continental Shelf Lands Act Amendments of 1978 and sections 1–201 and 1–203 of Executive Order 12123 of February 26, 1979.

§544.1 *Scope*

(a) These regulations (Part 544 of Title 46 of the Code of Federal Regulations) implement the vessel financial responsibility requirements of the Outer Continental Shelf Lands Act Amendments of 1978. These regulations apply to all vessels engaged in any segment of the transportation of oil produced from an offshore facility on the Outer Continental Shelf when such vessels are operating in the waters above submerged lands seaward from the coastline of a State or the waters above the Outer Continental Shelf.

(b) Vessels having on board Outer Continental Shelf-produced oil after that oil has been brought ashore, or loaded as a result of removal operations after an oil spill, do not thereby become subject to the regulations in this Part.

§544.2 *Definitions*

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

(a) "Act" means the Outer Continental Shelf Lands Act Amendments of 1978 (Public Law 95–372).

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

(c) "Application" means Application for Certificate of Financial Responsibility (Outer Continental Shelf), Form FMC–192.

(d) "Cargo" means oil carried on board a vessel for purposes of transportation, in any quantity and under any conditions.

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

(f) "Certificate" means a Certificate of Financial Responsibility (Outer Continental Shelf) issued by the Federal Maritime Commission pursuant to the regulations in this Part.

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

(h) "Damages" means economic loss arising out of or directly resulting from oil pollution, including injury to, or destruction of, real or personal property; loss of use of real or personal property; injury to, or destruction of, natural resources; loss of use of natural resources; loss of profits or impairment of earning capacity due to injury to, or destruction of, real or personal property or natural resources; loss of tax revenue for a period of one year due to injury to real or personal property; and reasonable costs associated with preparation and presentation of natural resource damage claims. Removal costs are not included in this definition.

(i) "Discharge" means any emission, intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emptying, or dumping.

(j) "Financial responsibility" means proof of financial ability to satisfy claims for damages and removal costs as required by section 305(a)(1) of the Act.

(k) "Incident" means any occurrence or series of related occurrences, involving one or more vessels, which causes or poses an imminent threat of oil pollution from any source. For purposes of these regulations, an "imminent" threat, as used in the Act, is synonymous with a "substantial" threat, as used in section 311 of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1321).

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

(m) "Offshore facility" includes any oil refinery, drilling rig, drilling structure, oil storage or transfer terminal, or pipeline, or any appurtenance related to any of the foregoing, which is used to drill for, produce, store, handle, transfer, process, or transport oil produced from the Outer Continental Shelf, and is located on the Outer Continental Shelf, except that a vessel or a deepwater port (as the term "deepwater port" is defined in section 3(10) of the Deepwater Port Act of 1974 (33 U.S.C. 1502)) is not included in this definition.

(n) "Oil" means petroleum, including crude oil or any fraction or residue therefrom, whether or not carried on board a vessel.

(o) "Oil pollution" means:

(1) the presence of oil, either in an unlawful quantity or which has been discharged at an unlawful rate (i) in or on the waters above submerged lands seaward from the coastline of a State, or on the adjacent shoreline of such State or (ii) on the waters of the contiguous zone established by the United States under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606); or

(2) the presence of oil in or on the waters of the high seas outside the territorial limits of the United States (i) when discharged in connection with activities conducted under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.) or (ii) causing injury to or loss of natural resources belonging to, appertaining to, or under the exclusive management authority of, the United States; or

(3) the presence of oil in or on the territorial sea, navigable or internal waters, or adjacent shoreline of a foreign country, in a case where damages are recoverable by a foreign claimant under Title III of the Act.

(p) "Operator" or "vessel operator" means a demise charterer or any other person responsible for the operation of a vessel, including a person who both owns and is responsible for the operation of a vessel.

(q) "Outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters (as the term "lands beneath navigable waters" is defined in section 1301 of the Submerged Lands Act (43 U.S.C. 1301)), and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.

(r) "Owner" or "vessel owner" means any person holding legal or equitable title to a vessel. In a case where a Certificate of Registry or equivalent document has been issued, the owner shall be deemed to be the person or persons whose name or names appear thereon as owner; *provided, however*, that where a Certificate of Registry has been issued in the name of the President or Secretary of an incorporated company pursuant to 46 U.S.C. 15, such incorporated company will be deemed to be the owner; and *provided, further*, that this definition does not include a person who, without participating in the management or operation of a vessel, holds indicia of ownership primarily to protect a security interest in that vessel.

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

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

(u) "Remove," "removing," or "removal" means (1) the physical removal of oil from the water and shorelines; (2) the taking of such other actions as may be necessary to prevent, minimize or mitigate damage to the public health or welfare (including, but not limited to, fish, shellfish, wildlife and public or private property, shorelines and beaches), resulting from a discharge or substantial threat of a discharge of oil; (3) the restoration or replacement of natural resources damaged or destroyed as the result of a discharge of oil in violation of section 311(b) of the Federal Water Pollution Control Act; (4) reasonable measures taken, after an incident has occurred, to prevent, minimize, or mitigate oil pollution from such incident; and (5) measures of similar or related nature under section 5 of the Intervention of the High Seas Act (33 U.S.C. 1474).

(v) "Submerged lands seaward from the coastline of a State" means the area of "lands beneath navigable waters" as described in section 2(a) of the Submerged Lands Act (43 U.S.C. 1301(a)(2)). Generally, that area can be described as all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coastline of a State, and to the boundary line of each such State where in any case such boundary extends seaward (or into the Gulf of Mexico) beyond three geographical miles.

(w) "Underwriter" means an insurer, a surety company, a guarantor, or any other person, other than the operator, who provides evidence of financial responsibility for an operator.

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

(y) "Vessel" means every description and size of watercraft or other artificial contrivance, other than a public vessel, which is operating in the waters above the Outer Continental Shelf or in the waters above submerged lands seaward from the coastline of a State, and which is engaged in any segment of the transportation of Outer Continental Shelf-produced oil from an offshore facility, including carrying, lightering, transshipping, or storing such oil.

§544.3 *General*

(a) The regulations in this Part set forth the procedures whereby an owner and operator of a vessel subject to these regulations can demonstrate that each is financially able to meet liability for removal costs and damages in the amount of $300 per gross ton of such vessel, of $250,000, whichever is greater. That amount represents the maximum amount of liability under section 304 of the Act in a case where the owner and operator of a particular vessel are entitled to limit their liability. Owners and operators are jointly, severally and strictly liable.

(b) Upon the satisfactory demonstration of financial responsibility in accordance with the regulations of this Part, the Commission shall issue Certificates which are to be carried aboard the vessels named on such Certificates. The carriage of a valid Certificate will indicate to the United States Coast Guard that the vessel named thereon is in compliance with the financial responsibility provisions of the Act. Failure to carry a valid Certificate subjects a vessel to enforcement action by the Coast Guard and also subjects the vessel owner and operator to penalty procedures by the Commission.

(c) Where a vessel is operated by its owner, or the owner is responsible for its operation, the owner shall be considered to be the operator and shall file the application for a Certificate. In all other cases, the vessel operator shall file the application.

(d) The operator of each vessel subject to the regulations in this Part shall submit as soon as possible to the Commission a properly completed Application Form FMC-192, acceptable evidence of financial responsibility and application and certification fees. Otherwise, such vessel operator shall not permit such vessel to have on board, for any purpose, oil that has been produced by an offshore facility, unless that oil has previously been brought ashore at a United States or foreign location.

(e) The gross tonnage of a vessel subject to these regulations shall be presumed to be that indicated in the vessel's Certificate of Registry, or, in the absence thereof, other marine documents acceptable to the Commission. If a vessel has more than one gross tonnage, the higher tonnage shall apply.

§544.4 *Where to Apply and Obtain Forms*

(a) Applications for Certificates (Form FMC-192), together with fees and evidence of financial responsibility, shall be filed with the Commission at the following address:

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

(b) Regulations concerning application forms are set forth in sections 544.5 and 544.6. Regulations concerning fees are set forth in section 544.12, and regulations concerning evidence of financial responsibility are set forth in section 544.8. Forms may be obtained from the Commission's Office in Washington, D.C. and from the Commission District Offices at New York, New York; New Orleans, Louisiana; Miami, Florida; San Francisco, California; Chicago, Illinois; Savannah, Georgia; San Pedro, California and Hato Rey, Puerto Rico. All requests for assistance, including telephone inquiries, in completing applications should be directed to the Commission's Office of Water Pollution Responsibility in Washington, D.C.

§544.5 *Time to Apply*

A completed application, fees and evidence of financial responsibility shall be filed as soon as possible before March 17, 1979. After that date, filings shall be made at least 21 days prior to the date the Certificate is required. Applications will be processed in the order in which they are filed.

§544.6 *Applications, General Instructions*

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

(b) Only vessel operators, as defined in paragraph (p) of section 544.2, may apply for a Certificate.

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

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

§544.7 *Renewal of Certificates*

Applications for renewal Certificates shall be made in writing at least 21 days, but no earlier than 90 days, prior to the expiration dates of the existing

Certificates. Each application shall be accompanied by appropriate recertification (renewal) fees, shall identify any item of information which has changed since the original application was filed, and shall set forth the correct information in full.

§544.8 *Establishing Financial Responsibility*

(a) *General*—In addition to filing Form FMC-192 and appropriate fees, each vessel operator subject to the regulations in this Part shall demonstrate that it is able to satisfy liability under Title III of the Act, in an amount not less than $300 per gross ton or $250,000, whichever is greater. The evidence of financial responsibility required by these regulations shall cover the vessel owners as well as the vessel operators, jointly and severally. The amount of evidence of financial responsibility required by the regulations in the Part is separate from and in addition to the amount, if any, required of an applicant pursuant to Parts 540, 542 and 543 of this title.

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

- Insurance;
- Surety Bond;
- Self-Insurance;
- Guaranty.

(1) *Insurance*—Insurance may be established by filing with the Commission an Insurance Form FMC-193 executed by an insurer which is acceptable to the Commission for purposes of the regulations in this Part;

(2) *Surety Bond*—An applicant may file with the Commission a Surety Bond Form FMC-194, executed by the applicant and by a surety company which is located in the United States and which is acceptable to the Commission for purposes of the regulations in this Part. To be acceptable, surety companies must, at a minimum, be certified by the United States Department of the Treasury with respect to the issuance of Federal bonds in the penal sum of the bonds to be issued under these regulations;

(3) *Self-Insurance*—A vessel operator may qualify as a self-insurer by maintaining, in the United States, working capital and net worth, each in the amount of $300 per gross ton of the largest vessel to be self-insured or $250,000, whichever is greater. For the purposes of this subparagraph, "working capital" is defined as the amount of current assets located in the United States, less *all* current liabilities; and "net worth" is defined as the amount of all assets located in the United States, less *all* liabilities. The amounts of working capital and net worth required by the subparagraph are in addition to the amount of working capital and net worth, if any, required by Part 540 (Security for the Protection of the Public), Part 542 (Financial Responsibility for Water Pollution) and Part 543 (Oil Pollution Cleanup—Alaska Pipeline) of this title. Maintenance of the required working capital and net worth shall be demonstrated by submitting with the initial application the items specified in subdivision (i) of this subparagraph for the applicant's last fiscal year preceding the date of application. Thereafter, for each of the applicant's fiscal years, the applicant/certificant shall submit the items specified in subdivisions (i) and (ii) of this subparagraph and shall be

subject to the provisions of subdivisions (iii), (iv), (v) and (vi) of this subparagraph:

(i) *Initial and Annual Submissions*—An applicant/certificant shall submit, for its most recent fiscal year, a non-consolidated balance sheet and related statement of income, retained earnings and changes in financial position for the year then ended audited by an independent Certified Public Accountant. Those financial statements shall be accompanied by an additional statement from the applicant's/certificant's Treasurer (or equivalent official) certifying to both the amount of current assets and the amount of total assets, included in the accompanying balance sheet, which are located in the United States and acceptable for purposes of this Part, e.g., not pledged for purposes of Part 540, Part 542 or Part 543. If the balance sheet and related statement of income, retained earnings and changes in financial position cannot be submitted in non-consolidated form, consolidated statements may be submitted if accompanied by supplemental schedules prepared by the applicant/certificant and audited by an independent Certified Public Accountant, which present the amount by which (A) the applicant's/certificant's total assets, located in the United States and acceptable for purposes of this Part, exceed its total liabilities, and (B) the applicant's/certificant's current assets, located in the United States and acceptable for purposes of this Part, exceed its current liabilities. Such additional statement audited by the Certified Public Accountant must specifically name the applicant/certificant, must indicate that the amounts so presented relate only to the applicant/certificant, apart from any other entity, and must identify the consolidated financial statement to which it applies;

(ii) *Semi-Annual Submissions*—When the applicant's/certificant's demonstrated net worth is not at least ten times the required amount, an affidavit shall be filed by the applicant's/certificant's corporate Treasurer (or equivalent official) covering the first six months of the applicant's/certificant's fiscal year. Such affidavits shall state that neither the working capital nor the net worth have, during the first six months, fallen below the required amounts;

(iii) *Additional Submissions*—If an applicant's/certificant's annual and semi-annual submissions of financial data under Parts 540, 542 or 543 demonstrate amounts large enough to meet the requirements of this Part as well, separate annual and semi-annual submissions for purposes of this Part shall not be necessary. Additional financial information, however, shall be submitted upon request of the Commission. All applicants/certificants who choose self-insurance shall notify the Commission within five days of the date such persons know, or have reason to believe, that the amounts of working capital or net worth have fallen below the amounts required by this subparagraph;

(iv) *Time for Submissions*—All required annual financial statements shall be received by the Commission within three calendar months after the close of the applicant's/certificant's fiscal year, and all six-month affidavits within one calendar month after close of the applicable six-month period. Upon written request, the Commission may grant a reasonable extension of the time limits for filing financial statements/affidavits, provided that the request sets forth good and sufficient reason to justify the requested extension and is received

15 days before the statements/affidavits are due. The Commission will not consider a request for an extension of more than 45 days;

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

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

(4) *Guaranty*—A vessel operator may file with the Commission a Guaranty Form FMC-195 executed by a guarantor acceptable to the Commission for purposes of the regulations in this Part. A guarantor shall be subject to and must fully comply with all of the self-insurance provisions of subparagraph (3) of this paragraph (b). In addition, the amounts of working capital and net worth required to be demonstrated by an acceptable guarantor shall be no less than the aggregate amounts underwritten as a guarantor and self-insurer pursuant to these regulations and the regulations of Part 540, Part 542 and 543 of this title;

(5) *Other Methods*—An applicant may not choose any other method of demonstrating financial responsibility, nor any modifications of any of the foregoing methods:

(c) *Forms—General*—The Commission's Application Form FMC-192, Insurance Form FMC-193, Surety Bond Form FMC-194 and Guaranty Form FMC-195, as appended to this Part, are hereby incorporated into this Part. If more than one guarantor joins in executing a guaranty form, such action shall constitute joint and several liability on the part of such joint guarantors. Each form submitted to the Commission pursuant to these regulations shall set forth in full the correct name of the vessel operator to whom Certificates are to be issued.

(d) *Direct Action*—Forms FMC-193 through FMC-195 shall permit a claimant to commence an action for removal cost and damage claims authorized by section 303 of the Act directly against the underwriter. Such forms shall also provide that in the event such action is brought directly against the underwriter, such underwriter shall be entitled to invoke only those rights and defenses permitted by section 305(c) of the Act.

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

§544.9 *Issuance of Certificates*

(a) After acceptable evidence of financial responsibility has been provided and appropriate fees have been paid, a separate Certificate for each vessel listed on completed applications shall be issued by the Commission. Such Certificates will be issued only to vessel operators, as defined in paragraph (p) of section 544.2 and shall be effective for not more than three years from the date of issue.

(b) The original Certificate shall be carried on the vessel named on the Certificate. However, a legible copy (certified as accurate by a notary public or other person authorized to take oaths) may be carried in lieu of the original Certificate if the vessel is an unmanned barge which (1) does not require a Certificate of Inspection from the United States Coast Guard, (2) is owned and operated by United States entities and (3) does not have a facility which the vessel operator believes would offer suitable protection for the original Certificate issued by the Commission. If a copy is carried aboard such barge, the original shall be retained at a location in the United States and shall be kept readily accessible for inspection by U.S. Government officials.

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

(d) If at any time after a Certificate has been issued a certificant becomes aware of a change in any of the facts contained in the application or supporting documentation, the Certificant shall notify the Commission in writing within ten (10) days of becoming aware of the change.

(e) If for any reason, including a vessel's demise or transfer to a new operator, a certificant ceases to be the vessel's operator, as defined in paragraph (p) of section 544.2, the certificant shall, within thirty (30) days, complete the reverse side of that vessel's original Certificate and return it to the Commission. Such Certificate and any copy thereof is automatically void (whether or not returned to the Commission), and its use is prohibited. Where such voided Certificate cannot be returned because it has been lost or destroyed, the certificant shall, as soon as possible, submit the following information to the Commission in writing:

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

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

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

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

(5) The reason why the Certificate cannot be returned.

§544.10 *Operator's Responsibility for Identification*

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

§544.11 *Denial or Revocation of Certificates*

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

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

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

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

(4) Failure to timely file the statements of affidavits required by subdivisions (i), (ii), or (iii) of subparagraph (3) of paragraph (b) of section 544.8 of these regulations; or

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

(b) Denial or revocation of a Certificate shall be immediate and without prior notice in a case where the applicant or certificant (1) is no longer the operator of the vessel in question , (2) fails to furnish acceptable evidence of financial responsibility in support of an application, (3) permits the cancellation or termination of the insurance form, surety bond or guaranty upon which the continued validity of the Certificate was based, or where (4) the Certificate no longer reflects current information, as would occur in the case of a name change or other change. In any other case, prior to the denial or revocation of a Certificate, the Commission shall advise the applicant or certificant, in writing, of its intention to deny or revoke the Certificate, and shall state the reason therefor.

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

(d) If the intended denial or revocation is based upon one of the reasons in subparagraphs 544.11(a)(1) or (3), the applicant or certificant may request, in writing, a hearing to show that the applicant or certificant is in compliance with the provisions of the regulations in this Part, and, if such request is received within 30 days after the date of the notification of intention to deny or revoke, such hearings shall be granted by the Commission. Hearings pursuant to these regulations shall be conducted in accordance with the Commission's Rules of Practice and Procedure (46 CFR Part 502).

§544.12 *Fees*

(a) This section establishes the application fee which shall be imposed by the Commission for processing Application Form FMC-192 and also establishes the certification fee which shall be imposed for the issuance or renewal of Certificates.

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

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

(d) Each applicant who submits Application Form FMC-192 for the first time shall pay an initial, non-refundable application fee of $100. Applications for additional Certificates, or to amend or renew existing Certificates, shall not require new application fees. However, once an Application Form FMC-192 is withdrawn or denied for any reason, and the same applicant, holding no valid Certificates, wishes to reapply for a Certificate (covering the same or new vessel), a new application form and application fee of $100 shall be required.

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

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

§544.13 *Enforcement*

(a) Any operator of a vessel subject to the regulations in this Part who fails to comply with such regulations shall be subject to a civil penalty of not more than $10,000 for each such failure to comply, in accordance with section 312(a) of the Act. Such penalties may be assessed and compromised by the Federal Maritime Commission pursuant to the provisions of section 312(a) of the Act. No penalty shall be assessed until notice and an opportunity for hearing on the alleged violation have been given.

(b) The Secretary of the Department in which the Coast Guard is operating may (1) deny entry to any port or place in the United States or the navigable waters of the United States and (2) detain at the port or place in the United States from which it is about to depart for any other port or place in the United States, any vessel subject to the regulations in this Part, which, upon request, does not produce a valid Certificate.

§544.14 *Service of Process*

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–8

EUROPEAN TRADE SPECIALISTS, INC., AND
KUNZLE & TASIN

v.

PRUDENTIAL-GRACE LINES, INC., AND
THE HIPAGE CO., INC.

Prudential-Grace Lines, Inc. found to have violated section 18(b)(3) of the Shipping Act, 1916. The Hipage Company, Inc., found not to have violated section 17 of the Shipping Act, 1916. Reparations granted.

William L. Borden for complainants.
John B. King, Jr., for respondent The Hipage Company, Inc.
John J. Purcell for respondent Prudential-Grace Lines, Inc.

REPORT AND ORDER

March 20, 1979

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

PROCEEDINGS

This proceeding arose by complaint of European Trade Specialists, Inc. (European), on behalf of itself as shipper and on behalf of its consignee Kunzle & Tasin (K & T), alleging violations by Prudential-Grace Lines, Inc. (Prudential) and by The Hipage Company (Hipage), an independent ocean freight forwarder, of various sections of the Shipping Act, 1916 (46 U.S.C. 801, *et seq.*). In his Initial Decision, issued July 9, 1975, Chief Administrative Law Judge John E. Cograve (Presiding Officer) concluded that no violations of the Shipping Act had been shown on the record. The Commission affirmed this decision in all respects except for the alleged violation of section 18(b)(3) (46 U.S.C. 817(b)(3)) by Prudential and the alleged violation of section 17 (46 U.S.C. 816) by Hipage, and remanded it to the Presiding Officer for further proceedings.[1] In his Initial Decision on Remand, served November 2, 1977, the Presiding Officer again

[1] Report and Order on Remand, served May 28, 1976, 16 S.R.R. 1031 (1976).

found that neither of the Respondents had violated any provision of the Shipping Act. Exceptions to this decision have been filed by Complainants, to which Respondents have replied.

FACTS

The underlying facts of the complaint in this proceeding are set forth in the Commission's Report and Order on Remand and are incorporated herein by reference.[2] For a further elucidation of the facts of this case, the analysis of the nature of "Roto-Pads" contained in the Initial Decision at 6 (footnotes omitted) and titled "Further Findings of Fact—Section 18(b)(3) Issue" is attached as an Appendix hereto and made a part of this Report.[3]

INITIAL DECISION

In the instant case the Order on Remand required the Presiding Officer to determine the proper tariff rate to be applied to the Complainant's commodity. Appropriate consideration was to be given to tariff Item No. 1198 (Pads, Scouring, or material therefor), Item No. 0101 (Abrasives, Viz. . . . . Cloth, NOT in Belt Form and Rolls (Not Pads, Scouring, or Materials Therefor)), the Cargo, N.O.S. classification, or any other tariff classification which may be properly considered.

The Presiding Officer, after making a preliminary analysis of the nature of "Roto-Pads," found on the basis of official notice that the commodity shipped was not "abrasive cloth," and that Prudential's Tariff Item No. 0101 was therefore inapplicable. He also found that Item No. 1198 did not apply because the commodity shipped was not "scouring pads." Accordingly, the "Cargo, N.O.S." rating was held to be the applicable classification.

No specific delineation was made of what Hipage's obligations were under the circumstances of this case. The Presiding Officer found that Hipage did obtain from European additional information necessary to prepare the bill of lading after Lavino Shipping Company had questioned the classification of Roto-Pads as abrasive cloth. He also held that even if it had not, this fact alone would not constitute a violation of section 17 because no continuing practice of Hipage was proven. The Presiding Officer also found no violation of sections 510.23(c), (e) and (j) of the Commission's regulations (46 C.F.R. 510.23(c), (e) and (j)).

POSITIONS OF THE PARTIES

In its Exceptions, European alleges that the Presiding Officer erred in: (a) finding that the commodity shipped was not "abrasive cloth"; (b) excluding

[2] The original complaint alleged numerous Shipping Act violations by both Respondents arising out of a shipment of 1,009 cartons of "Roto-Pads." The shipment was assesed a "Cargo, N.O.S." rate by Prudential after European had been led to believe by International Great Lakes Shipping Company, a wholly-owned subsidiary of Lavino Shipping Company (Prudential's agent), that the lower rate for "Abrasive Cloth" would be applied. As a consequence, European's shipping costs were thirteen times greater than originally expected. Hipage, after having received shipping documents from European indicating the application of an "Abrasive Cloth" classification, allegedly failed to notify European of Prudential's reclassification of the commodity as "Cargo, N.O.S." European claimed it did not learn of the problem until after the commodity was shipped.

[3] The specific matters that the Commission directed to be determined at the remand hearings were: (a) the true nature of the commodity shipped and the tariff rate which must be applied, and (b) the actions that the freight forwarder was obliged to take to notify the shipper of any confusion and whether or not it did so.

relevant evidence and including improper evidence under the guise of official notice; (c) taking official notice of his own personal experiences; (d) misstating one issue as lack of notice of improper description rather than improper rating; (e) finding that the freight forwarder did notify the shipper of the rate change; (f) requiring the shipper to prove its claim by more than a preponderance of evidence; and, (g) not finding the freight forwarder in violation of section 17 due to its alleged violation of sections 510.23(c), (e), and (j) of the Commission's regulations.[4]

Prudential's response to the first three exceptions is that the commodity shipped was not cloth, the Complainant submitted no probative evidence that it was cloth, and, Complainant's own witness admitted that the description the freight forwarder submitted to the carrier indicated it was not cloth. In its reply to the remaining four exceptions Hipage takes the position that: (a) European did not meet its burden of proof on the notice issue; (b) the testimony and observed demeanor of the witnesses warranted the Presiding Officer finding that notice was in fact given; and (c) even if notice was not given, it was not a violation of section 17 as a matter of law because it was an isolated act.

Discussion and Conclusions

Section 18(b)(3)

In determining the proper tariff rate to be applied to the cargo in this proceeding, an objective inquiry into the true nature of the commodity and whether it can be included under a specific tariff item according to the reasonable construction of the tarrif language is required. *National Cable & Metal Co. v. Am. Hawaiian*, 2 U.S.M.C. 474 (1941). While ambiguities should be construed against the carrier, the terms must be given meaning in the sense that they are understood commercially. *Raymond International Inc. v. Venezuelan Line*, 6 F.M.B. 189 (1961). Additionally, the Presiding Officer is correct in noting that if no specific commercial meaning has been engrafted onto a term, that term must be construed according to its ordinary meaning. *Nix v. Hedden*, 149 U.S. 304 (1893).

The commodity here is described as discs made of synthetic material impregnated with abrasives, designed to be used for scrubbing and polishing industrial or institutional floors and marketed under the trade name "Roto-Pads." The Presiding Officer found that Item No. 1198 did not apply and this finding has not been contested. Additionally, no party has proffered that any other item not already considered should apply. The issue is now confined to whether Item No. 0101 or Cargo, N.O.S. is the proper classification.

The parenthetical exclusion in Item No. 0101, *i.e.*, "Not Pads, Scouring or Materials Therefor," corresponds to the description of Item No. 1198. It follows, therefore, that the parenthetical exclusion in Item No. 0101 is met upon a finding that Item No. 1198 covering "Pads, Scouring, or material therefor" does not apply. The commodity is clearly in disc form and hence the non-parenthetical exclusion *i.e.*, not belt or roll form, is met. The material is clearly an abrasive of

[4] European alleged that Hipage violated 46 C.F.R. 510.23(c), (e) and (j) by: continuing to involve itself in the transaction without clarifying the classification problem, withholding information concerning the dispute, and not itemizing the ocean freight charges on its invoice to European, as required by Commission's rules.

some sort reducing the entire controversy to the question of whether it can objectively be described as cloth.

The Presiding Officer found that the material was indeed a fabric consisting of bonded synthetic fibers, either nylon or polyester, and that as such it fell within the dictionary definition of cloth. No evidence of any particular commercial meaning of the word "cloth" was proffered. Therefore, we can conclude that the material in question is in fact "cloth" unless clear evidence exists that the "ordinary meaning" of the word is more restrictive than the dictionary meaning and would not include the commodity in question.

There have been instances where it has been found that the "ordinary" or "common" meaning of a term is not consistent with the dictionary meaning and the former should be used for judicial purposes. *Himala International v. Fern Line*, 3 U.S.M.C. 53 (1948), *Nix v. Hedda, supra*. However, these cases are rare and involve factual situations where the common usage of a term is at great variance with the technical definition. The adjudicative body deciding the issue is in effect taking official notice of facts of such notoriety that they amount to an objective certainty and are virtually indisputable. *See,* Annotation 18 ALR 2d 552. The common meaning of words is something of which courts are bound to take judicial notice, dictionary meanings not being admitted as evidence but only as aids to the memory and understanding of the court. *Nix v. Hedden, supra* at 307. However, the taking of judicial official notice is to be exercised with great caution, care being taken that the requisite notoriety exists, with every reasonable doubt on the subject being "resolved promptly in the negative", *Brown v. Piper*, 91 U.S. 37, 43 (1875).

The record here contains evidence proffered by Complainants as to the ordinary meaning of the term "cloth." Three witnesses testified that the material at issue fell within their general understanding of the word "cloth." (Tr. at 25, 184; Ex. at 1-R). No direct evidence was submitted that the material in question was not cloth. Respondents merely argued that the *descriptions* of the article proffered to the carrier did not indicate that the material was cloth. In finding that the common meaning of cloth did not include the commodity in question, the Presiding Officer relied on his individual experience in purchasing a similar product for his domestic use.

In reviewing the record, we find that, while considerable weight must be given the factual findings of the Presiding Officer, official notice taken to arrive at the restrictive construction of the tarrif term in question contravenes the weight of the record evidence. Based on the evidence of record, which includes a sample of the commodity (Ex. 1), the Commission is of the opinion that the commodity at issue does in fact come within the ordinary meaning of the term "cloth," or more precisely "abrasive cloth." Accordingly, we conclude that the commodity in question should have been rated under Item No. 0101 and not the Cargo, N.O.S. classification.

Because the bill of lading description and the good faith of the carrier are irrelevant to this finding of misclassification, we find that Respondent Prudential violated section 18(b)(3). *Union Carbide Inter-America v. Venezuelan Line*, 17 F.M.C. 181 (1973). Complainant having paid freight charges in the amount of $2,738.70 and the proper charges being $206.25, we find that Complainant is entitled to reparations in the amount of $2,532.45 from Respondent Prudential, plus interest, at the rate of 6 percent per annum in the amount of $1,038.30.[5]

Section 17

Even assuming, without deciding, that European was not notified of the classification and rating problem we cannot say that such conduct by Hipage amounts to a violation of section 17. Unless its normal *practice* was not to so notify the shipper, such adverse treatment cannot be found to violate the section as a matter of law. *Investigation of Certain Practices of Stockton Elevators*, 8 F.M.C. 181, 200 (1964). We therefore, need not reach the issue of whether in this case the shipper was so notified.

Similarly, because any violation of section 510.23 of the Commission's regulations must be considered in terms of section 17 by operation of the language of the Order on Remand, without a showing of continuing violations of these regulations no section 17 violation can be found.

THEREFORE, IT IS ORDERED, That Complainants, European Trade Specialists, Inc. and Kunzle & Tasin, are granted reparations from Respondent, Prudential-Grace Lines, Inc., in the amount of $2,532.45 plus interest in the amount of $1,038.30; and

IT IS FURTHER ORDERED, That these proceedings be discontinued.

(S) FRANCIS C. HURNEY
Secretary

[5] Interest is computed from April 1, 1972 to February 1, 1979. *See, U.S. Borax & Chem. Corp. v. Pac. Coast European Conf.*, 11 F.M.C. 451, 470 n. 28 (1968).

APPENDIX

Further Findings of Fact—Section 18(b)(3) Issue

Complainants admit that the product in issue is accurately described as "Roto-Pad Abrasive Floor Maintenance Pads." A "Roto-Pad" consists of synthetic fibers, either nylon or polyester, which are chemically bonded to form a fabric or as Complainants would have it, a "cloth" and impregnated with an abrasive. Roto-Pads are in the shape of circles or discs and are designed for use primarily on floor maintenance machines. These machines are in common parlance variously referred to a "polishers," "waxers" or "scrubbers."

"Roto-Pad" is a trade name personally coined by Mr. Bruce A. Meade, President of European Trade Specialists. Mr. Meade felt that, "To some extent it describes that they rotate and that they are a pad in that sense." The pads are also known commercially as "discs," but Mr. Meade thought that "Roto Discs" didn't sound very good. When asked why he didn't call the articles "Roto Cloth," Mr. Meade responded, "For the same reason you find cloth is difficult to pronounce, the 'th' sound in most other languages does not exist and is extremely hard to pronounce."

There were five types of Roto-Pads in the shipment in issue. Three types (Fine Polish, Spray Buff, and Red Spray) were designed for polishing, or "spray cleaning" and polishing. Two types (Thickline and Blue Spray) were designed according to Complainants for "wet scrubbing." Complainants' sales literature contains the claim of an "EXTRA BONUS" which is obtained by telling the purchasers of Roto-Pads to "punch out the center and [he will] have an excellent scouring pad for those hard to get at places."

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-18

SEATRAIN GITMO, INC.—
RATES ON GOVERNMENT CARGO

Domestic offshore carrier's classification system for rating government cargo found to violate Shipping Act section 18(a) and the purposes of P.L. 93-487 insofar as it permits government shippers to choose between "Government Cargo" rates and individual commercial commodity rates, and to employ shipping documents which do not reveal the contents of each shipment in terms readily convertible to commercial cargo classifications.

Neal M. Mayer and *Paul D. Coleman* for Seatrain Gitmo, Inc.

Dudley J. Clapp, Jr., *Milton J. Stickles, Jr.* and *E. Duncan Hamner, Jr.* for Military Sealift Command.

John Robert Ewers and *C. Douglass Miller* for Bureau of Hearing Counsel.

REPORT AND ORDER

March 21, 1979

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

On November 20, 1978, Seatrain Gitmo, Inc. (Seatrain), was ordered to show cause why those portions of its tariff FMC-F No. 1 providing for the carriage of government cargo from U.S. Atlantic Coast ports to Puerto Rico do not violate section 18(a) of the Shipping Act, 1916 (46 U.S.C. 817(a)) because of their failure to:

(1) forbid qualifying government shippers from employing any other simultaneously effective tariff provisions; and

(2) require the use of shipping documents which fully identify all items tendered for transportation.

Seatrain's tariff classifications for "Government Cargo, N.O.S.," "Government Cargo, Refrigerated," and "Government Cargo, Vehicles," are the same as those of Puerto Rico Maritime Shipping Authority (PRMSA) which were recently found unreasonable in FMC Docket No. 75-20.[1]

On December 22, 1978, Seatrain advised the Commission that it had no objection to the entry of an order invalidating the subject tariff provisions unless and until they are modified to conform to the requirements imposed by the Commission's *PRMSA* opinion. Seatrain's present "Government Cargo" classi-

[1] *Puerto Rico Maritime Shipping Authority–Rates on Government Cargo*, 18 S.R.R. 830, 1265 (1978). Hereafter referred to as the "*PRMSA* opinion."

fications were defended only by the Military Sealift Command (MSC), an intervenor herein.

MSC contends that, as a practical matter, it is unnecessary for Seatrain to modify its tariff because PRMSA is the dominant government carrier in the trade and other carriers cannot implement government cargo rates which are not "competitive" with PRMSA's.[2] The best that can be said of this "competitive rates" argument is that Seatrain may have to increase its sailings if it is to carry an appreciably greater share of MSC's cargo, something Seatrain may do at any time without authority from the Commission.

MSC also claims that in some instances it is unable to furnish a complete description of the items it ships, and proposes that the Commission therefore not require the contents of "Government Cargo" containers to be specifically identified prior to shipment.[3] MSC would leave the collection of information concerning the composition of government shipments to individual rate investigation proceedings.

This proposal is rejected for the reasons stated in the Commission's *PRMSA* opinion, *supra*. If, as MSC states, ocean carriers cannot be reasonably expected to physically inspect the contents of every "Government Cargo" container tendered for shipment, it is especially critical that government shippers routinely furnish this information so that carriers can keep their "Government Cargo" rates properly adjusted in relation to their commercial rates for similar commodities. This obligation is no greater than that required of commercial shippers who wish to avoid "Cargo, N.O.S." rates, and the time constraints recently placed upon domestic offshore commerce rate investigations by P.L. 95–475 make it all the more important that the contents of current MSC shipments be readily available to carriers offering special "Government Cargo" tariff classifications and to the Commission alike.[4]

Finally, MSC requests the Commission to abandon the approach taken in Docket No. 75–20 for determining the reasonableness of "Government Cargo" rates. MSC believes it unnecessary to compare "Government Cargo" rates with the carrier's commercial rates for the commodities which actually comprise government shipments over a representative time span. Instead, MSC would examine "Government Cargo" rates in isolation and have the Commission accept any rate which covers the carrier's "fully allocated costs plus an appropriate share of a reasonable return"—essentially the basis upon which MSC negotiated domestic offshore rates prior to the adoption of P.L. 93–487.[5] Past experience has proven this approach unacceptable.

The legislative history of P.L. 93–487 indicates that MSC has been able to

[2] MSC notes that during 1977 PRMSA offered almost four times as many sailings as its closest competitor. From this fact, MSC would apparently have the Commission conclude that Seatrain will be compelled by competitive circumstances to match, rather than undercut, PRMSA's "Government Cargo" rates—a proposition which is both illogical and unsubstantiated. Seatrain's rates have recently been lower than PRMSA's. Moreover, the Commission stayed its Docket No. 75-20 Order in response to PRMSA's unchallenged contention that the application of government cargo tariff requirements to PRMSA alone would place PRMSA at a competitive *disadvantage* in attracting MSC cargo.

[3] Most MSC shipments in the Puerto Rican trade are containerized.

[4] Beginning January 16, 1979, the Commission must complete rate investigations in 180 days. Section 4, P.L. 95-475, 92 Stat. 1495.

[5] 88 Stat. 1463 (1974). This statute repealed former section 6 and amended section 5 of the Intercoastal Shipping Act (46 U.S.C. 846 and 845b) which had exempted government and charitable shipments from section 18(a) and related Shipping Act considerations.

induce domestic offshore carriers to carry its cargo at rates significantly lower than those available to commercial shippers of similar items. Although these rates varied periodically and were not necessarily below carrier costs, they tended to produce a rate structure wherein commercial shippers furnished a greater share of the carrier's revenue needs than would otherwise have been the case. It was this element of unjustified "subsidization" which Congress intended to preclude. *See Department of Defense v. Matson Navigation Company*, 17 S.R.R. 1, 5–6 (1977).

Comparison of commodity rates is a valid and accepted approach to determining the reasonableness of rates. *See Youngstown Sheet and Tube Co. v. United States*, 295 U.S. 476 (1935). All commodities would have equal rates were it not for differing handling characteristics, carrier costs and other transportation factors which warrant a price differential. "Government Cargo" is a composite of many individual commodities which traditionally appear in carriers' tariffs. To assure that rates assessed government shippers are not improperly based solely upon the identity of the shipper, a carrier publishing "Government Cargo" rates must demonstrate that any differences in the amount of revenues realized from carrying "Government Cargo" and the same quantity of commercially rated commodities are justified in terms of recognized transportation factors. Government rates which cannot be so justified are unreasonable within the meaning of Shipping Act section 18(a). Because the "Government Cargo" commodity classifications in Seatrain's tariff FMC No. F–1 do not contain the minimum provisions necessary to assure reasonable comparability between "Government Cargo" rates and the commodity rates which would otherwise apply, their use is unlawful. The type of "Government Cargo" tariff classification which would satisfy section 18(a) is further discussed in the *PRMSA* opinion and in *Sea-Land Service, Inc.–Rates on Military Cargo*, FMC Docket No. 77–38 (served simultaneously herewith), which are incorporated herein by reference.

THEREFORE, IT IS ORDERED, That, pursuant to section 18(a) of the Shipping Act, 1916, the following pages of Seatrain Gitmo, Inc.'s Tariff FMC-F No. 1, as amended or revised through the date of this Order, are cancelled effective May 1, 1979:

1st Revised Pages 86 through 93
Second Revised Pages 320 and 321
Original Pages 322 and 323

and;

IT IS FURTHER ORDERED, That, effective May 1, 1979, Seatrain Gitmo, Inc., cease and desist from publishing, filing, or operating under any tariff in the Puerto Rican trade which includes government cargo commodity descriptions which do not: (1) forbid qualifying government shipments from employing other simultaneously effective rate items in the tariff; and (2) require the use of shipping documents which fully identify the items tendered for transportation in terms which would allow the items to be accurately classified and rated under Seatrain Gitmo's commercial tariff (*i.e.*, at non "Government Cargo" rates).

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–34

TARIFF FMC 6, RULE 22 OF THE CONTINENTAL NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE

DOCKET NO. 76–36

TARIFF RULES CONCERTEDLY PUBLISHED DEFINING PRACTICES OF CONFERENCES AND RATE AGREEMENT MEMBERS REGARDING THE ACCEPTANCE AND RESPONSIBILITY FOR SHIPPER-OWNED OR SHIPPER-LEASED TRAILERS OR CONTAINERS

ORDER ON RECONSIDERATION

March 22, 1979

On December 19, 1978, the Commission served its Report in this consolidated proceeding. A Petition for Reconsideration and Motion for Stay of that decision was filed by "Container Leasing Companies and Intervenor Shippers."[1] Replies to the Petition for Reconsideration were filed by Continental North Atlantic Westbound Freight Conference, North Atlantic Westbound Freight Association, Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference, Continental/U.S. Gulf Freight Association, Pacific Westbound Conference, Far East Conference, Pacific Coast River Plate Brazil Conference, Pacific Coast European Conference, North Europe-U.S. Pacific Freight Conference and the Commission's Bureau of Hearing Counsel.

The only issue before the Commission in this proceeding was whether the concerted activity which resulted in the publication and filing of the subject tariff rules was taken without prior Commission approval in violation of section 15 of the Shipping Act, 1916, (46 U.S.C. 814).[2] We held it was not, concluding that the tariff rules were routine implementations of the authority granted the conferences by their previously approved conference agreements. Petitioners now argue that we: (1) did not understand the case; (2) committed several factual errors; and (3) reached an incorrect legal conclusion. We disagree.

[1] The designated petitioners are: Interpool Limited, ITEL Container Corporation, Trans-Ocean Leasing Corporation, A.J. Hollander & Co., Inc., and Inn Keepers Supply Co. Of these, only A. J. Hollander & Co., Inc. and Inn Keepers Supply Co. were granted leave to intervene in this proceeding (Order served July 16, 1976). They are, consequently, the only petitioners which have standing for this petition and shall be hereafter referred to as "petitioners."

Petitioners also filed a Motion to Strike and to Add Shipper Parties. As part of this motion, Petitioners request that Mack Trucks, Inc., Southern Tier Hide and Tallow, Inc. and Samsonite Corporation be added to their Petition for Reconsideration. The North Atlantic Conferences filed in opposition. Though Southern Tier Hide and Tallow, Inc. and Samsonite Corporation may have standing as parties to this proceeding, we cannot add them to the petition under these circumstances. If they wish to join in the petition, they must, by themselves, assert their desire to do so. A party cannot simply move to add another party, or a third party, to its pleading. Petitioners' motion will, therefore, be denied.

[2] Order to Show Cause, served June 24, 1976 at 8; Order Consolidating Proceeding, served July 16, 1976.

This case was based upon the facts set forth in the Order to Show Cause which initiated Docket No. 76–36. Parties were given the opportunity: (1) to request an evidentiary hearing, if they felt one was required, and (2) to submit affidavits of fact along with their memoranda of law.[3] None chose to pursue either course. It is now too late for Petitioners to attempt to controvert the factual description of the neutral container system contained in our Report.

Petitioners have not offered any new facts or law which are material to the basic issue of this proceeding and which would alter our decision. We are, accordingly, denying their Petition for Reconsideration.

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration and Motion for Stay and Motion to Strike and to Add Shipper Parties filed by A.J. Hollander & Co., Inc. and Inn Keepers Supply Co. are denied and the Commission's Report of December 19, 1978 is affirmed.

By the Commission.*

(S) Francis C. Hurney
Secretary

[3] Order to Show Cause, at 9; *See also*, Order Consolidating Proceedings, *supra*.

*Commissioner Kanuk concurs in the denial of the "Motion to Strike and to Add Shipper Parties", but would grant the Petition for Reconsideration.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–13

FIRST INTERNATIONAL DEVELOPMENT CORPORATION

v.

SHIP'S OVERSEAS SERVICES, INC.

Ship's Overseas Services, Inc., found to have acted as nonvessel operating common carrier by water in arranging transportation of a shipment of pipe from Houston, Texas, to Benghazi, Libya.

Ship's Overseas Services, Inc.'s failure to file a tariff covering such transportation found to violate section 18(b) (1), Shipping Act, 1916.

Michael A. McManus, Jr., for Complainant First International Development Corporation.

W.B. Ewers for Respondent Ship's Overseas Services, Inc.

REPORT AND ORDER REMANDING PROCEEDING

March 23, 1979

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

By complaint filed May 7, 1977, First International Development Corporation (FIDCO) alleges that Ship's Overseas Services, Inc. (SOS) violated sections 14 Fourth, 16, 17 and 18, Shipping Act, 1916 (46 U.S.C. 812(4), 815, 816 and 817), and requests the Commission to order SOS to cease and desist from said alleged violations and to pay reparation in the amount of $553,481.71, plus whatever other punitive damages the Commission may determine to be lawful.

On May 2, 1978, Administrative Law Judge William Beasley Harris (Presiding Officer) issued an Initial Decision denying reparation and dismissing the complaint for lack of jurisdiction. Complainant filed Exceptions to the Initial Decision to which Respondent replied. Subsequently, by Order dated August 15, 1978, the Commission remanded the proceeding to the Presiding Officer for consideration of a reply brief which although timely filed had not been included in the record due to clerical oversight. On August 23, 1978, the Presiding Officer served a supplemental decision reasserting the findings and conclusions reached in his Initial Decision. The proceeding came before the Commission on Complainant's Exceptions and Respondent's Reply to Exceptions.

Facts

In February, 1975, FIDCO, a domestic corporation engaged in international trade, received from the Oasis Oil Company of Libya, Inc. (Oasis), a purchase order for steel pipe FOB Spain. The pipe was subsequently rejected by Oasis because it did not bear the stamp of approval of the American Petroleum Institute. FIDCO then purchased steel pipe from Gulf Consolidated International, Inc. (Gulf) for delivery FAS or FOB Houston, Texas, for shipment to Benghazi, Libya. The purchase order was to expire and Oasis insisted that transportation be arranged before payment was made. Due to congestion at the port of Benghazi, arranging transportation of the pipe was difficult, and FIDCO asked Charles Ragan, a full-time employee of Gulf and a former broker, for assistance.

Ragan requested SOS to arrange for the shipment of approximately 600 tons of pipe. SOS booked 101 tons on the "*Drucilla U*," a vessel owned by the Uiterwyck Shipping Lines (Uiterwyck), a member of the Gulf Mediterranean Ports Conference (Conference). SOS advised FIDCO of the booking and billed FIDCO $23,115.14 for freight charges.[1] The pipe was assessed at a rate of $227.50 per metric ton, which was based on the Conference tariff rate of $125.00 per ton, plus a 4% war risk surcharge and a 75% port congestion surcharge. After receiving payment and depositing the money in its acocunt, SOS informed FIDCO that the shipment had not and would not depart on the "*Drucilla U*."[2]

SOS subsequently chartered the "*Northcliff Hall*" from March Chartering, Ltd. (March). The charter contract, incorporated in a liner booking note, provided for the transportation of 541 tons of pipe at the fixed amount of $87,500.00. At SOS's request FIDCO executed a similar liner booking note which provided for a rate of $227.50 per ton.[3] SOS was aware at the time that the situation in Libyan ports had improved and that the port congestion surcharge no longer applied.

The shipment did not leave on the "*Northcliff Hall*," apparently because of damage to the vessel. SOS did not advise FIDCO of the "*Northcliff Hall*"'s failure to perform until booked space on the Uiterwyck vessel "*AnnLee U*" at the Conference rate of $125.00 plus a 4% war risk surcharge. It then asked FIDCO to sign an "amendment" to the liner booking note, as an understanding and agreement that the "*AnnLee U*" would perform in lieu of the "*Northcliff Hall*."[4] Due to the improved situation in Libyan ports, SOS was, in the words of SOS's Vice President, R.C. Fettig:

> . . . elated because the 75% charge was now being dropped and . . . . it was going to be a very nice contract.[5]

---

[1] Throughout the discussions over the shipment of the pipe to Benghazi, SOS communicated with FIDCO through Ragan only, never directly.

[2] When asked in what capacity SOS had "billed" FIDCO, Ronald C. Fettig, Vice President of SOS explained that "it was a very unusual incident as an accommodation."

[3] In the first liner booking note, March, the agent for the owner of the vessel appears as "Carrier" whereas SOS is listed as "Merchant"; on the second liner booking note, SOS is named as "Carrier" and FIDCO as "Merchant."

[4] SOS presented the amendment as "an extension" of the liner booking note previously executed by FIDCO to cover the carriage of pipe aboard the "*Northcliff Hall*."

[5] The reference, apparently, is to the Conference tariff which contained the 75% port congestion surcharge. The booking on the "*Northcliff Hall*" provided a fixed charge, specifically excluding demurrage, dispatch and detention charges.

The pipe was shipped to Libya aboard the *"AnnLee U."* SOS billed freight to FIDCO at the rate of $227.50 per ton, for a total of $123,101.38, less the $23,115.14 collected earlier for the aborted shipment on the *"Drucilla U."* Uiterwyck charged SOS the Conference tariff rate of $125 a ton plus the 4% war risk surcharge but not the 75% port congestion surcharge, for a total amount of $69,616.67 or $53,484.71 less than SOS collected from FIDCO. Upon learning of this discrepency, FIDCO requested a partial refund from SOS. SOS indicated that some arrangement could be made if FIDCO would permit SOS to share in the profit FIDCO made from the sale of the pipe. No agreement was reached and FIDCO subsequently sought relief from the Commission.

Discussion and Conclusions

The complaint alleges that the charges paid by FIDCO were assessed under rates which were (1) unfiled; (2) unduly or unreasonably prejudicial and disadvantageous; and (3) unreasonable, in violation of section 14 Fourth, 16, 17, and 18 of the Act.

The Presiding Officer dismissed the proceeding for lack of jurisdiction on the ground that FIDCO had failed to prove that SOS is a common carrier by water subject to the Act. In the Presiding Officer's opinion, SOS did not satisfy the "holding out" test for common carriage, because it provided a transportation service on a single occasion.

Consequently, the preliminary issue to be determined in this proceeding is whether SOS in arranging for the shipment of FIDCO's cargo from Houston to Benghazi was engaged as a "common carrier by water" within the meaning of section 1 of the Act.[6]

In the absence of an express definition of the term "common carrier" in the Act, the Commission has long held that the carrier to be regulated is the common carrier at common law, that is, a carrier "who by a course of business holds himself out to accept goods from whomever offered to the extent of his ability to carry." *Transportation by Southeastern Terminals & S.S. Co.*, 2 U.S.M.C. 795, 797 (1946). In *Tariff Filing Practices, Etc. of Containerships, Inc.*, 9 F.M.C. 56, 65 (1965), the Commission set forth the criteria to be applied to a determination of a carrier's status:

> the variety and type of cargo carried, the number of shippers, type of solicitation utilized, regularity of service and port coverage, responsibility of the carrier towards the cargo, issuance of bills of lading or other standardized contracts of carriage, and method of establishing and charging rates.

The Commission, however, pointed out that the determination of a carrier's status cannot be made with reference to any *particular* aspect of the carriage. Likewise, "The absence of one or more of these factors does not render the carrier noncommon." *Tariff Filing Practices, Etc. of Containerships, Inc., supra,* at 65.

The Commission has also determined that ownership or control of the means of

---

[6] Section 1 defines a common carrier by water in foreign commerce to mean:

> . . . *a common* carrier, except ferry-boats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions, and a foreign country, whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce." 46 U.S.C. 801.

transportation is not essential to common carrier status.[7] In this regard the Commission has recognized the non-vessel operating common carrier by water (NVOCC), which has been defined as:

> . . . a person who holds himself out by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce as defined in the Shipping Act, 1916; assumes responsibility or has liability imposed by law for the safe water transportation of the shipments and arranges in his own name with underlying water carriers for the performance of such transportation.[8]

SOS denies that it acted as a common carrier by water subject to regulation under the Shipping Act. SOS contends that: (1) it does not advertise its services or hold itself out in any manner to provide transportation for the general public; (2) the carriage on the "*AnnLee U*" was an extension of the contract on the "*Northcliff Hall*," which was a "private" or "contract" carriage and, therefore, a so-called "tramp" operation; and (3) it agreed to arrange transportation, not for FIDCO, but for Gulf.[9] SOS admits, however, that: (1) since 1970 it has been paying Charles Ragan for "steering business" to it;[10] and (2) it shipped the pipe in its own name and assumed responsibility for the water movement and safe delivery of the cargo to its destination. SOS concedes that it has no tariff on file with the Commission.

A carrier may "hold itself out" to the general public by *indirect* solicitation.[11] Notwithstanding SOS's insistence that it never advertised or held itself out in any manner, we find that the "steering" of business to SOS for which Ragan received payments over the years constitutes such "holding out" to the general public.[12]

Nor is there any validity to SOS's contention that the transaction involved a "private" or "contract" carriage, *i.e.*, a "tramp" operation. SOS's argument implies that a nonvessel operating carrier cannot be held to be a common carrier if it moves cargo on so-called "tramp" vessels.[13] The status of an NVOCC is not determined by the type of the underlying carrier's operations.

The Act does not recognize "contract" carriage as such. *Tariff Filing Practices, Etc. of Containerships, Inc., supra,* at 64–65. Nor can a carrier avoid common carrier status by insisting on a transportation agreement with each shipper. *Investigation of Tariff Filing Practices,* 7 F.M.C. 305, 321 (1962). SOS

---

[7] *Agreement 6210,* 2 U.S.M.C. 166 (1939).

[8] *Pacific Coast European Conference v. Southern Pacific Marine Transport, Inc.*, 16 S.R.R. 863 (I.D., 1976). *See also Possible Violations of Section 18(a) of the Shipping Act, 1916,* 16 S.R.R. 425 (I.D., 1975); *Determination of Common Carrier Status,* 6 F.M.B. 245 (1961); *Puget Sound Tug & Barge v. Foss Launch & Tug Co.*, 7 F.M.C. 43 (1962); *Bernard Ullman Co., Inc. v. Puerto Rican Express Co.*, 3 F.M.B. 771 (1952).

[9] SOS's argument that it agreed to deal with Gulf but not with FIDCO is not persuasive. SOS knew that Gulf had sold the pipe FOB Houston and that FIDCO was the shipper.

[10] Ragan received an undetermined amount of money in 1975. In 1977, he was paid $15,000.00 for past services and in contemplation of future business he would bring to SOS.

[11] *Puget Sound Tug and Barge Co. v. Foss Launch & Tug Co., supra,* note 8, at 48. *Transportation—U.S. Pacific Coast and Hawaii,* 3 U.S.M.C. 190, 196 (1950).

[12] Prior to the shipment of 541 tons of pipe, FIDCO was unknown to SOS and was, with respect to SOS, a member of the general public. SOS's contention that the service to FIDCO was performed on a single occasion and was a "single shot" is irrelevant. While the subject of this proceeding is indeed the transaction between FIDCO and SOS, and not a general investigation of SOS's activities, the record does indicate that SOS is in the shipping business and admittedly handles shipments for various customers. This implies that SOS directly or indirectly holds itself out to offer transportation services for the shipping public in general.

[13] The argument, if valid, would in this instance be self-defeating as SOS would be considered a common carrier because of the common carrier status of the underlying vessel operating carrier.

stated that it initially acted as "broker",[14] but later, after the booking on the "*Drucilla U,*" acted as a "principal" in arranging the charter of the "*Northcliff Hall.*"[15]

The status of a carrier is determined not by its own declarations, or for that matter by the status of the underlying water carrier whose services it utilizes, but by the nature of operations. *Bernard Ulmann & Co., Inc. v. Puerto Rican Express Co., supra,* at 775; *Tariff Filing Practices Etc. of Containerships, Inc., supra,* at 64; *Possible Violation of Section 18 (a) of the Shipping Act, supra,* at 434. The record shows: that SOS held itself out by indirect solicitation to perform transportation services for the general public; that it shipped FIDCO's cargo in its own name; and, that it assumed responsibility for the safe ocean transportation and delivery of the shipment to its destination. In view of the foregoing, we conclude that in arranging the transportation of the shipment of pipe from Houston to Benghazi, SOS acted as a non-vessel operating common carrier by water subject to the Shipping Act, 1916, and that SOS's failure to file with the Commission a tariff covering such transportation violated section 18(b)(1) of that Act.

FIDCO has not pressed, and appears to have abandoned allegations of violations of section 14 Fourth, 16 and 17 of the Act and none is found on this record.

There remains the question of FIDCO's request for reparation. Although SOS's violation of section 18(b)(1) provides FIDCO a basis to seek reparation,[16] we are unable on this record to reach a conclusion as to whether FIDCO has in fact been injured by reason of the section 18(b)(1) violation and, if so injured, the extent of such injury. The proceeding is therefore remanded to the Presiding Officer for a determination of these matters and the amounts of reparation, if any to be awarded FIDCO.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

---

[14] Section 510.21(f) of the Commission's General Order 4 contains the following defintion:

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, condition and terms of transportation. 46 C.F.R. 510.21(f). (Emphasis added).

SOS, in this instance, was not engaged by a carrier but represented the shipper in quest for cargo space. The term "broker" therefore does not accurately reflect SOS's involvement in this matter.

[15] As mentioned in Note 3, *supra*, in the liner booking note dated August 14, 1975, March appears as "Carrier" whereas SOS is listed as "Merchant." SOS had no beneficial or other interest in the shipment.

[16] Section 22 of the Act provides that the Commission ". . . may direct the payment . . . of full reparation to the complainant for the injury caused by such violation." 46 U.S.C. 821.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–80

CARGO DIVERSION AT U.S. GULF PORTS BY COMMON CARRIERS BY WATER WHICH ARE MEMBERS OF THE GULF-EUROPEAN FREIGHT ASSOCIATION

ORDER DENYING RECONSIDERATION

March 23, 1979

The Commission now has before it in this proceeding a "Petition for Reconsideration" of the Ports of Baton Rouge, Beaumont, Lake Charles, and Port Arthur (Petitioners); and separate replies in opposition filed by Sea-Land Service, Inc., and the Commission's Bureau of Hearing Counsel.

Petitioners request that the Commission vacate its January 2, 1979, Order discontinuing without prejudice an investigation into alleged diversionary activities at certain United States Gulf Coast ports and that the proceeding be reopened.* No new matters of fact or law were raised by Petitioners and the Petition contained no information indicating that the discontinuance of Docket No. 73–80 was an abuse of discretion or otherwise unlawful. Accordingly, reconsideration shall be denied.

THEREFORE, IT IS ORDERED, That the "Petition for Reconsideration" of the Ports of Baton Rouge, Beaumont, Lake Charles, and Port Arthur is denied.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

*Petitioners would be satisfied to have the proceeding continue either as an adjudication or as a rulemaking.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–38

SEA-LAND SERVICE, INC.—RATES ON GOVERNMENT CARGO

Domestic offshore carrier's classification system for rating government cargo found to violate Shipping Act section 18(a) and the purposes of P.L. 93–487 insofar as it permits government shippers to choose between "Government Cargo" rates and individual commercial commodity rates, and to employ shipping documents which do not reveal the contents of each shipment in terms readily convertible to commercial cargo classifications.

Gerald A. Malia for Sea-Land Service, Inc.

Dudley J. Clapp, Jr., Milton J. Stickles, Jr. and *E. Duncan Hamner, Jr.*, for Military Sealift Command.

John Robert Ewers, C. Douglass Miller and *Charles C. Hunter* for Bureau of Hearing Counsel.

REPORT AND ORDER

March 26, 1979

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

On November 20, 1978, Sea-Land Service, Inc. (Sea-Land), was ordered to show cause why those portions of its tariffs FMC–F No. 34, FMC–F No. 36 and FMC–F No. 37 providing for the carriage of government cargo from U.S. Atlantic Coast ports to Puerto Rico do not violate section 18(a) of the Shipping Act, 1916 (46 U.S.C. 817(a)) because of their failure to:

(1) forbid qualifying government shippers from employing any other simultaneously effective tariff classifications; and

(2) require the use of shipping documents which fully identify all items tendered for transportation.

Sea-Land's tariff classifications for "Government Cargo, N.O.S.," "Government Cargo, Refrigerated" and "Government Cargo, Vehicles," are the same as those published by Puerto Rico Maritime Shipping Authority (PRMSA) which were found unreasonable in FMC Docket No. 75-20.[1]

The Military Sealift Command (MSC), which intervened as a respondent herein, and Sea-Land both responded to the Commission's order and argue that Sea-Land's tariffs do not violate section 18(a). The Commission's Bureau of Hearing Counsel (Hearing Counsel) replied in opposition to the memoranda and affidavits submitted by Respondents. No party sought to establish facts in a

[1] *Puerto Rico Maritime Shipping Authority—Rates on Government Cargo*, 18 S.R.R. 830, 1265 (1978). Hereafter referred to as the "PRMSA opinion."

further, evidentiary hearing.[2] Because this proceeding concerns material which appeared in Sea-Land's tariffs for the first time in June, 1977, the burden of proof is on the publishing carrier to establish their reasonableness. *See Commonwealth of Puerto Rico v. Federal Maritime Commission*, 468 F.2d 872 (D.C. Cir. 1972).

Discussion

Sea-Land contends that its tariff already includes an adequate proscription against alternating between "Government Cargo" rates and commercial commodity rates, but immediately confesses that this proscription does not prevent government shippers from using a Government Bill of Lading to obtain commercial rates for items which would otherwise be rated as "Government Cargo."[3] This was precisely the practice rejected in the Commission's *PRMSA* opinion. 18 S.R.R. at 837. Contrary to Sea-Land's assertion, section 531.5(b)(8)(x) of the Commission's tariff regulations does not allow carriers to apply different rates to the *same shipment*. That section is exclusively concerned with rates which vary with the quantity of goods shipped.

Differences in quantity have long been considered a legitimate basis for assessing different rates; different quantities of the same commodity may each constitute a reasonable "commodity classification" in a carrier's tariff. Once the quantity tendered for shipment is determined, there is only one rate which can be applied. Similarly, a reasonable "Government Cargo" classification must, among other things, require the shipper to use the "Government Cargo" classification exclusively for all shipments of qualifying commodities.[4] "Project rate cargo" is another class of cargo wherein all qualifying commodity items (items used in a specific not-for-resale manufacturing, resource exploitation, public utility or public service project) may be shipped only under the project rate. Although each commodity included in a project rate shipment does not have to be identified in the shipping documents, precautionary measures similar in purpose and effect to those required for "Government Cargo" shipments are imposed by section 531.6(m) of the Commission's Rules.

Sea-Land's primary objection to the requirement that "Government Cargo" shipments be identified and justified in terms of comparable commercial commodities is that this practice will create burdensome paperwork for shippers and carriers and the expense of performing this paperwork will have an inflationary impact upon the national economy. Sea-Land fails entirely to describe the nature

[2] Sea-Land did claim it had been deprived of the right to be heard in some general sense by the Commission's November 20, 1978 "Order Restructuring Proceeding," but failed to move for an evidentiary hearing in accordance with the November 20th Order. The only factual matter with which Sea-Land seemingly takes issue is the assertion that it carries cargo under the government cargo commodity classifications in question. Although the amount of such carriage is relatively small, the affidavits of Raymond P. Ebeling and Dominick P. Nizzare plainly establish that Sea-Land carried MSC cargo under the subject tariffs.

Sea-Land has not been improperly prejudiced by the *PRMSA* decision. The *PRMSA* opinion did announce certain principles by which government cargo rates would be judged, but Sea-Land was not bound by that decision. The reasonableness of Sea-Land's government cargo tariffs are the subject of the present hearing. An administrative agency has discretion to announce general standards in individual adjudicatory proceedings rather than by notice and comment rule making. *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 202–203 (1947).

[3] Sea-Land's "Government Cargo" rates apply to shipments accompanied by a "shipping order" rather than a bill of lading.

[4] The tariff must clearly identify the shippers (*e.g.*, MSC) eligible to use the "Government Cargo" classification at any particular time. A shipper so identified may use no other commodity classification in the carrier's tariff unless the "Government Cargo" classification is first modified to delete that shipper. Such tariff additions and deletions must be promptly made upon the request of the shipper—provided the shipper is otherwise eligible to use the "Government Cargo" classification.

and extent of this paperwork burden or to quantify the additional expenses associated with it.

Customary shipping industry practices, the legislative history of P.L. 93--487,[5] and the affidavits submitted herein establish that Sea-Land and MSC already maintain records of their shipments, costs and related matters, and periodically evaluate these records for the purpose of making pricing or purchasing decisions. It is presumed that compliance with the *PRMSA* requirements will entail some paperwork relating to "Government Cargo" which neither Sea-Land nor MSC currently performs, but there is nothing to indicate that the burden associated with this paperwork is substantially different from that required for other commodity shipments. This is especially true for Sea-Land, which need only: (1) inspect the shipping documents and apply one of two rates;[6] and (2) retain these documents and review them periodically for the purpose of comparing its "Government Cargo" rates with the applicable commercial commodity rates. The effort required to perform these tasks is proportional to the amount of "Government Cargo" carried, and Sea-Land handles a relatively small number of government shipments in the Puerto Rico trade. MSC may be initially inconvenienced by the need to develop an efficient system for identifying its shipments in commercial tariff terminology, but, as far as the record indicates, it can accomplish this task without incurring expenses disproportionate to those incurred by other large shippers of multiple commodities.

MSC contends that, as a practical matter, it is unnecessary for Sea-Land to modify its tariff because PRMSA is the dominant government carrier in the trade and other carriers cannot implement government cargo rates which are not "competitive" with PRMSA's.[7] The best that can be said of this "competitive rates" argument is that Sea-Land may have to increase its sailings if it is to carry an appreciably greater share of MSC's cargo, something Sea-Land may do at any time without authority from the Commission.

MSC also claims that in some instances it is unable to furnish a complete description of the items it ships, and proposes that the Commission therefore not require the contents of "Government Cargo" containers to be specifically identified prior to shipment.[8] MSC would leave the collection of information concerning the composition of government shipments to individual rate investigation proceedings.

[5] 88 *Stat.* 1463 (1974). This statute repealed former section 6 and amended section 5 of the Intercoastal Shipping Act (46 U.S.C. 846 and 845b) which had exempted government and charitable shipments from section 18(a) and related Shipping Act considerations.

[6] Either the "Government Cargo" rate or the appropriate commercial commodity rate (*e.g.*, "Cargo, N.O.S.") would be applied, depending on whether MSC properly identified its shipment. *See PRMSA* opinion, at 1268. MSC faults this approach for being inconsistent with the "no alternation of rates" requirement. Allowing a limited form of rate alternation pursuant to the express terms of the "Government Cargo" commodity classification may be contradictory in theory, but is preferable to requiring the carrier to turn away unidentified government shipments.

The legitimate "Government Cargo" classification contemplated by the *PRMSA* opinion must provide that when a full description of a container's contents does not appear on the shipping documents, the carrier shall, in its sole discretion, either inspect the container and apply the correct commercial commodity rate or forego inspection and apply a commercial "Cargo, N.O.S." rate.

[7] MSC notes that during 1977 PRMSA offered almost four times as many sailings as its closest competitor. From this fact, MSC would apparently have the Commission conclude that Sea-Land will be compelled by competitive circumstances to match, rather than undercut, PRMSA's "Government Cargo" rates—a proposition which is both illogical and unsubstantiated. The rates of Seatrain Gitmo, Inc., have recently been lower than PRMSA's in the subject trade. Moreover, the Commission stayed its Docket No. 75-20 Order in response to PRMSA's unchallenged contention that the application of government cargo tariff requirements to PRMSA alone would place PRMSA at a competitive *disadvantage* in attracting MSC cargo.

[8] Most MSC shipments in the Puerto Rican trade are containerized.

This proposal is rejected for the reasons stated in the Commission's *PRMSA* opinion, *surpa*. If, as MSC states, ocean carriers cannot be reasonably expected to physically inspect the contents of every "Government Cargo" container tendered for shipment, it is especially critical that government shippers routinely furnish full commodity descriptions so that carriers can keep their "Government Cargo" rates properly adjusted in relation to their commercial rates for similar commodities. This obligation is no greater than that required of commercial shippers who wish to avoid "Cargo, N.O.S." rates, and the time contraints recently placed upon domestic offshore commerce rate investigations by P.L. 95–475 make it all the more important that the contents of current MSC shipments be readily available to carriers offering special "Government Cargo" tariff classifications and to the Commission alike.[9]

Finally, MSC requests the Commission to abandon the approach taken in Docket No. 75–20 for determining the reasonableness of "Government Cargo" rates. MSC believes it unnecessary to compare "Government Cargo" rates with the carrier's commercial rates for the commodities which actually comprise government shipments over a representative time span. Instead, MSC would examine "Government Cargo" rates in isolation and have the Commission accept any rate which covers the carrier's "fully allocated costs plus an appropriate share of a reasonable return"—essentially the basis upon which MSC negotiated domestic offshore rates prior to the adoption of P.L. 93–487. Past experience has proven this approach unacceptable.

The legislative history of P.L. 93–487 indicates that MSC has been able to induce domestic offshore carriers to carry government shipments at rates significantly lower than those available to commercial shippers of similar items. Although these rates varied periodically and were not necessarily below carrier costs, they tended to produce a rate structure wherein commercial shippers furnished a greater share of the carrier's revenue needs than would otherwise have been the case. It was this element of unjustified "subsidization" which Congress intended to preclude. *See Department of Defense v. Matson Navigation Company*, 17 S.R.R. 1, 5-6 (1977).

Comparison of commodity rates is a valid and accepted aproach to determining the reasonableness of rates. *See Youngstown Sheet and Tube Co. v. United States*, 295 U.S. 476 (1935). All commodities would have equal rates were it not for differing handling characteristics, carrier costs and other transportation factors which warrant a price differential. "Government Cargo" is a composite of many individual commodities which traditionally appear in carriers' tariffs. To assure that rates assessed government shippers are not improperly based solely upon the identity of the shipper, a carrier publishing "Government Cargo" rates must demonstrate that any differences in the amount of revenues realized from carrying "Government Cargo" and the same quantity of commercially rated commodities are justified in terms of recognized transportation factors. Government rates which cannot be so justified are unreasonable within the meaning of Shipping Act section 18(a). Because the "Government Cargo"

[9] Beginning January 16, 1979, the Commission must complete rate investigations in 180 days. Section 4, P.L. 95–475, 92 Stat. 1495.

commodity classifications in Sea-Land's Tariffs FMC No. F-34, 36 and 37 do not contain the minimum provisions necessary to assure reasonable comparability between "Government Cargo" rates and the commodity rates which would otherwise apply, their use is unlawful.

The type of "Government Cargo" tariff classification which would satisfy section 18(a) is further discussed in the *PRMSA* opinion, which is incorporated herein by reference.

THEREFORE, IT IS ORDERED, That, pursuant to section 18(a) of the Shipping Act, 1916, the pages of Sea-Land Service, Inc's Tariffs FMC-F No. 34, FMC-F No. 36 and FMC-F No. 37 listed in the attached Appendix, as amended or revised through the date of this Order, are cancelled effective May 1, 1979, and;

IT IS FURTHER ORDERED, That, effective May 1, 1979, Sea-Land Service, Inc., cease and desist from publishing, filing, or operating under any tariff in the Puerto Rican trade which includes government cargo commodity descriptions which do not: (1) forbid qualifying government shipments from employing other simultaneously effective rate items in the tariff; and (2) require the use of shipping documents which fully identify the items tendered for transportation in terms which would allow the items to be accurately classified and rated under Sea-Land, Inc.'s commercial tariff provisions (*i.e.*, at non "Government Cargo" rates).

(S) FRANCIS C. HURNEY
Secretary

APPENDIX

SEA-LAND SERVICE, INC.

Tariff FMC-F No. 34

Original Page 97-A	Original Page 97-G
Original Page 97-B	Original Page 97-H
Original Page 97-C	Original Page 289
Original Page 97-D	Original Page 290
Original Page 97-E	Original Page 292
Original Page 97-F	Original Page 293

Tariff FMC-F No. 36

Original Page 92-A	Original Page 92-G
Original Page 92-B	Original Page 92-H
Original Page 92-C	Original Page 253
Original Page 92-D	Original Page 254
Original Page 92-E	Original Page 255
Original Page 92-F	

Tariff FMC-F No. 37

Original Page 62-A	Original Page 62-F
Original Page 62-B	Original Page 62-G
Original Page 62-C	Original Page 62-H
Original Page 62-D	Original Page 105
Original Page 62-E	Original Page 106

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-4

AGREEMENT NOS. 9902-3, ET AL.
(MODIFICATION OF EURO-PACIFIC JOINT SERVICE)

Cooperative working arrangement whereby established ocean carriers operate under a common trade name, cross charter vessel space, pool operating costs and revenues, and agree on pricing decisions is anticompetitive and will be disapproved unless adequately justified by its proponents.

Joint service agreement to provide up to 7200 TEU's of containership space per quarter in each direction between U.S. Pacific Coast and Europe is approved upon the condition that one of three parties be deleted and the remaining two parties maintain separate marketing arrangements.

Joint service agreement which permits two carriers to operate an efficient, beneficial transportation service, while committing less tonnage to the trade than if the parties independently operated containerships, meets the standards for section 15 approval under the Commission's *Svenska* doctrine.

Interim amendment to joint service agreement which adds a third carrier to a two carrier service and increases the container capacity of the service is disapproved because the third carrier's participation was not shown to be necessary to achieve the public benefits relied upon to justify the agreement.

Edward Schmeltzer, Edward J. Sheppard and *George Weiner* for Hapag-Lloyd, A.G., Compagnie Generale Maritime, and Intercontinental Transport (ICT), B.V.

Russell T. Weil, James P. Moore, Mary Lou Montgomery and *Elizabeth Ritvo* for United States Lines, Inc.

Paul J. McElligott, Robert T. Devoy and *John A. Douglas* for Sea-Land Service, Inc.

John Robert Ewers, Paul J. Kaller and *Alan J. Jacobson* for the Bureau of Hearing Counsel.

REPORT AND ORDER

March 29, 1979

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

The Commission has before it Agreement No. 9902-8 (Amendment No. 8) and Agreement No. 9902-5 (Amendment No. 5), both of which relate to the expansion, modernization and continuation of the Euro-Pacific Joint Service (Joint Service) by common carriers serving the U.S. Pacific Coast/Continental Europe, United Kingdom and Scandinavia trades.[1] The Proponents of these agreements are Hapag-Lloyd, A.G. (Hapag-Lloyd); Compagnie Generale Maritime (French Line); and Intercontinental Transport, B.V. (ICT). Protests

[1] The Joint Service also calls at wayports in Mexico, Central America, the East Coast of South America and the West Indies, but carries no United States cargo in these trades.

objecting to the approval of each agreement were filed by United States Lines, Inc. (USL), and Sea-Land Service, Inc. (Sea-Land).

BACKGROUND

On March 21, 1977, the Commission ordered an investigation into the approvability of what was then designated Agreement No. 9902–6, under section 15 of the Shipping Act, 1916 (46 U.S.C. 814). This Agreement proposed that the Joint Service continue until December 31, 1982. Proponents were to operate eight new containerships with a ten-day frequency of service in the trade, cross charter vessel space to each other, and pool revenues and costs (with the exception of marketing expenses).[2] The average capacity of the eight containerships would have been 1,000 twenty-foot container equivalent units (TEU's).[3]

Also on March 21, 1977, the Commission approved Agreement No. 9902–5 (Amendment No. 5), a temporary continuation of Agreement No. 9902–3 (Amendment No. 3), pending completion of the present investigation. Amendment Nos. 3 and 5 together represented an interim measure whereby ICT was permitted to join the Joint Service and alterations were made in the composition of Euro-Pacific's fleet. Six 650 TEU containerships operating on a ten-day frequency of call were substituted for combination container/breakbulk vessels.[4] The Commission's approval of this interim arrangement was appealed to the United States Court of Appeals.[5] The Court remanded the matter and expressly directed the Commission to consider the antitrust implications of ICT's participation in the Joint Service. *United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978).

The investigation into the long-term approvability of the expanded Joint Service generated 80 exhibits, over 1,100 pages of transcript, various motions to compel discovery, and ancillary litigation in the United States District Court to enforce Commission subpoenas.[6] The result of this evidentiary inquiry was a settlement between Proponents, the two protesting carriers (Protestants) and the Commission's Bureau of Hearing Counsel (Hearing Counsel). On January 8, 1978, Amendment No. 6 was replaced by Amendment No. 8. This amendment removed restrictions on the number and type of vessels operated by the Joint Service in return for a limitation on the number of TEU's to be carried on each voyage. The pooling, cross charter, separate marketing, and termination provisions remained the same.[7]

---

[2] Proponents would all use the Euro-Pacific trade name, but the Joint Service would be separately marketed by agents of Hapag-Lloyd and joint agents of ICT and French Line. Vessel space would be allocated 50% to Hapag-Lloyd and 50% to French Line/ICT.

[3] One TEU equals approximately 1,100 cubic feet.

[4] Prior to October 15, 1976, the Joint Service consisted of only Hapag-Lloyd and French Line. They operated ten combination breakbulk/container vessels with an average capacity of 310 TEU's and 450,000 cubic feet of breakbulk cargo space. Container operations were expanded and ICT was included as a participating carrier pursuant to the Commission's September 29, 1977, order conditionally approving Agreement No. 9902–3. As finally approved, Amendment No. 3 was identical to Amendment No. 5 and covered the period of October 15, 1976, to March 21, 1977.

[5] Amendment Nos. 3 and 5 were both appealed but the expiration of Amendment No. 3 and simultaneous approval of Amendment No. 5 on March 21, 1977, operated to consolidate the relevant issues within the context of Amendment No. 5.

[6] *United States Lines, Inc. v. Boyce Luckett*, Case No. C–77–1507 WHO (N.D. Calif.), Order of Enforcement entered September 27, 1977.

[7] Revenues and non-marketing expenses are to be divided 50% to Hapag-Lloyd, 30% to French Line and 20% to ICT. For marketing purposes, vessel space is equally divided between Hapag-Lloyd on the one hand and French Line/ICT on the other. Should one of the two marketing entities require more than the 50% allocated to it, that entity may charter additional space from the other.

Fifty "stipulated" findings of fact were presented to Administrative Law Judge William Beasley Harris by the Proponents.[8] On October 24, 1978, an Initial Decision was issued conditionally approving Amendment No. 8.[9] No exceptions were taken from the Initial Decision, but on November 27, 1978, the Commission undertook to review the decision on its own motion. The Commission's Office of Environmental Analysis served a Final Energy and Environmental Impact Statement (FEIS) on December 5, 1978.

Under Amendment No. 8, the Joint Service would carry up to 800 TEU's every ten days in each direction (averaged quarterly). The 800 TEU limitation includes all loaded containers handled at a given port, including transshipment cargo. Assuming nine voyages per quarter, the Joint Service would carry no more than 7,200 TEU's in each direction per quarter. Proponents currently propose to operate six 1,500 TEU containerships in the trade. The FEIS concluded that approval of Amendment No. 8 would result in less fuel consumption per TEU carried than either the continued operation of the Joint Service's six 650 TEU containerships, or the separate operation of a 1,500 TEU containership service by more than one of the Proponents.[10] Because of its potential for fuel conservation, approval of Amendment No. 8 was found to be the environmentally preferable course of action.

Discussion

A. *Applicable Standards*

The parties' concurrence concerning the approvability of Amendment No. 8 does not relieve the Commission from the responsibility of independently evaluating the matter under section 15 standards—particularly with regard to the antitrust implications of approval. *United States Lines, Inc. v. Federal Maritime Commission, supra.* This evaluation may begin with the consideration of Proponents' proposed findings of fact, all but one of which are supported by the record and are adopted, with minor modifications, as findings of the Comission.[11] These findings, as complemented by the further findings and conclusions contained in the following discussion, support the conclusion that the purposes of the Shipping Act would be served by continuing the Joint Service as a larger, fully containerized operation limited to 7,200 TEU's per quarter. The Proponents have not, however, demonstrated the necessity for ICT's participation in the Joint

[8] Only 42 of these proposed findings were actually agreed upon by the parties. USL objected to the relevancy of Finding No. 13 and Finding Nos. 15 through 20. Hearing Counsel disagreed with Finding No. 44. The Initial Decision did not specifically discuss most of the proposed findings, but did sustain USL's relevancy objection.

[9] On November 16, 1979, Proponents submitted a "Second Revised" version of Amendment No. 8 which complied with the Administrative Law Judge's conditions of approval. This version of Amendment No. 8 is attached as Appendix "B" hereto.

[10] Over a five year period almost 2,000,000 barrels of Bunker C fuel (or its equivalent) could be conserved. The use of larger vessels would also increase the air pollutants emitted in United States ports by a total of 94 tons annually, but the additional amounts emitted in each port of call would have only a minimal effect on local air quality.

[11] The exception is Finding 49—which concludes that a four and one-half year term is necessary for the expanded Joint Service. The record discloses no necessary connection between the capital investment required to furnish the proposed 7,200 TEU's per quarter service and the length of the Agreement. The remaining findings of fact, as adopted by the Commission, are attached as Appendix "A" hereto. USL's objection to the relevancy of Finding 13 and Findings 15–20 is denied. These six findings concern economic benefits resulting from the operation of larger containerships in an all-water Euro-Pacific service. Agreement No. 8 does not commit Proponents to a particular type of container fleet, but does allow them the flexibility to operate whatever vessels they find to be economically efficient. The disputed findings are therefore relevant to Proponents' assertions that the modified Joint Service will provide a reliable, useful all-water service to the shipping public.

Service. Agreement No. 9909–8 shall therefore be disapproved unless modified to delete ICT as a party.

The arrangement proposed by Amendment No. 8 plainly lessens competition within the criteria suggested in the Supreme Court's *Penn-Olin* decision.[12] The Proponents are engaged in identical lines of commerce, presently compete in other United States trades, have historically competed in the Pacific Coast/Europe trade, will operate their own vessels under the Agreement, and are individually capable of providing viable containership service between the Pacific Coast and Europe. Under these circumstances, Proponents' decision to limit their participation in the market, pool revenues and expenses and concertedly establish rates and practices, is better viewed—for Shipping Act purposes—as a violation of section 1 of the Sherman Act (15 U.S.C. 1) than as a legitimate adjunct of a joint venture. Regardless of whether Agreement No. 8 would be found a restraint of trade by a court of law, it is sufficiently anticompetitive to fall within the Commission's *Svenska* doctrine.[13] Proponents must therefore produce evidence demonstrating the Agreement's practical effects upon competition and that these effects are necessary to meet a serious transportation need, secure an important public benefit or achieve a valid regulatory purpose.

B. *Effects of Agreement No. 9902–8*

Euro-Pacific will compete in the Pacific Coast/Europe market for containerized liner cargo (the market).[14] Current, comprehensive statistics concerning that market's composition are not part of the record, but reasonable estimates and projections can be made from the information the parties did provide.

The market consists of three segments: (1) the direct all-water services offered by Johnson Scanstar (11,400 TEU's per quarter), Euro-Pacific (5,850 TEU's per quarter) and Hoegh Line (1,760 TEU's per quarter);[15] (2) the indirect all-water service of USL (14,400 TEU's per quarter);[16] and (3) the minilandbridge services of USL, Sea-Land, Seatrain International, American Export Line, Lykes Bros. Steamship Co., Inc., Balt-Atlantic Line, and Balt-Gulf Line (60,000 plus TEU's per quarter).[17] Other things being equal, approval of Amendment No. 8 would leave Euro-Pacific with 35% of the trade's potential direct service capacity, 21% of its potential all-water capacity and 8% of its potential total capacity.

The minibridge segment of the market has experienced much faster growth than the other two segments, but all-water service still carries the most cargo and is likely to continue to do so. When large specialized vessels such as cellular containerships are employed, all-water service is fully competitive with mini-

[12] *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

[13] *Federal Maritime Commission v. Svenska Amerika Linien*, 390 U.S. 238 (1968). *See also United States Lines, Inc. v. Federal Maritime Commission, supra*, at 529.

[14] Rapid containerization of the trade during the 1970's resulted in the withdrawal of a number of liner services and a trebling of the total cargo share carried by non-liner vessels. The present demand for liner service is almost entirely limited to container cargo.

[15] Capacity figures represent *potential* capacity only. Both Johnson Scanstar and Euro-Pacific carry Canadian and certain other cargoes on their vessels so that less than maximum capacity is actually available to the instant trade.

[16] USL's practical capacity is considerably less than its potential capacity because its ships call at Pacific Coast ports loaded with as much Far East trade cargo as they can obtain and "top off" with European trade cargo which has been or will be transshipped to or from other USL vessels at Atlantic Coast ports.

[17] The practical capacity of the minibridge carriers is considerably less than their potential capacity because they primarily operate in Atlantic and Gulf/Europe trades and "top off" with minibridge cargo loaded at Atlantic or Gulf Coast ports.

bridge service[18] and there are cargoes such as refrigerated and heavy lift items which are not susceptible to minibridge carriage. If Amendment No. 8 were approved, tonnage devoted to all-water direct service would increase by 13%. The Joint Service would have the annual capacity to carry 249,216 long tons to Johnson Scanstar's 370,975 and Hoegh Line's 67,114.

Based upon actual 1976 eastbound carryings, about 75% of the trade's liner tonnage moved on direct all-water vessels, 22% by minibridge and 3% by all-water transshipment service. Even the most conservative projections for 1979 and 1980 indicate that the expanded Joint Service would obtain 25% or more of the market's total tonnage.

An arrangement which provides for the concerted acquisition of such a substantial market share may be approved only if it is necessary to achieve substantial Shipping Act objectives. In this instance, there are legitimate Shipping Act objectives which justify the Agreement's anticompetitive effects.

Direct all-water service is important to the ocean borne commerce of the United States. The Euro-Pacific service in particular is strongly supported by shippers and Pacific Coast ports. It has achieved high container space utilization during the eight years it has been in operation. Despite its popularity, changing economic conditions have rendered even Euro-Pacific's present 650 TEU service unprofitable. Larger, more specialized vessels are critical to the Joint Service's continuation. Larger vessels would meet an expressed transportation need for additional heavy lift and refrigerated cargo space and would conserve fuel by virtue of their greater operating efficiency.

These benefits could be achieved to some degree if only one of the three Proponents were to furnish a fully competitive container service.[19] Yet, containership operation is a capital intensive business. Vessels of appropriate size cost $20,000,000 or more and a fleet of at least six such vessels is necessary to offer ten day service on the 21,000 mile trade route in question. No single carrier presently offers frequent containership service between the Pacific Coast and Europe.[20]

Protestants alleged that a frequent 1,500 TEU service by Proponents would seriously overtonnage the trade and Hearing Exhibit No. 74 supports this contention. When overtonnaging exists, malpractices naturally follow as carriers are pressured to lower prices and then to rebate or otherwise discriminate between shippers in order to attract sufficient cargo to recover at least some of their fixed costs. This type of competition creates an unstable environment which is detrimental to commerce and economically wasteful. Excess capacity generally forces one or more competitors out of the trade after experiencing substantial losses. The Commission cannot compel a single carrier to limit its container

[18] Speed is the usual advantage of minibridge service, but for some routings, all-water direct service is faster than minibridge.

[19] A "fully competitive" container service is one featuring modern, 1,000 TEU or larger vessels on a seven to ten day frequency. See Finding Nos. 13-20. It is possible Hapag-Lloyd would institute a 1,500 TEU service if the Euro-Pacific arrangement terminated. French Line and ICT would probably not independently enter the market with a fully competitive container service and would certainly not compete head-on with both Johnson Scanstar and Hapag-Lloyd. Even if one accepts Proponents' predictions that there will be modest market growth and that the all-water carriers will succeed in recapturing some minibridge and transshipment cargo, it is plain that insufficient container cargo would be available to accommodate three fully competitive services at necessary utilization levels. If French Line and ICT did not withdraw from the trade, they would operate a minibridge service, an infrequent all-water service or both.

[20] Johnson Scanstar is a joint venture of three carriers with nine vessels averaging 950 TEU's. Hoegh Line offers only a 21 day service with 440 TEU vessels.

capacity, and competitive pressures make it difficult, if not impossible, for a capacity limitation to be voluntarily imposed.

The pooling of resources and spreading of risks are necessary to create a stable, reliable, and efficient all-water containership service in the Pacific Coast/Europe trade. A rationalized service of the type proposed by Amendment No. 8 best serves the overall needs of the shipping public by reasonably limiting the competitive disruptions associated with the introduction of improved containership technology. Although the market may be unable to absorb an increase in Euro-Pacific's capacity from 650 to 1,500 TEU's, the 800 TEU limitation imposed by the instant Agreement should prevent the Joint Service from causing overtonnaging (Hearing Exhibit No. 74). Amendment No. 8, therefore, will not only provide an effective competitor for Johnson Scanstar, but will also avoid detrimental commercial effects which would occur if even one of the Proponents offered a fully competitive containership service on its own.

C. *Conditions of Approval*

Proponents have not proven that the rationalized container service they proposed cannot be provided without ICT's participation. The Joint Service was begun by Hapag-Lloyd and French Line. It operated throughout 1974, 1975, and most of 1976 with only these two members. The fact that ICT's corporate predecessors maintained a regular national flag line presence in the trade only emphasizes the absence of evidence establishing why ICT must now belong to the Joint Service. ICT is a subsidiary of Brostroem Shipping Company, A.B., a large and respected owner/operator of ocean carriers, including containerships. Even if ICT were temporarily to cease all-water service in the trade, it would remain a potential competitor of considerable stature.

It is not enough that ICT would economically benefit from membership in a fully competitive containership joint service; participation must be necessary to achieve public interest objectives as well. As far as the present record shows, Amendment No. 8 will achieve its legitimate transportation objectives with only Hapag-Lloyd and French Line as members. ICT's participation is not necessary to secure these objectives and the omission of this third party should not cause disruptive overtonnaging or cause ICT to disappear as a competitive force in the trade.

For this reason, and because Proponents also failed to justify the further reduction in competition represented by the Agreement's proposed joint marketing arrangement between ICT and French Line, Amendment No. 8 is unapprovable unless modified to delete ICT from membership in the Joint Service.[21]

A final matter requires attention. Amendment No. 9902-8 has already been twice revised by the parties and will not be approved unless further modifications are made. As a further condition of approval, Proponents shall be required to present a clarified version of the modified joint service arrangement designated "FMC Agreement No. 9902-9" which more closely conforms to Proponents' representations in the present proceeding, provides more frequent and detailed reporting requirements and plainly indicates that the Joint Service is not exempt from the Commission's tariff regulations pertaining to bills of lading.

[21] This action is without prejudice to Proponents later submitting a properly justified amendment adding ICT to the Joint Service.

Commission oversight of the Joint Service's activities will be more effective if these activities are reported quarterly rather than semi-annually and if per voyage carryings as well as total carryings are reported. Section 536.5(d) (8) of the Commission's regulations requires *prior* filing of any bill of lading used by an ocean carrier. Proponents have shown no basis for waiving this requirement in the case of the Joint Service.

The proposed separate marketing arrangement between Hapag-Lloyd and French Line is an important public interest factor weighing in favor of Agreement No. 9902-8's approval. Even with this pro-competitive feature, however, the Joint Service does not perform as a true rate making body on those occasions when it publishes its own (*i.e.*, non-conference) tariff, and the limited self-policing arrangement proposed by Agreement No. 9902-8 does not, under these particular circumstances, constitute a valid regulatory purpose under the Commission's *Svenska* test. Accordingly, Article 11 of Amendment No. 8 may be deleted if the parties so desire.[22]

D. *Agreement No. 9902-5*

Practically speaking, the Commission's disposition of Agreement No. 9902-8 eliminates the need to analyze separately Euro-Pacific's present 650 TEU operation under Agreement No. 9902-5. Although the smaller vessels command a smaller market share and therefore have a lesser competitive impact, Proponents' failure to present evidence justifying ICT's participation in the Joint Service is as fatal to the unconditional approval of Agreement No. 9902-5 as it is to Agreement No. 9902-8. Any further *pendente lite* extension of the 650 TEU service would also be conditioned upon the deletion of ICT.

The parties will be allowed sixty days as a reasonable winding down period.

THEREFORE, IT IS ORDERED, That, pursuant to the mandate of the United States Court of Appeals in *United States Lines v. Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978), the Commission's March 21, 1977, Order approving Agreement No. 9902-5 shall be vacated effective May 31, 1979; and

IT IS FURTHER ORDERED, That Agreement No. 9902-5 shall be dismissed on May 31, 1979; and

IT IS FURTHER ORDERED, That Agreement No. 9902-8 is disapproved pursuant to section 15 of the Shipping Act, 1916, effective May 31, 1979, unless the Proponents actually deliver to the Commission's offices in Washington, D.C., on or before May 30, 1979, a modified version of that agreement designated "FMC Agreement No. 9902-9", signed by both parties thereto, which contains the following provisions:

This Agreement was first entered into by and between Hapag-Lloyd Aktiengesellschaft and Compagnie Generale Maritime (hereinafter referred to as the parties) on September 1, 1970 and has been amended from time to time. This amendment (No. 9) supersedes and cancels all previous amendments to Agreement No. 9902.

The parties, both of which are common carriers by water in the foreign commerce of the United States, agree that, in the trade between ports on the Pacific Coast of the United States and ports in the United Kingdom, Scandinavia and Continental Europe, including wayports in Mexico, Central America, the East Coast of South America and the West Indies, they will jointly establish and

[22] Two-party rate making bodies are exempt from neutral body self-policing requirements under Part 528 of the Commission's Rules. 46 C.F.R. 528.6.

maintain a direct all-water containership cargo service, with limited passenger accommodations, to be known as the "Euro-Pacific Joint Service," subject to the following terms and conditions:

1. The parties may each maintain membership in any freight conference or rate agreement already established and approved or that may be established and approved under the Shipping Act, 1916, in the trade covered hereby; *provided, however,* that in any such conference or rate agreement in which the parties individually or as a joint service are members, the votes of the parties or joint service shall not exceed, and the parties or service shall not exercise in total, a greater number of votes than that which may be accorded a single member of such conference or rate agreement. The parties may develop joint positions regarding votes and memberships in such bodies.

2. In any trades or traffic within the scope of this Agreement where rates, charges and practices are not prescribed by any conference of which both parties are members, the Joint Service shall establish and maintain its own rates, charges and practices covering such trades or traffic. The Joint Service shall file a tariff containing such rates, rules and regulations with the Federal Maritime Commission in accordance with section 18(b) of the Shipping Act, 1916.

3. The parties shall cooperate to supply tonnage for the Joint Service as their owned or chartered vessels are available. There shall be no automatic interchange of empty cargo containers and/or related equipment among the parties; *provided, however,* that the parties may interchange such empty containers and/or equipment between themselves as circumstances and conditions may require and permit, said interchange to be subject to mutually acceptable terms and conditions.

4. The parties shall contribute to and share in any and all deposits, costs, expenses, profits, and losses incurred by and derived from the Joint Service in the following proportions: Hapag-Lloyd Aktiengesellschaft ____ percent; Compagnie Generale Maritime, ____ percent.

5. Whether operating under a conference tariff or under their own tariff, the parties shall not employ any bill of lading not previously filed with the Federal Maritime Commission Pursuant to 46 C.F.R. 536 (5) (d) (8) or otherwise inconsistent with the Commission's tariff filing regulations.

6. Compagnie Generale Maritime and Hapag-Lloyd shall apppoint separate agents to represent their marketing interests, with the agents of each to be allocated ____ percent and ____ percent, respectively, of the space available on each sailing; *provided, however,* that on any such sailings the parties may charter from each other space in addition to that allocated to the respective agents. The parties may employ other agents on terms to be discussed among them.

7. The parties will jointly study the effect of structural changes in shipping services with respect to this specific trade and the possibilities of developing new or rebuilt types of vessels for use by the Joint Service.

8. The parties will rationalize the operation of the Joint Service with a view to promoting and developing the trade covered by this Agreement. In so doing, the parties may operate such containerships (or other substitute vessels on an emergency basis) as may be necessary; *provided, however,* that such ships will operate on approximately a ten-day frequency and will not carry cargo in containers in excess of 800 twenty-foot container equivalent units (TEU's) (averaged quarterly) every ten days in each direction between ports on the Pacific Coast of the United States and ports in the United Kingdom, Scandinavia and Continental Europe. This limitation shall apply to any such containers *both* loaded *and* discharged at the ports described in this Article, regardless of the ultimate destination or origin of such containers. The limitations expressed in this Article 8 shall remain in effect for the term of this Agreement, as set forth in Article ____ hereof.

9. The parties will submit quarterly Euro-Pacific operating reports to the Federal Maritime Commission concerning the Joint Service's activities in United States trades only which include: the dates, ports of call, and vessel employed for each Euro-Pacific voyage undertaken in each direction, the total number of loaded containers (expressed in TEU's) carried on each such voyage, and the average number of TEU's per sailing carried quarterly in each direction.

10. The parties may discuss and preliminarily agree upon arrangements for enlarging the scope and/or the membership of this Agreement. No such change shall become effective until it is approved by the Federal Maritime Commission.

* * *

[Final Article.] This Agreement shall become effective on the date following approval by the Federal Maritime Commission, and shall remain effective until December 31, 1982. This Agreement may, however, be terminated by mutual agreement of the parties at any time, or, as to any one participant, upon two years' advance notice to the remaining party. Copies of any such notice or mutual agreement to terminate this Agreement shall be promptly furnished to the Federal Maritime Commission.

Proponents shall determine the shares specified in Articles 4 and 6 of the Agreement and insert the correct figures in the blanks provided, may include such articles numbered 11, 12, or 13 as are consistent with Amendment No. 8 (second revised) and this Report, and shall insert the appropriate article number in the last sentence of Article 8; and

IT IS FURTHER ORDERED, That upon full and timely compliance with the conditions set forth in the above ordering clause, Agreement No. 9902-9 shall be approved.

(S) FRANCIS C. HURNEY
Secretary

APPENDIX "A"

FINDINGS OF FACT

1. Proponents (or their predecessor companies) have a long history of service in the liner trade between the U.S. Pacific Coast and Europe. Hapag-Lloyd has served that trade since 1899, CGM since 1921 and ICT since 1920.

2. In January of 1971, Hapag-Lloyd and CGM submitted for FMC approval Agreement No. 9902, authorizing those parties to establish a joint cargo service between Pacific Coast ports and ports in Europe. Agreement No. 9902 was approved by the Commission on March 16, 1971.

3. On March 17, 1971, Hapag-Lloyd, CGM and Holland-America Line submitted for FMC approval Amendment 1 to Agreement No. 9902, authorizing participation by Holland-America Line in the Euro-Pacific service, pursuant to the terms of Amendment 1. Agreement No. 9902-1 was approved by the Commission for a three year period on June 17, 1971.

4. Amendment 2 to Agreement No. 9902, which was approved by the Commission on March 21, 1974, extended approval of the Agreement for an additional three-year period, to March 21, 1977.

5. Pursuant to Article 8 of Agreement No. 9902 (as amended through Amendment 2), Euro-Pacific operated a fleet of conventional vessels in its service. The number and capacity of these vessels varied, but as of the beginning of 1976, Euro-Pacific was operating a fleet of ten conventional vessels, on a weekly frequency, with average container capacity of about 310 TEU's and average additional breakbulk capacity of approximately 450,000 cubic feet.

6. From the beginning of 1976 to the present, only Euro-Pacific and Johnson Scanstar (JSS) were offering a frequent (ten-day or less frequency), direct all-water liner service in this trade. JSS utilizes nine cellularized container vessels, ranging in size from 800 to 1,200 TEU's, to offer a weekly frequency of service. USL offers an indirect all-water service in the trade, utilizing vessels in its Far East service to move shipments between the Pacific and Atlantic Coasts, and vessels in its trans-Atlantic service to move the same shipments between the U.S. Atlantic Coast and Europe. Sea-Land also offered a weekly indirect all-water service, using vessels (with an average capacity of 543 35-foot containers, or 950 TEU's) in its "intercoastal service" to move shipments between Pacific and Atlantic ports, and its trans-Atlantic vessels to move the same shipments between the U.S. Atlantic Coast and Europe. The Sea-Land service was discontinued early in 1978. In October of 1977, Hoegh Lines instituted a direct all-water service, on approximately a three-week frequency, utilizing vessels having a container capacity of approximately 440 TEU's. In June of 1978, Vaasa Line, which had been operating a conventional vessel direct service on a monthly frequency, ceased operations.

7. In 1976, eight carriers were offering minilandbridge service in the Pacific Coast/European trade. These were American Export Lines, Seatrain, Sea-Land, USL, Lykes, Balt-Atlantic, Great Lakes and European Lines, and Balt-Gulf. With the exception of the last-named, all of these minibridge carriers offered weekly service. Apart from Great Lakes and European Lines, all of these minibridge operators continue to offer service at the same frequency.

8. Non-liner operators have made increasingly greater inroads into the Trade Route 26 market. In the period from 1970 to 1977, the non-liner share of total traffic via direct all-water movements has increased from 35.07 percent of the total to 52.35 percent.

9. Pacific Coast/European liner trade has become increasingly containerized; the annual rate of increase in containerized cargo movements during the years 1970 through 1974 averaged 23.69 percent, with yearly growth tapering off. By 1974, almost 60 percent of the commercial liner cargo in that trade was carried in containers, and the trend toward a high degree of containerization in this trade has continued.

10. Due to developments in the trade, including the length of this trade route (21,000 nautical miles roundtrip) increasing containerization of liner service and inroads made by non-liner operators into the Trade Route 26 market, at least 15 liner carriers have withdrawn from the Pacific Coast/European trade since the mid-1960's.

11. The conventional vessels operated by Euro-Pacific were not suitable to meet the needs of the trade because shippers prefer container service for their general liner cargoes. These hybrid vessels, designed as breakbulk ships and later modified to accommodate a limited number of containers, were inherently inefficient for use in this trade. That is, to carry a large number of containers, certain amounts of breakbulk cargo had to be carried in the holds for stability purposes. However, the loading of breakbulk cargo slowed the process of loading containers, and, therefore, it was more costly to load containers on the Euro-Pacific combination ships than to load containers on cellularized ships. Thus, despite adequate utilization, these ships could not be employed in a viable container operation in a trade that had become highly containerized.

12. Pursuant to FMC approval, *pendente lite*, of Amendment 3 to Agreement No. 9902, Euro-Pacific was authorized to operate a fleet of six, 650-TEU average capacity containerships, on a ten-day frequency, covering the following itinerary: Long Beach, Oakland, Vancouver, Seattle, Portland, Oakland, Long Beach, Liverpool, LeHavre, Antwerp, Rotterdam, Hamburg, Bremerhaven, Greenock, Liverpool, and return to Long Beach. Since this fleet was fully phased into service (the first such vessel calling in April of 1976, Tr. at 289) in the last quarter of 1976 and through 1977, utilization of these ships has been at very favorable levels, averaging 85 percent westbound and 84 percent eastbound.

13. These 650-TEU ships are also inefficient for use in this trade. Despite favorable utilization factors, in the first half of 1977 Euro-Pacific experienced a loss. To try to establish its service on an economically viable basis, Euro-Pacific must therefore replace its present container fleet with suitable vessels.

14. The two carriers (JSS and USL) still offering frequent all-water service in this trade operate on a weekly frequency, as do all but one of the minibridge services in this trade. Thus, it is necessary that a sufficient number of replacement vessels be employed to allow Euro-Pacific to offer, at a minimum, a ten-day frequency of service (intervals other than seven or ten days would result in operational disadvantages in vessel scheduling) in order to offer a competitive service comparable to that which Euro-Pacific has historically operated in this trade.

15. There are significant economies of scale inherent in the operation of cellularized container vessels in liner services, *i.e.*, vessel operating cost per unit of cargo does not increase in proportion to increases in vessel carrying capacity. Such economies can result from the technology inherent in containerized operations, *e.g.*, Euro-Pacific needed to operate ten conventional vessels to maintain weekly service, but could cover the same itinerary in a weekly service with only eight containerships. Further, as a general proposition, in full containership operation the operating cost per unit (here, a twenty-foot container equivalent unit) of cargo carried decreases as the carrying capacity of the containership increases.

16. Such economies of scale depend not only on the size of a vessel, but also upon the amount of time spent in port, *i.e.*, economies in operating cost at sea are offset to the extent a larger vessel spends greater amounts of time in port to load and discharge greater amounts of cargo. Determining appropriate vessel size to take advantage of economies of scale in containerized operations therefore depends upon the relationship between time at sea and time in port.

17. Time in port is a function of cargo handling rates, which are largely determined by the complexity of the itinerary, *i.e.*, the more complex the itinerary the more restowing of cargo is necessary for stability and safety purposes, thus extending port time. This factor is, however, ameliorated on a long trade route where time at sea (and the economies there achieved with larger vessels) is a larger proportion of round voyage time than is time in port, and the economies of scale obtainable with larger vessels operating at sea outweigh the negative effect of increased port time.

18. Thus, on shorter routes where port time is a greater proportion of round voyage time, smaller vessels covering a simple itinerary will be relatively more efficient. Conversely, on a long trade route, where time at sea is a much greater proportion of round voyage time than port time involved with even a complex itinerary, larger containerships are necessary for efficient operation.

19. The application of these principles dictates that Euro-Pacific's operation of small (650-TEU average capacity) containerships on this long trade route (21,000 nautical miles on a round voyage) covering a complex itinerary cannot be an efficient service under the best of operational circumstances. Given: (a) the great length of the Pacific Coast/European trade; (b) the complex itinerary which must be followed for proper port coverage; and (c) the fact that, even with larger vessels, port time will not increase substantially over that of the present Euro-Pacific fleet, Euro-Pacific's replacement of its small, 650-TEU ships with larger vessels should result in a more efficient service.

20. The six replacement ships proposed to be employed in the Euro-Pacific service will have a capacity of between 1,400 and 1,500 TEU's (depending upon the installation of onboard container cranes). Although only 800 TEU's of this capacity will be employed in the U.S. Pacific Coast/European trade, the economies of scale obtainable with these larger vessels on this long trade route and complex itinerary will apply to all the containers carried aboard these ships.

21. The phasing-in of Euro-Pacific's proposed replacement fleet will not be completed until early 1979. The export capacity of vessels employed in direct, all-water liner service in this trade in 1975 totalled 706,132 long tons, of which

335,157 long tons consisted of breakbulk capacity employed by Euro-Pacific. The impact of Euro-Pacific's deployment of six, 650-TEU vessels in late 1976 reduced total direct, all-water liner export capacity to 665,372 long tons in 1976, and, notwithstanding the entry of Heogh Lines into this trade in October of 1977 with vessels having a weekly export container capacity of approximately 150 TEU's, direct all-water export capacity further declined to 559,870 long tons in 1977. Direct, all-water liner export capacity will increase to 610,205 long tons for 1978. By 1979, with Euro-Pacific's proposed fleet replacement, direct, all-water liner export capacity will total 687,305 long tons. These data for direct, all water liner export capacity are detailed in Attachment A.

22. The levels of import and export cargo moving via direct all-water liner and non-liner services between the U.S. Pacific Coast and Europe (Trade Route 26) for the years 1967 through 1977 are set out in Attachment B.

23. The levels of import and export liner cargo moving via minibridge and all-water transshipment liner services for 1975, 1976 and the first quarter of 1977 between the U.S. Pacific Coast and Europe (Trade Route 26) are set out in Attachment C.

24. In November of 1977, the U.S. Maritime Administration published a study entitled "A Long-Term Forecast of U.S. Waterborne Foreign Trade, 1976-2000" (hereinafter referred to as "MarAd Forecast"). This study was utilized by Witness Ellsworth in his testimony and is an updated version of that utilized by Witness Simat. The MarAd Forecast shows that the average overall growth rate of waterborne (liner, non-liner and tanker) imports and exports on Trade Route 26 (*i.e.*, the U.S. Pacific Coast/European trade) will be 4.77 percent annually for the years between 1975 and 1980.

25. Between 1971 and 1975, the Far Western states comprising the U.S. side of Trade Route 26 have experienced greater than overall U.S. growth in population (twice the rate for the U.S. overall), effective buying income (10.8 percent greater than overall U.S.) and retail sales (8.8 percent greater than the nation as a whole). U.S. Commerce Department forecasts predict continuation of the growth trend for Far West economic indicators such as population and personal income.

26. The volume of those commodities which comprise the 20 leading export commodities moving on Trade Route 26 did, in the overall U.S. to Europe trade, increase at the rate of 13.06 percent annually between 1971 and 1975, while, during that same period, the volume of all U.S./Europe waterborne commerce increased at a rate of only 8.42 percent yearly.

27. Economic activity, as reflected by Gross National Product (GNP) has historically had a close relationship to foreign trade and, concomitantly, to levels of waterborne foreign commerce. This relationship serves as the basis for the MarAd Forecast. The MarAd Forecast is predicted upon aggregate data projecting overall economic activity for the United States, and does not reflect that a particular region may experience a greater economic growth rate than the nation as a whole.

28. The MarAd Forecast does not distinguish between liner and non-liner movements. Analysis of data for direct all-water liner movements for the years 1967-1976 shows that liner traffic moving via direct, all-water service on Trade

Route 26 declined from 1,550,453 long tons in 1967 to 1,122,500 long tons in 1976, an annual decrease of 3.5 percent (data for 1967-1969 include all commodities; data for 1970-1977 exclude commodities 321 (coal, coke and briquets) and 332 (petroleum products)). These data do not, however, include liner cargoes moving via minibridge and all-water transshipping service, which, in 1976, carried an additional 350,393 long tons of liner cargo (eastbound 204,179 long tons and westbound 146,214 long tons). Thus, in 1976, total liner cargo on Trade Route 26 (including minibridge and transshipment) was 1,472,893 long tons, a decrease from 1967 of approximately .05 percent annually.

29. During the 11-year period 1967-1977, direct all-water liner movements on Trade Route 26 were at their highest levels in 1970, 1,880,459 long tons, and reached their lowest level in 1975, at 1,063,864 long tons. Since 1975, however, direct all-water liner traffic increased to 1,122,500 long tons in 1976 and to 1,506,527 long tons in 1977, and the liner share (vis-a-vis non-liner movements) of total all-water traffic has also increased from 39.28 and 35.4 percent in 1975 and 1976, respectively, to 47.65 percent in 1977.

30. The Euro-Pacific partners cannot continue the service in its present form, using the inefficient fleet of ships currently employed. In the event Amendment 8 is not approved, the three Proponents would not individually operate the ships they would contribute under the terms of Amendment 8, *i.e.*, no one of the Proponents would contribute more than three ships, allowing for service only every three weeks, which, with vessels designed only for containerized liner service, would be non-competitive in this trade where virtually every all-water and indirect service has a weekly frequency.

31. In the event Amendment 8 is not approved, only three alternative means of service are open to the Proponents individually:

(a) one or more of the Proponents would obtain fleets of the six-to-eight vessels necessary to offer a competitive frequency of service, of a capacity necessary for efficient operation in this trade, in view of the economies of scale related to containerized operations;

(b) one or more of the Proponents would discontinue direct, all-water service and instead offer minilandbridge, service; or

(c) one or more of the Proponents would continue direct all-water service comparable to that proposed in Amendment 8, and one or more of the other Proponents would offer minilandbridge service.

32. Approval of Amendment 8 will allow for continuation of the rationalized Euro-Pacific service, reduce the amount of capacity which would be placed in the trade absent approval, permit the use of energy efficient vessels, and maintain the proponent carriers in the market as providers of frequent, direct, all-water service.

33. Many shippers in this trade rely on Euro-Pacific's frequent, direct all-water service and support approval of the subject Agreement because the proposed container service: (a) will ensure continuation of the Euro-Pacific direct service, with its established regularity and reliability and ability to issue onboard bills of lading; (b) will continue to be a competitive factor vis-a-vis the only other frequent direct, all-water liner service and the several minibridge carriers in the trade; (c) will continue and improve a direct all-water service found useful and

necessary by shippers of out-size, heavy-lift and refrigerated cargoes (the latter by virtue of increased reefer capacity from 39 reefer plugs per vessel to more than 100 per vessel), which cannot in many instances be accommodated by minibridge services; and (d) may help hold down long term rate levels in the trade by using more efficient vessels.

34. The ports of Long Beach, Oakland, Portland and Seattle support approval of the subject agreement, because approval will: (a) maintain utilization of container terminal facilities in which these ports (and the communities they serve) have made substantial investments; (b) make available more efficient direct all-water service for the shipping public using these ports; (c) result in employment of more modern tonnage, supplying the lift capability for many commodities (such as autos, perishables and refrigerated goods, and volatile chemicals) that do not accommodate themselves to minilandbridge movement; and (d) maintain a competitive balance in the liner trades and offer shippers a choice of routing from various gateways.

35. Holland-America Line entered the U.S. Pacific Coast/European trade in 1920, and shortly thereafter formed the "North Pacific Coast Line" joint service with Royal Mail Lines; Furness Withy joined this service in 1964. Both Royal Mail and Furness Withy withdrew from the trade in 1970. Holland-America Line thereupon operated its own service in this trade for a short time in 1970-1971, but, because it could offer only one sailing per month, sought to join the rationalized Euro-Pacific service of Hapag-Lloyd and CGM. The Commission approved Holland-America Line's participation on June 17, 1971.

36. Holland-America Line was originally formed as a Dutch company in 1873, under the name Nederlandsch-Amerikaansche Stoomvaart-Maatschappij N.V., to which the name Holland Amerika Lijn was added in 1898. The title of the company was formally shortened in 1973 to Holland Amerika Lijn. In 1974, the Dutch company known as Holland Amerika Lijn Holding N.V. was formed, which subsequently acquired more than 99 percent of the shares of Holland Amerika Lijn. Holland Amerika Lijn Holding N.V. on December 31, 1974 transferred to Brostroem Holland B.V. (a Dutch company wholly-owned by the Brostroem Shipping Company A.B. of Gothenburg, Sweden) its shares of Holland Amerika Lijn, in return for the assets of Holland Amerika Lijn except for those related to the transport of goods by sea.

37. Holland Amerika Lijn on December 30, 1974 changed its name to Intercontinental Transport (ICT) B.V. Except for certain vessels sold prior to that date two chartered vessels for each of the Euro-Pacific and Combi-Line services, the same vessels owned by Holland-America Line have been operated by ICT. ICT has, as a Dutch successor company to that founded in 1873, continued to operate in the field of transport of goods by sea.

38. Holland-America Line suspended its service in the U.S. Pacific Coast/European trade in late 1973 (a voyage of one of its vessels being completed in early 1974), because its conventional vessels could not profitably serve the trade in view of the demand for container space and because it was not possible to charter other suitable vessels at acceptable rates.

39. Following the above-described reorganization of Holland-America Line into ICT at the beginning of 1975, ICT wished to reinstitute its service in this

trade. ICT did not wish to institute a minilandbridge service, being of the view that direct, all-water service was the optimal means to serve this trade. An independent ICT container service, with the number of ships for a competitive weekly or ten-day frequency, of the capacity necessary for efficient operation in this trade, would have required a large capital investment and could have resulted in overtonnaging in the trade. ICT therefore concluded that its reentry into this trade was best undertaken in the context of a rationalized service, with its former Euro-Pacific partners, whose views on modernizing to a frequent, direct, all-water full container service in this trade coincided with those of ICT.

40. Since its inception (and per the terms of Agreement No. 9902 as originally approved), the marketing of the Euro-Pacific service has been undertaken on a joint basis, *i.e.*, agents are appointed to represent the joint service, not the respective parties thereto.

41. CGM and ICT are members of services in other trades, which services are direct competitors of services operated by Hapag-Lloyd. Each of these services has established its respective marketing organizations and each carrier and/or service in which they participate seeks to maintain its own marketing identity.

42. CGM and ICT therefore wish to continue to market their services in this trade on a joint basis, but, because of the overlapping scope of services already marketed separately as between CGM and ICT (or services of which they are members) and Hapag-Lloyd, to maintain their separate identities, CGM and ICT, on the one hand, and Hapag-Lloyd, on the other, desire to undertake separately the marketing of their services in the context of Euro-Pacific.

43. The organizations representing Hapag-Lloyd, on the one hand, and ICT and CGM, on the other, will (independently from each other) be able to market the services offered by these parties.

44. Separate marketing will allow for a degree of competition between Hapag-Lloyd and CGM and ICT, as well as among Proponents' respective marketing organizations and other carriers in the trade, by allowing each respective organization to develop its own marketing identity.

45. Proponents' continuation, under the terms of the subject Agreement, of the pooling of revenues and expenses derived or incurred in the Euro-Pacific service creates a disincentive for the principals to engage in malpractices upon implementation of separate marketing arrangements.

46. Article 6 of Agreement No. 9902–8 provides for an allocation to the respective marketing organizations of one-half the space available on each sailing, with necessary adjustments to such allocations being made by the principals, thus enabling all of the principals to oversee the activities of both marketing agents to ensure that these organizations also do not engage in malpractices.

47. Article 1 of Agreement No. 9902, as revised by Amendment 8, incorporates a provision to allow each Proponent individual conference membership, but with combined voting rights equivalent to those which may be accorded single conference members.

48. Article 3 of Agreement No. 9902, as revised by Amendment 8, permits Proponents to interchange among themselves empty containers and related equipment, as is necessary for the operation of a rationalized service.

49. Not adopted.

50. Revision of Article 11(d) of Agreement No. 9902, as set out in Amendment 8, is necessary to rectify an apparent inconsistency between that provision and Article 11(b) of the Agreement.

ATTACHMENT A

DIRECT, ALL-WATER LINER EXPORT CAPACITY
U.S. PACIFIC COAST/EUROPE TRADE
1975–1979

Year	Carriers	Carrier Capacity (Long Tons)	Export Trade Capacity (Long Tons)
1975	Johnson ScanStar[a]	370,975	
	Euro-Pacific[b]	335,157	706,132
1976	Johnson ScanStar[a]	370,975	
	Euro-Pacific[c]	294,397	665,372
1977	Johnson ScanStar[a]	370,975	
	Euro-Pacific[d]	172,116	
	Hoegh Line[e]	16,179	559,870
1978	Johnson ScanStar[a]	370,975	
	Euro-Pacific[d]	172,116	
	Hoegh Line[f]	67,114	610,205
1979	Johnson ScanStar[a]	370,975	
	Euro-Pacific[d]	249,216	
	Hoegh Line[f]	67,114	687,305

[a] Source: Ex. 75 (workpapers of Dr. Ellsworth) at 1.

[b] Source: Ex. 1, Att. 1, page 1 of 4. Mr. Simat here computed Euro-Pacific's 1975 export *and* import capacity to be 670,314 long tons. Since the above table deals only with export capacity, we have here halved the figure developed by Mr. Simat.

[c] Source: Through approximately three quarters of 1976, Euro-Pacific employed the same breakbulk fleet as in 1975. During the final quarter of that year, Euro-Pacific employed its current fleet of 650-TEU vessels. Thus, in deriving Euro-Pacific capacity for that year, we here used three quarters of the 1975 capacity (.75 × 335,157 = 251,368) and one quarter of Euro-Pacific's present capacity of 172,116 long tons (.25 × 172,116 = 43,029), as derived by Doctor Ellsworth, Ex. 74 at 5. This total was 251,368 + 43,029 = 294,397 long tons.

[d] Source: Euro-Pacific's present capacity as derived by Doctor Ellsworth, Ex. 74 at 5.

[e] Source: At page 4 of his testimony (Ex. 74 at 4), Doctor Ellsworth computes Hoegh Line's capacity to be approximately 150 TEU's per week, and, in his workpapers (Ex. 75 at 3), computes Hoegh's annual capacity to be 67,114 long tons. However, as noted at page 4 of Doctor Ellsworth's testimony (Ex. 74 at 4), Hoegh did not begin operating until the last quarter (October) of 1977. Thus, in the above table, we have included only one quarter Hoegh's annual capacity for 1977.

[f] Source: Ex. 75 at 3.

ATTACHMENT B

TRADE ROUTE 26—COMMERCIAL DRY CARGO IMPORTS AND EXPORTS FOR CALENDAR YEARS, 1967—1977[a] (IN LONG TONS)

	Liner	Non-Liner	Total	Liner As Percent of Total
1967:				
Imports	604,887	173,000	777,887	77.77
Exports	945,566	765,469	1,711,035	55.26
Total	1,550,453	938,469	2,488.922	62.29
1968:				
Imports	632,933	240,980	873,913	72.42
Exports	805,410	874,687	1,680,097	47.94
Total	1,438,343	1,115,667	2,554,010	56.32
1969:				
Imports	725,442	339,043	1,064,485	68.15
Exports	1,078,511	1,134,932	2,213,443	48.73
Total	1,803,953	1,473,975	3,277,928	55.03
1970:				
Imports	664,227	290,496	954,723	69.57
Exports	1,216,232	725,196	1,941,428	62.65
Total	1,880,459	1,015,692	2,896,151	64.93
1971:				
Imports	655,941	264,140	920,081	71.29
Exports	762,239	770,066	1,532,305	49.74
Total	1,418,180	1,034,206	2,452,386	57.76
1972:				
Imports	669,185	548,262	1,217,447	54.97
Exports	676,187	947,330	1,623,517	41.65
Total	1,345,372	1,495,592	2,840,964	47.36
1973:				
Imports	671,578	579,660	1,251,238	53.67
Exports	756,486	1,137,105	1,893,591	39.95
Total	1,428,064	1,716,765	3,144,829	45.41
1974:				
Imports	664,302	865,952	1,530,254	43.41
Exports	681,642	920,166	1,601,808	42.55
Total	1,345,944	1,786,118	3,132,062	42.97
1975:				
Imports	452,444	366,431	818,875	55.25
Exports	611,420	1,277,807	1,889,227	32.36
Total	1,063,864	1,644,238	2,708,102	39.28
1976:				
Imports	452,774	481,316	934,090	48.47
Exports	669,726	1,566,651	2,236,377	29.95
Total	1,122,500	2,047,967	3,170,467	35.40
1977:[b]				
Imports	695,386	500,796	1,196,182	58.13
Exports	811,141	1,154,203	1,965,344	41.52
Total	1,506,527	1,654,999	3,161,526	47.65

[a] 1967–1969 includes all commodities; 1970–1977 excludes commodities 321-coal, coke and briquets; and 332-petroleum products.

[b] Preliminary data.

ATTACHMENT C

MINIBRIDGE AND ALL-WATER TRANSSHIPPING CARGO MOVEMENT— U.S. WEST COAST TO NORTHERN EUROPE (1975-1977)

Year	Direction	Number of Carriers[b]	Minibridge	All-Water Transshipped	Total
1977 (1st Quarter)[a]	Eastbound	7	54,369	2,987	70,034
1976		7	181,815	22,364	204,179
1975		5	92,748	21,738	114,486
1977 (1st Quarter)[a]	Westbound	7	24,261	4,745	38,668
1976		7	100,301	45,913	146,214
1975		5	64,940	36,215	101,154

[a] Components do not sum to total because one carrier could not separate minibridge and all-water transshipment cargoes and therefore reported a total only.

[b] The carriers in 1975 were as follows: (1) American Export Lines, (2) Lykes Bros., (3) Sea-Land, (4) Seatrain, (5) United States Lines. The 1976 and 1977 data include the five carriers listed above plus Baltic Atlantic Line and Baltic Shipping Company.

APPENDIX "B"

AGREEMENT NO. 9902

(Restatement as Revised Through
Agreement No. 9902-8 (2d Revised)

JOINT SERVICE AGREEMENT

BETWEEN

COMPAGNIE GENERALE MARITIME

(FRENCH LINE)

AND

HAPAG-LLOYD AKTIENGESELLSCHAFT

AND

INTERCONTINENTAL TRANSPORT (ICT) B.V.

This Agreement was entered into by and between the parties on September 1, 1970. The undersigned, common carriers by water in the foreign commerce of the United States (hereafter referred to as the parties), agree that, in the trade between ports on the Pacific Coast of the United States and ports in the United Kingdom, Scandinavia and Continental Europe, including wayports in Mexico, Central America, the East Coast of South America and the West Indies, they will establish and maintain a joint cargo service, with limited passenger accommodations, to be called Euro-Pacific.

1. The parties hereto each may maintain membership in any freight conference already established and approved or that may be established and approved under the United States Shipping Act in the trade covered hereby, *provided, however*, that such membership would not be inconsistent with the terms of this Article 1. In any conference in which the parties individually or as a joint service are members, the votes of the parties or joint service shall not exceed and the parties or service shall not exercise in total a greater number of votes than that which may be accorded a single member of such conference. The parties may develop joint positions regarding conference votes and membership.

2. In the case of any trades or traffic within the scope of this Agreement where the rates, charges and practices are not prescribed by any conference of which the parties to this Agreement are members, the new service shall establish and maintain its own rates, charges and practices covering such trades or traffic. The joint service shall file a tariff containing such rates, rules and regulations with the Federal Maritime Commission in accordance with the provisions of Section 18(b) of the Shipping Act, 1916, as amended.

3. The parties shall cooperate to supply tonnage for this joint service as their owned or chartered vessels are available. There shall be no automatic interchange of empty cargo containers and/or related equipment among the parties, provided,

however, that the parties, between or among them, may interchange such empty containers and/or equipment as circumstances and conditions may require and permit, said interchange to be subject to mutually acceptable terms and conditions.

4. The parties shall contribute to and share in any and all deposits, costs, expenses, profits, and losses incurred by and derived from this joint service in the following proportions: Hapag-Lloyd Aktiengesellschaft, 50 percent; Compagnie Generale Maritime, 30 percent; Intercontinental Transport (ICT) B.V., 20 percent.

5. Copies of all bills of lading used by the parties under the joint service will be furnished promptly to the Federal Maritime Commission.

6. The parties will employ agents on terms to be discussed among them. Compagnie Generale Maritime and Intercontinental Transport (ICT) B.V. may appoint agents to represent their marketing and other interests, and Hapag-Lloyd may appoint separate agents to represent its marketing and other interests, in which event the respective agents shall each be allocated one-half of the space available on each sailing, provided that on any such sailings the parties may charter from each other space in addition to that allocated to the respective agents.

7. The parties will study jointly the effect of the structural change in shipping services with respect to this specific trade and the possibilities to develop a new or rebuilt type of vessel for a profitable operation.

8. The parties will rationalize their services with a view to promoting and developing the trade covered by this Agreement. In so doing, the parties may operate such containerships (or other substitute vessels on an emergency basis) as may be necessary, *provided, however,* that such ships will operate on approximately a ten-day frequency and will not carry cargo in containers in excess of 800 twenty-foot container equivalent units (TEU's) (averaged quarterly) every ten days in each direction between ports on the Pacific Coast of the United States and ports in the United Kingdom, Scandinavia and Continental Europe. This limitation shall apply to any such containers *both* loaded *and* discharged at the ports described in this Article, regardless of the ultimate destination or origin of such containers. The limitations expressed in this Article 8 shall remain in effect for the term of this Agreement, as set forth in Article 13 hereof.

Euro-Pacific will submit to the Commission semi-annual reports stating: (a) the number of sailings, the number of loaded containers (expressed in TEU's) and the average number of TEU's per sailing carried quarterly in each direction; and (b) in each direction and by month, the number of sailings, together with the aggregate number by which loaded TEU's carried in each month either exceeded or fell below the average 800-TEU-per-sailing level.

9. The parties may decide to enlarge the scope and/or the membership of this Agreement after mutual consultation and acceptance. No such change shall become effective until approval by the Federal Maritime Commission.

10. In any event of implementation of the rate-making powers conferred on the parties under Article 2 hereof, the self-policing provisions of Article 11 shall apply. In the event of any other dispute between or among the parties under this Agreement, if the matter cannot be resolved between or among the parties

themselves such dispute shall be referred to arbitration in London, before a panel of three arbitrators, each side to the dispute appointing one arbitrator and (unless the foregoing results in the appointment of three arbitrators) the third arbitrator being selected by the two previously appointed, or, if those two fail to arrive at agreement, then the third arbitrator to be appointed by the President of the Chamber of Commerce of London. Provided all sides to the dispute agree, a single arbitrator, similarly appointed by the President of the Chamber of Commerce of London, may act in place of the three-man arbitration panel. In any case submitted to arbitration under these provisions, the decision of any two such arbitrators (or of the single arbitrator) shall be final and binding.

11. Wherever the parties have undertaken joint rate-making pursuant to Article 2 of this Agreement, any malpractice or breach of any rate-making provision of the Agreement, the joint tariff, or the rules and regulations thereunder, will be subject to self-policing as hereinafter described.

a) Each separate event of breach shall carry a maximum penalty of $10,000. Failure to comply with a final disciplinary adjudication, as set forth in this Article, and to pay the penalties assessed when due, shall constitute a separate breach of the Agreement.

b) If any party to the Agreement has reasonable grounds to believe a breach has occurred on the part of any other party, the first party shall, in the first instance, communicate the fact to the suspected party and to the third party. In the event the matter cannot be resolved amicably by such informal means, and in any case where requested by the accused party, the matter shall be referred to arbitration as set forth in the following sub-paragraphs.

c) Arbitration of a self-policing accusation shall be referred to an arbitration panel in London, the accused party and the remaining parties each appointing one arbitrator and the two so appointed selecting the third arbitrator, or, if those two fail to arrive at agreement, then the third to be appointed by the President of the Chamber of Commerce of London. Provided both sides to the dispute agree, a single arbitrator, similarly appointed by the President of the Chamber of Commerce of London, may act in place of the three-man arbitration panel. In any case submitted to arbitration under these provisions, the arbitrator(s) shall have the authority to adjudicate the allegations of breach and, within the limits of sub-paragraph (a) above, to assess penalties on any breach found.

d) At least 30 days before submission of the matter to the arbitrator(s), the accused party shall be furnished a written statement of the charge against it, sufficient to apprise it of the nature of the charge and to enable it to frame an adequate defense. The accused line shall at the same time be furnished with all evidence then developed, intended to be offered in support of the charge. In the event additional evidence is thereafter developed, the accused party, after being furnished with such additional material, shall be afforded a delay of the arbitration proceeding for an additional period of not to exceed 15 days, within which to prepare a defense to the new material.

e) All evidence presented to the arbitrator(s), by either side, shall also be furnished to the other side of the dispute. At the arbitration proceeding, each side shall have the opportunity to present counter-evidence and rebuttal, and to offer matters in explanation, mitigation, extenuation and/or aggravation of the offense charged.

f) The arbitrator(s) shall consider only the material so presented in reaching the decision as to breach and as to penalties to be assessed (if any). The decision of any two of the three-man arbitration panel (or of the single arbitrator, if applicable) shall be final and binding.

12. The parties shall establish and maintain at Hapag-Lloyd A.G., Ballindamm 25, Hamburg, Germany, an office from which the operations of the joint service will be directed.

13. This Agreement shall become effective on the day following approval by the Federal Maritime Commission, and shall remain effective for four years and six months following such date or until December 31, 1982, whichever is earlier. This Agreement may, however, be terminated by mutual agreement of the parties hereto at any time, or, as to any one or more participants, upon two years' advance notice by such party or parties to the remaining party or parties. Copies of any such notice or mutual agreement to terminate this Agreement shall be furnished to the Federal Maritime Commission promptly.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-37

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE
SERGIO E. VASQUEZ

NOTICE

March 30, 1979

Notice is given that no appeal has been filed to the February 14, 1979 order of dismissal in this proceeding and the time within which the Commission could determine to review that order has expired. No such determination has been made and, accordingly, review will not be undertaken.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 77-37

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE
SERGIO E. VASQUEZ

ORDER DISMISSING PROCEEDING

Finalized on March 30, 1979

The sole issue established by the Commission's Order of Investigation and Hearing was whether or not respondent Sergio E. Vasquez has the requisite independence under sections 1 and 44 of the Shipping Act, 1916, to continue to operate as a licensed IOFF. No violations of the Shipping Act, 1916, or the Commission's Rules and Regulations were alleged. On January 26, 1979, Hearing Counsel filed a Motion to Dismiss Proceeding. As set forth in the motion (to which no reply has been filed), the following facts have generated Hearing Counsel's request:

By notice published in the *Federal Register* on July 28, 1978 (43 F.R. 32776) the Commission amended General Order 4 (46 CFR 510.5) regarding licensed independent ocean freight forwarders (IOFF). This amendment, *inter alia*, increased the amount of the surety bond required for IOFF's to $30,000, and further provided that existing licensees were required to file the increased bond on or before December 1, 1978, otherwise the license issued to the IOFF would be revoked in accordance with Rule 510.9 (46 CFR 510.9). As of December 1, 1978, the Commission failed to receive the required surety bond from Respondent Sergio E. Vasquez.

Thereafter, by notice published in the *Federal Register* on January 3, 1979 (44 F.R. 953, 954), the Commission notified all licensed IOFF's, including Respondent Vasquez, who failed to furnish a valid surety bond, that their licenses were revoked effective December 2, 1978, in accordance with Rule 510.5 and that such licenses must be returned to the Commission.

In view of the fact that respondent Sergio Vasquez' license has already been revoked by the Commission, it appears that no valid regulatory purpose or public interest would be served by continuing with this proceeding. Accordingly, the proceeding is hereby *DISMISSED* as moot.

(S) THOMAS W. REILLY
Administrative Law Judge

February 14, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-32

PACIFIC WESTBOUND CONFERENCE— EQUALIZATION RULES AND PRACTICES

Pacific Westbound Conference Agreement No. 57, which provides for absorption of "rail or coastal steamer freights or other charges", does allow the absorption of motor carrier freight rates as "other charges". *Intermodal Service to Portland, Oregon,* (17 F.M.C. 105, 119 (1973)).

Rule 16 of Pacific Westbound Conference Tariff No. 3, which provides for port equalization, is not *per se* violative of sections 15, 16, or 17 of the Shipping Act, 1916 or section 205 of the Merchant Marine Act of 1936. *Stockton Port District v. Pacific Westbound Conference,* 9 F.M.C. 12, 20 (1965).

Rule 16 of Pacific Westbound Conference Tariff No. 3 does not prohibit cargo being equalized from moving on ICC-exempt carriers.

Further hearing is required to determine whether or not the equalization and absorption practices of the Pacific Westbound Conference, as applied to Portland, violate sections 15, 16 or 17 of the Shipping Act, 1916 or section 205 of the Merchant Marine Act of 1936.

Norman E. Sutherland for Petitioner Port of Portland.

R. Frederick Fisher and *Richard C. Jones* for Respondent Pacific Westbound Conference and member lines.

Joseph F. Kelly, Jr.,[1] for Intervenor Massachusetts Port Authority.

Martin A. Hecksher for Intervenor Delaware River Port Authority.

C.C. Guidry and *G.B. Perry,* respectively, for Intervenors Board of Commissioners of the Port of New Orleans and New Orleans Traffic and Transportation Bureau, Inc.

John Robert Ewers, Alan J.Jacobson and *Don Blumenthal* for the Bureau of Hearing Counsel.

REPORT AND ORDER OF FURTHER INVESTIGATION AND HEARING

March 30, 1979

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

PROCEEDING

This proceeding was commenced by an Order of Investigation and Hearing (Order) issued by the Commission pursuant to sections 15, 16, 17 and 22 of the Shipping Act, 1916 (46 U.S.C. 814, 815, 816 and 821), on September 11, 1978. The purpose of the proceeding is to investigate further the repeated complaints of the Port of Portland, Oregon (Portland) that the equalization and absorption

---

[1] Effective February 2, 1979, Joseph F. Kelly and his firm withdrew from this case. Douglas B. MacDonald and Barbara Gard have been substituted as attorneys of record for the Massachusetts Port Authority (Massport).

practices of the Pacific Westbound Conference and its member lines (PWC) constitute an unlawful diversion away from Portland of cargo which is "naturally tributary" to Portland, in violation of sections 15, 16, and 17 of the Shipping Act, 1916, and contrary to the policy of section 205 of the Merchant Marine Act of 1936 (46 U.S.C. 115).[2]

The order designated the following four issues for examination:

(1) Whether Article 3 of the PWC's basic Agreement No. 57 permits equalization and absorption of motor carrier inland freight rates and charges;

(2) Whether PWC's equalization and absorption practices, as they affect Portland, are unlawful and detrimental to the commerce of the United States and the general public interest, or unduly prejudicial or unjustly discriminatory to Portland or to businesses and individuals which depend on Portland's economic viability pursuant to section 205 of the Merchant Marine Act, 1936, and sections 15, 16 and 17 of the Shipping Act, 1916;

(3) Whether PWC Freight Tariff No. 3, Rule 16, violates section 205 of the Merchant Marine Act of 1936, and sections 15, 16 and 17 of the Shipping Act, 1916 by permitting equalization and absorption of cargo away from Portland where direct service is adequate to handle such cargo; and

(4) Whether PWC Freight Tariff No. 3, Rule 16 permits cargo being equalized and absorbed to move on ICC-exempt carriers.

With respect to the concept of "naturally tributary" cargo, the Order stated that the Commission would adhere to the principles recently articulated in *Council of North Atlantic Shipping Associations v. American Mail Lines, Ltd. (CONASA),* (21 F.M.C., ____ 18 S.R.R. 774 (1978)) and *Board of Commissioners of the Port of New Orleans v. Seatrain International, S.A.*, (21 F.M.C. ____, 18 S.R.R. 763 (1978)).

The proceeding was limited to the submission of affidavits of fact and memoranda of law relative to the four designated issues, and the Commission's Bureau of Hearing Counsel (Hearing Counsel) was designated a party. Petitions to intervene were received from the United States Department of Transportation (DOT), the Massachusetts Port Authority, the Delaware River Port Authority, and the Port of New Orleans. Intervention was granted to these parties on a limited basis, to allow filing of legal memoranda in reply to the opening submissions of PWC, Portland and Hearing Counsel. Memoranda were received from all intervenors except DOT.

In accordance with the procedural schedule set forth in the Order, PWC, Portland and Hearing Counsel filed opening and reply memoranda and affidavits.[3] After the filing of these memoranda and affidavits, the following motions were made: (1) Portland moved to strike the entirety of PWC's reply on the ground that the matters in it should have been raised in PWC's opening

[2] Between 1975 and 1978, Portland's objections to PWC's equalization and absorption practices were aired in a direct exchange of views and information between Portland and PWC. The progress of these discussions was monitored by the Commission. By April 1978, it had become apparent that disputed legal and factual issues surrounding PWC's equalization and absorption practices as they affect Portland had not been resolved. Consequently, on April 14, 1978, the Commission issued an order, pursuant to section 21 of the Shipping Act, 1916 (46 U.S.C. 820), requiring both PWC and Portland to file with the Commission certain relevant information concerning PWC's practices and their impact on Portland. This information was made part of the record in the present proceeding by the Commission's Order of Investigation and Hearing. That Order also incorporated into the record in this proceeding documents summarizing the earlier exchange of views and information between Portland and PWC.

[3] PWC did not present evidence with its opening memorandum, arguing that it is incumbent upon Portland first to allege what area it considers to be "naturally tributary" to it, so that PWC can frame a response. Portland presented some limited information with its opening memorandum (in the form of an affidavit, with appendices, from Milton A. Mowat, Portland's Traffic and Regulatory Affairs Manager), but did not address the "naturally tributary" issue in any detail. Portland contended that PWC should have the burden of proving its practices to be legal. Although PWC still objected to Portland's failure to define its "naturally tributary zone," it came forward in its reply memorandum with affidavits and documentary evidence intended to show that its practices are not illegal under the standards of the CONASA case.

memorandum; (2) Portland requested extensive "discovery" from PWC (even though none had been authorized by the Order); and (3) Hearing Counsel requested that the Commission dispose of certain issues without further delay and set other issues for hearing before an Administrative Law Judge.

The submission of affidavits of fact and memoranda of law by PWC and Portland, pursuant to the Commission's Order, has not resulted in a fully developed record. As a result, the Commission can, at present, resolve only part of the issues designated for decision in the Order of Investigation and Hearing. Further hearing will be required to resolve the remaining issues.

Discussion

A. *Does PWC's basic Agreement No. 57 Permit the Absorption of Inland Motor Carrier Freight Charges by PWC?*

Portland argues that the following language from Article 3 of PWC's agreement authorizes PWC members to absorb rail and coastal steamer charges, but not motor carrier charges:

"[there shall be] no absorption at loading or discharging ports of rail or coastal steamer freights or other charges . . . except as may be agreed to."

PWC and Hearing Counsel argue that the language, "or other charges" clearly includes, *ejusdem generis*, motor carrier freight rates.

In *Intermodal Service to Portland, Oregon*, (17 F.M.C. 106, 119 (1973)), the Commission held that language indistinguishable from that contained in Article 3 of the PWC agreement *does* encompass motor carrier freight charges. Portland has offered no good reason of law or policy for the Commission to deviate from this interpretation of the "or other charges" language, and this interpretation appears to reflect the intent of the parties to the PWC agreement as well as the understanding of the Commission.

Because the interpretation of Article 3 of PWC's agreement involves no outstanding factual questions, and is controlled by the reasoning of the *Intermodal Service to Portland* case, no further hearing on the issue is required. Article 3 does allow absorption of motor carrier charges as agreed to by the PWC parties.

B. *Do PWC's Equalization and Absorption Practices, as Applied to Portland, Violate Sections 15, 16, or 17 of the Shipping Act, 1916 or Section 205 of the Merchant Marine Act of 1936?*

Portland argues that any absorption of inland freight charges on cargo which would otherwise move most cheaply to Portland (as opposed to any other port) constitutes a diversion of Portland's naturally tributary cargo,[4] and that such diversion is illegal *per se* unless it can be shown that Portland's facilities or service are inadequate. To support this argument, Portland relies upon *Intermodal Service to Portland, Oregon, supra*, and ignores the fact that this case was substantially expanded in the Commission's CONASA decision.

[4] Portland was required by the Commission's section 21 Order to describe in detail the area it believed to be "naturally tributary" to it. Portland did not describe any specific area but asserted that any cargo as to which Portland was the basis for an equalization to a "more distant" port is naturally tributary to Portland.

In CONASA, the Commission set forth the following general principles, specifically designating them as guidelines to be considered in future cases involving alleged diversions of cargo from a port:[5]

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

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

A comparison of the existing record in this case (which includes responses to the Commission's section 21 order which preceded its CONASA decision) with the CONASA guidelines leads to the conclusion that the record does not address the CONASA guidelines in sufficient depth to warrant a Commission decision on the diversion issue at this time.[6] Evidence relevant to some of the CONASA factors is contained in the responses to the Commission's section 21 order.[7] PWC's reply memorandum and affidavits address several of the CONASA factors,[8] but they do not pretend to be exhaustive. Neither Hearing Counsel nor Portland have had an opportunity to respond to PWC's information, and the Commission has no basis for concluding that all of PWC's information is beyond dispute. Other relevant documents are scattered throughout the record,[9] but the record as a whole simply will not support a conclusive finding as to the legality or illegality of PWC's practices. Consequently, a further hearing is required.

C. *Does Rule 16 of PWC's Tariff No. 3[10] Violate Sections 15, 16 and 17 of the Shipplng Act, 1916 and Section 205 of the Merchant Marine Act of 1936 by*

[5] 21 F.M.C. ____, 18 S.R.R., at 779. Intervenor Massport takes the position that the CONASA guidelines cannot properly apply to this case because the CONASA case was an adjudicatory proceeding, and not a rulemaking. As a corollary to this argument, Massport asserts that the CONASA analysis (which involved minibridge movements) is inapplicable here because "the considerations applicable to such a radical variance from historical shipping patterns as minibridge must necessarily differ considerably from the considerations applicable to localized competition between adjacent ports through absorption."

The Commission's analysis in CONASA is not limited, in logic or fact, to minibridge cases, but represents a refinement in the methodology that the Commission will apply generally to all cases of cargo diversion and absorption of inland transportation costs. This methodology is no less applicable to "small diversions" (*i.e.*, those involving adjacent ports in the same range) than it is to "big diversions" (*i.e.*, minibridge movements).

[6] The Commission has also determined that environmental issues may be involved in this case, and has directed that an environmental assessment be made by its Office of Environmental Analysis.

[7] The responses (which constitute exhibits 36-68 in this proceeding), provide a partial description of PWC's equalization, in 1977, of all cargo for which Portland was the port to which the lowest inland rates applied. This description is directly pertinent to the quantity and quality of cargo being diverted (CONASA factor 2(a)), and sheds some light on the normal flow of traffic through Portland absent any equalization (factor 1(a)). The section 21 responses do not indicate the *amount* of equalization paid or the relevant inland transportation rates (factor (1)(b)).

[8] PWC's reply discusses shipper needs (factor 1(d)), the cost to carriers of providing direct service (factor 2(b)), operational difficulties in serving Portland (factor 2(c)), competitive conditions in the trade (factor 2(d)), and the fairness of its methods (factor 2(e)).

[9] *See, e.g.*, Portland's equalization list (exhibit 22), PWC's equalization statistics (exhibit 29), and PWC equalization reports (exhibit 31, placed in record by Portland).

[10] The Commission's inquiry also includes PWC Local and Overland Freight Tariff No. 11 (FMC-19), page 69, Rule 13.3.3 (effective January 1, 1979). This tariff supersedes and cancels PWC Local and Overland Freight Tariff No. 3 (FMC-13). Rule 16 of

Permitting Equalization Away From Portland Where Direct Service is Adequate to Handle Such Cargo?

Equalization, as such, is not illegal[11] and a tariff that allows for equalization therefore is not *per se* illegal. It is only the *application* of the tariff in a particular manner that can be illegal. The legality of PWC's Tariff No. 3 apart from its application does not present a separate legal issue in this case. Additionally, the question of adequacy of Portland's service is only *one* of the factors to be considered under the CONASA guidelines, and is not dispositive by itself of the legality of an equalization. For the foregoing reasons, the Commission concludes that PWC's Rule 16, Tariff No. 3, does not, in and of itself, violate sections 15, 16 or 17 of the Shipping Act, 1916, or contravene section 205 of the Merchant Marine Act of 1936. The question of the legal *application* of the Rule still remains within Issue (B), *supra*. If an illegal implementation of PWC's tariff were proved, then modification of the tariff to prohibit such implementation could be required.

D. *Does PWC's Rule 16, Tariff No. 3*[12] *Permit Cargo Being Equalized to Move on ICC-Exempt Carriers?*

PWC's equalization rule provides for the payment of equalization as follows:

> Equalization is the absorption by the ocean carrier of the difference between the shipper's cost of delivery to the ship's tackle at dock and port at which the lowest applicable common carrier or contract carrier rates, excluding rates on any time basis apply and cost of delivery to ship's tackle at terminal dock and port of equalizing line. Shipper's cost for inland transportation is to be an amount that is not in excess of the cost computed at the lowest applicable common carrier or contract carrier rates.

Portland argues that this provision should be read to restrict shippers of equalized cargo to the use of "common or contract carriers" as defined by the Interstate Commerce Commission (ICC). Put another way, Portland's contention is that PWC's tariff forbids the use of ICC-exempt carriers for equalized shipments. Portland furnishes no persuasive reason for imposing such a limitation, and cites no Commission precedent for such an interpretation.

PWC's equalization rule clearly refers to "applicable common carrier or contract carrier *rates*" (emphasis supplied) for the purpose of setting the amount of equalization to be paid, and *not* for the purpose of restricting shippers to ICC regulated carriers.[13] The latter purpose represents poor transportation policy by arbitrarily restricting the use of inland transportation resources by shippers in foreign commerce. It is therefore the Commission's conclusion that PWC's equalization rule does authorize the use of ICC exempt carriers for the transport of equalized cargo.

---

which contained the equalization provisions referred to by Portland and PWC in their memoranda. Rule 13.3.3 of PWC Tariff No. 11 contains language indistinguishable from that contained in Rule 16 of PWC Tariff No. 3. Therefore, the original investigation of this language applies equally to PWC's present Rule 13.3.3 of its Tariff No. 11.

[11] *See* CONASA, 18 S.R.R. at 779, *Port of New Orleans*, 18 S.R.R. at 770-772, *Stockton Port District v. Pacific Westbound Conference*, 9 F.M.C. 12, 20 (1965), and *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 500, 504 (1941).

[12] The Commission's inquiry also includes PWC's Rule 13.3.3, Tariff No. 11 (FMC-19). *See* Note 10, *supra*.

[13] If the tariff is interpreted as referring *only* to *ICC* rates rather than the lowest applicable common or contract carrier rates, applications of the tariff Rule to ICC-exempt shipments could result in rebates to shippers who carry their own goods to port in violation of section 16 Second of the Shipping Act, 1916. Therefore, neither the *type* of carrier used nor the *amount* of equalization to be paid is necessarily governed by ICC definitions or rates.

CONCLUSIONS

It is concluded as a matter of law that: (1) Article 3 of PWC's Agreement No. 57 does permit equalization and absorption of motor carrier inland freight rates and charges; (2) PWC freight tariff No. 11, Rule 13, (and PWC freight tariff No. 3, Rule 16), are not violative of section 205 of the Merchant Marine Act, 1936 or sections 15, 16 or 17 of the Shipping Act, 1916, on their face; and (3) PWC Freight Tariff No. 11, Rule 13 (and PWC Freight Tariff No. 3, Rule 16) do permit cargo being equalized and absorbed to move on ICC-exempt carriers.

It is further concluded that the lawfulness, under section 205 of the Merchant Marine Act, 1936 and sections 15, 16 and 17 of the Shipping Act, 1916, of PWC's equalization and absorption practices as they affect Portland, cannot be determined conclusively from the present record. For these reasons, a further hearing will be ordered. In the interest of avoiding excessive delay of this proceeding, the scope of the additional evidence to be taken will be limited so as to fit with the pertinent data already received.

THEREFORE, IT IS ORDERED, That the motion of the Port of Portland to strike the reply of the Pacific Westbound Conference, and the request of the Port of Portland for discovery, are denied; and

IT IS FURTHER ORDERED, That the request of the Bureau of Hearing Counsel for a further hearing is granted to the extent set forth below; and

IT IS FURTHER ORDERED, That to determine the legality, under section 205 of the Merchant Marine Act of 1936 and sections 15, 16 and 17 of the Shipping Act, 1916, of the Pacific Westbound Conference's equalization and absorption practices as they affect the Port of Portland, a further hearing shall be held before an Administrative Law Judge of the Commission; and

IT IS FURTHER ORDERED, That the Commission's Bureau of Hearing Counsel shall be a party to the hearing before the Administrative Law Judge; and

IT IS FURTHER ORDERED, That the issues to be considered at the hearing before the Administrative Law Judge shall be restricted to the following:

(1) Whether and to what extent the equalization and absorption practices of the Pacific Westbound Conference cause cargo which would ordinarily move through the Port of Portland to move through ports other than Portland?

(2) Does the diversion of cargo described in issue (1), if any, cause *significant* economic harm to the Port and the local economy of Portland?; and

(3) If the equalization and absorption practices of the Pacific Westbound Conference do cause significant economic harm to Portland, are they nonetheless reasonable and justified?; and

IT IS FURTHER ORDERED, That the additional evidence to be gathered in the proceeding before the Administrative Law Judge shall be limited to the following, unless the Administrative Law Judge finds compelling reasons to go beyond this limitation:

A. For the years 1977[14] and 1978, the information described in the first ordering paragraph of the Commission's April 14, 1978 section 21 order, but only as to the ten most important cargo commodities (in terms of gross revenue to the Port of Portland) carried by the Pacific Westbound Conference in 1978;

[14] For the year 1977, this information may be extracted from previous section 21 order responses once the ten most important commodities of 1978 have been determined.

B. For the years 1977 and 1978, as to the ten commodities described in paragraph A, the amount of equilization paid by the Pacific Westbound Conference and the basis for such equalization payments[15]; and

C. Affidavits or, if considered necessary by the Administrative Law Judge, depositions, concerning the following matters, but only to the extent that these affidavits or depositions relate to the ten commodities described in paragraph A, and then only to the extent that they relate to shipments occurring in 1977 or 1978:

1. Natural, geographical or economic conditions of inland transportation which favor or impede movements through the Port of Portland;
2. The ability of the Port of Portland to meet the needs of shippers, such as timeliness of shipments and special cargo handling facilities;
3. The extent to which equalization payments, as opposed to other factors, induced shippers to move their cargo through a port other than Portland;
4. The extent, if any, to which Portland's ability to meet shipper demand was limited by the level of port calls of members of the Pacific Westbound Conference;
5. The amount of net revenue lost by the Port of Portland as a result of cargo diversion caused by equalization payments, and the effect of such loss on the local economy of Portland; and
6. The methods and scope of cargo solicitation employed by Portland, Seattle, Los Angeles-Long Beach and the Pacific Westbound Conference, to the extent considered relevant by the Administrative Law Judge.

D. Affidavits or, if considered necessary by the Administrative Law Judge, depositions concerning the following matters, but only to the extent that they address time periods after December 31, 1976:

1. The cost to member lines, or the Pacific Westbound Conference as a whole, of providing direct service to Portland with various amounts of frequency;
2. Operational difficulties or other transportation factors bearing upon the ability of the Pacific Westbound Conference to provide increased direct service to Portland;
3. Competitive conditions of carriers in the westbound trade affecting the ability of the Pacific Westbound Conference to increase its direct service to Portland; and
4. The economic feasibility to the Pacific Westbound Conference of serving Portland via feeder vessels to other ports; and

E. Interrogatories, and answers thereto, and discovery of documents, as allowed by the Administrative Law Judge, but only to the extent relevant to the issues described in paragraphs A through D above; and

IT IS FURTHER ORDERED, That the participation of intervenors in this further hearing shall be limited to the submission of memoranda of law at the close of the taking of evidence before the Administrative Law Judge, and the filing of exceptions, or replies thereto, to any initial decision of the Administrative Law Judge.

(S) FRANCIS C. HURNEY
Secretary

[15] The purpose of this paragraph is to obtain the most detailed information possible with respect to the *amount* of equalization paid and applicable inland rates without causing undue burden to the parties or undue expansion of the record. Accordingly, the Administrative Law Judge may alter the scope of this inquiry to balance the need for detailed information against the interest in arriving at a manageable record.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 390(I)

CUMMINS ENGINE CO.

v.

UNITED STATES LINES

INFORMAL DOCKET NO. 391(I)

CUMMINS ENGINE CO.

v.

AMERICAN PRESIDENT LINES

INFORMAL DOCKET NO. 392(I)

CUMMINS ENGINE CO.

v.

MAERSK LINES, LTD.

ORDER ON RECONSIDERATION

April 5, 1979

These three proceedings are before the Commission on Petition for Reconsideration (Petition) filed by Cummins Engine Co. (Cummins), requesting the Commission to reconsider its decision and the decision of the Settlement Officer denying reparation. The complaints filed in these proceedings allege freight overcharges in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)), by United States Lines, American President Lines, and Maersk Lines, Ltd. (collectively referred to as Respondents). The Japan/Korea-Atlantic and Gulf Freight Conference (Conference), whose tariff is the subject of the controversy, was granted leave to intervene.

At the request of Cummins and with the consent of Respondents, the proceedings were conducted under Subpart S of the Commission's Rules of Practice and

Procedure (Rules) which gives the parties no right of appeal.[1] Having waived such right by requesting the Subpart S procedure, Cummins, now faced with an adverse decision, seeks to circumvent the Rules by filing exceptions under another guise, *i.e.*, petition for reconsideration. The Petition offers no new evidence or arguments not already considered and will be denied.

This denial would normally obviate any further discussion of the matter. However, in view of the different decision reached on the merits by the Settlement Officer in *Cummins Engine Co. v. United States, Inc.*, Informal Docket No. 330(I), a proceeding involving the same issue, some clarification of the Commission's policy in this regard is appropriate.[2]

The facts in this proceeding are as set forth in the decision of the Settlement Officer. The question raised is whether there existed an ambiguity in the Conference's tariff which, according to established principles, should be resolved in favor of the shipper. Cummins contends that in the absence of any other qualification, the tariff commodity description "Cylinder Block Assemblies With or Without Crankshaft," is broad enough to cover all parts and pieces that "either attach to, or, are fitted into the cylinder block and ultimately result in the completed cylinder block assembly." The Conference maintains that the description encompasses only the cylinder block, the main bearing caps, and the crankshaft, if attached to the cylinder block.

In Informal Docket No. 330(I) the award of reparation was based upon the finding that the failure to specify in the tariff what component parts constitute a "cylinder block assembly" caused an ambiguity in the tariff which had to be resolved in favor of the shipper. The Settlement Officer in these proceedings distinguished that decision on the basis of the record in Docket No. 330(I) which was not as fully developed as the record here. In his opinion had the defenses presented in the instant proceedings been raised in the former proceeding, the result in Informal Docket No. 330(I) would probably have been different.[4]

The evidence introduced by the Conference in the instant proceedings clearly establishes that, although there is a question of whether other potential shippers of the same commodities could have been misled, Cummins, at least, was fully apprised beforehand of the tariff classification and rates the Conference would apply.[5] While such knowledge by one shipper would not of itself generally make an ambiguous tariff unambiguous, it does serve to put the matter into proepr perspective. The Conference's repeated refusals to establish the commodity description Cummins had persistently requested and Cummins' continuous use of Conference vessels notwithstanding, implies consent on Cummins' part to the rates expected to be charged. Indeed, not only had Cummins requested the Conference to file the now disputed tariff description "cylinder block assembly," but in reply to the Conference's expressed concern over the nature of the commodity so described, Cummins itself explained that a cylinder block assem-

---

[1] Subpart S—Informal Procedure for Adjudication of Small Claims, 46 C.F.R. 502.301, 502.304.

[2] Decision of the Settlement Officer served March 3, 1976, adopted by the Commission on November 17, 1976.

[4] The reference is to correspondence between Cummins and the Conference which shows that since 1966 Cummins has repeatedly requested and the Conference consistently denied the establishment of a generic commodity description which would encompass all *pieces and parts that go into a diesel engine.*

[5] No complaint alleging tariff ambiguity was received from any other shipper.

bly consisted basically of the cylinder block and the main bearing caps and capscrews and that other miscellaneous parts "such as dowels, buckings and pipe plugs . . . make up less than one-half of one percent by weight, volume or value of the total cylinder block."[6] It appears, therefore, that Cummins not only knew what was in fact meant by the tariff but had itself contributed to whatever ambiguity it now contends exists.

Permitting an award of reparations to Cummins under these circumstances would not be warranted.

The Petition for Reconsideration is therefore denied.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[6] Letter of March 11, 1968, to the Conference from R.O. Christian, Cummins' Corporate Transportation Manager. Cummins argues that since that time its purchases from Japanese suppliers have increased "and had they been involved at that time, would have been included by Mr. Christian". The fact is, however, that they were not.

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–10

UNION CAMP CORPORATION, ET AL.—
POSSIBLE VIOLATION OF SECTIONS 15,
16, 18 AND 44 OF THE SHIPPING ACT, 1916 AND
COMMISSION GENERAL ORDER NO. 4

ORDER OF DISCONTINUANCE

April 6, 1979

On April 20, 1978, the Commission served its order of Investigation and Hearing in this proceeding. The action arose from activities in 1972, 1973, and 1975, involving volume contracts between Union Camp Corporation and Open Bulk Carriers, Ltd. for the carriage of linerboard and wood pulp from U.S. South Atlantic ports to ports in Europe. The Order cited possible violation of the Shipping Act, 1916 and of 46 CFR 510.23(a).

On August 24, 1977, the Government filed Civil Action No. CV477–193 in the U.S. District Court for the Southern District of Georgia seeking civil penalties for claimed violations of the Shipping Act of 1916. On April 24, 1978, the Government filed a Motion for Stay Pending Federal Maritime Commission Hearing and Investigation seeking determination of issues by the FMC in this proceeding rather than by the District Court.

The Commission's Order of Investigation and Hearing in this proceeding issued in accordance with the Government's motion in the District Court contained the following qualifying language:

IT IS FURTHER ORDERED, That this order shall become effective upon the District Court's entry of a stay of its proceedings pending the Commission's hearing and investigation.

On January 19, 1979,following argument and briefing, Judge Alexander A. Lawrence, Senior Judge of the U.S. District Court, entered his Order on Government's Motion for Stay and Ebberwein's Motion to Dismiss. In addition to ruling on other matters, Judge Lawrence denied the Government's motion to stay the District court proceeding.

Inasmuch as the Commission's Order of Investigation and Hearing in this proceeding was conditioned upon the stay of the District Court proceedings, and such stay has been denied, no further proceedings are contemplated in this matter. Accordingly, the motion of Hearing Counsel for discontinuance is granted.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–44

AGREEMENT BETWEEN PUERTO RICO MARITIME SHIPPING AUTHORITY AND PUERTO RICO MARINE MANAGEMENT, INC./ PUERTO RICO MARINE OPERATING COMPANY, INC.

ORDER ON RECONSIDERATION

April 12, 1979

Caribe Trailer Services, Inc. (Caribe) has filed a Petition for Reconsideration (Petition) of the Commission's January 3, 1979, Report and Order (Order) discontinuing this proceeding.[1] In the Order, the Commission found that the corporate affiliation which constituted the central issue to be resolved in the proceeding ceased to exist on January 15, 1976, that the Management Services Contract which was the subject of the Commission's investigative proceeding ceased to exist on or about June 30, 1978, and that no further investigation or Commission action was warranted under the circumstances.

In its Petition, Caribe objects to the Order on three basic grounds: (1) that there was no adequate basis in the record for the Commission's findings that the corporate affiliation between Puerto Rico Marine Management (PRMMI) and Sea-Land Service, Inc. (Sea-Land) had ended and that the Management Services Contract had ceased to exist; (2) that there was insufficient consideration given, during the proceeding and in the Order, to public interest and antitrust issues; and (3) that section 15 of the Shipping Act, 1916 and due process considerations preclude the Commission from terminating its investigation without first making a ruling or expressing an opinion as to the applicability of section 15 to the Management Services Contract. Responses in opposition to the Petition were received from the Commission's Bureau of Hearing Counsel, the Puerto Rico Maritime Shipping Authority (PRMSA), and Sea-Land Service, Inc./Gulf Puerto Rico Lines, Inc.

DISCUSSION

1. *The Commission's Findings*

a. *End of Corporate Affiliation*

In its Order, the Commission found that, "[o]n January 15, 1976, the corpo-

[1] This proceeding was a Commission investigation instituted pursuant to sections 15 and 22 of the Shipping Act, 1916 (46 U.S.C. 814 and 821). The primary purpose of the proceeding was to determine whether a Management Services Contract between the Puerto Rico Maritime Shipping Authority and Puerto Rico Marine Management, Inc. is subject to section 15 of the Shipping Act, 1916, by reason of the Puerto Rico Marine Management, Inc.'s corporate affiliation with Sea-Land Service, Inc., and, if so, whether the agreement should be approved, disapproved or modified.

rate relationship which represents the central issue in this proceeding ceased to exist." as a result of the sale of PRMMI to TKM Corporation, a company unrelated to Sea-Land. This finding is supported by competent evidence[2] of record.[3] Caribe availed itself of numerous opportunities to comment on this evidence,[4] but did not come forward with any information contradicting it. Similarly, Caribe's Petition voices numerous objections[5] to the Commission's consideration of evidence demonstrating the sale of PRMMI to TKM, but offers no new evidence to refute the evidence of record. Despite several opportunities, and most recently in its Petition, Caribe raised no serious issues of law or fact that would warrant reconsideration of the Commission's finding that PRMMI is no longer a corporate affiliate of Sea-Land.

b. *Termination of the Management Services Contract*

The Commission also has found that, "[o]n or about June 30, 1978, the Management Services Contract that constituted the subject of this investigation ceased to exist. In a well-publicized action, PRMSA paid its outstanding obligations under the Management Services Contract and terminated the Contract." These findings were facts within the general knowledge of the Commission as an expert body, and were a proper subject of official notice under the Commission's Rules of Practice and Procedure.[6] By announcing the extra-record factual basis for its findings, the Commission made it clear that it was taking official notice of these matters in its final Order.[7] Caribe was afforded an opportunity to show that these facts do not exist through the use of the Commission's Rules for Reconsideration of Proceedings.[8] Caribe filed its Petition, but failed to allege or prove any facts contradicting the Commission's official notice. In view of the fact that Caribe did not allege that the Commission's official notice as to the termination of the Management Services Contract was *factually* incorrect, but complained only that it was based upon "hearsay," Caribe's objection to the official notice is without substance.

2. *Public Interest and Antitrust Issues*

The gravamen of this portion of Caribe's complaint is that the Commission did not address the alleged antitrust violations surrounding the unfiled agreement(s) under investigation in the proceeding. Since no determination has been made that

[2] *See* Exhibit A to PRMSA's January 21, 1976, Motion to Discontinue (Stock Purchase Agreement), and Exhibits A and B to Hearing Counsel's February 5, 1976, Reply to PRMSA's Motion (Ancillary Agreement, and Affidavit of Charles F. Benbow).

[3] Commission Rule 169 (46 C.F.R. *Part 169*) provides:

> The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision.

[4] *See* Caribe's February 5, 1976 Answer to PRMSA's Motion to Dismiss, Caribe's February 8, 1976 letter to the Administrative Law Judge, Caribe's "First Amended Reply" of February 12, 1976 and its "Second Amended Reply" of February 26, 1976.

[5] Caribe argues that the Administrative *Law Judge should have reopened the proceeding* to admit evidence of the sale to TKM, and that "[t]he only reason why the Judge did not re-open the proceedings and properly admit the affidavit was that the affidavit was known by all parties to be fraudulent and presented for the purposes of discontinuing a federal proceeding and that it would not stand the scrutiny of a hearing." *In light of the fact that Caribe can articulate no plausable basis for its suspicions of fraud,* a further hearing to allow Caribe to air those suspicions is not warranted.

Caribe refers, at pages 5-6 of its Petition, to "ex parte" communcations between Hearing Counsel and counsel for Sea-Land. Since neither *Hearing Counsel nor Sea-Land's counsel are persons "participating in" the* Commission's decision in this case, communications between them are not "ex parte." within the meaning of the Commission's Rules. *See* 46 C.F.R. Part 502.11, formerly codified at 46 C.F.R. Part 502.170.

[6] Rule 226 (46 C.F.R. Part 502.226).

[7] The Commission may take official notice of facts at any stage of a proceeding, including its final decision. *See Attorney General's Manual on the Administrative Procedure Act* (1947), *p. 80.*

[8] Rule 261 (46 C.F.R. Part 502.261).

an agreement was ever *subject to* section 15 of the Shipping Act, 1916, it is clearly premature and inappropriate for the Commission to determine whether such an agreement would be *approvable* under the standards of that section. Analysis of public interest issues, including antitrust considerations, should be undertaken only after jurisdiction to engage in such analysis has been found.[9]

3. *Termination of the Proceeding*

Caribe's final contention is that the Commission is legally required to pass on the question of whether the PRMSA-PRMMI Management Services Contract was subject to section 15 of the Shipping Act.

Caribe apparently believes that the Commission must address this question even though: (1) there is no longer any legal theory under which both parties could be found to be persons subject to the Shipping Act; (2) the agreement no longer exists; and (3) there is no evidence of fraud by either party in attempting to avoid the Shipping Act. Caribe acknowledges that the Commission has in the past discontinued proceedings under similar circumstances,[10] but argues that so long as there is a possibility that a past violation of the Shipping Act might be discovered, the Commission cannot discontinue the proceeding. In view of the three factors mentioned above, the Commission concludes that further proceedings in this case would serve no important regulatory purpose, and would be wasteful of the time and resources of the Commission and the parties. Under such circumstances, the Commission is empowered to terminate the proceedings.

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration of Caribe Trailer Services, Inc. is denied, and the Commission's Report and Order of January 3, 1979, is affirmed.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[9] If violations of the antitrust laws have occurred, Caribe is free to seek damages through judicial proceedings.

[10] *See Kerr Steamship Co. v. Isthmian Steamship Co.*, 2 U.S.M.C. 93 (1939); *Port Commission of the City of Beaumont v. Seatrain Lines, Inc.*, 3 F.M.B. 581 (1951); and *Agreement No. 9431, Hong Kong Tonnage Agreement*, 10 F.M.C. 134 (1966).

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-10

JOY MANUFACTURING CO.

v.

LYKES BROS. STEAMSHIP CO., INC.

NOTICE

April 13, 1979

Notice is given that no exceptions were filed to the March 7, 1979 initial decision on remand in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, review will not be undertaken.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 76-10

JOY MANUFACTURING CO.

v.

LYKES BROS. STEAMSHIP CO., INC.

Finalized on April 13, 1979

Applicable freight charges on numerous shipments determined to total $194,375.38. Overcharges and undercharges determined. Net undercharges are $6,145.87.

William Levenstein for complainant.

Edward S. Bagley for respondent.

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

The factual background is stated in the initial decision served March 17, 1977, and in the Commission's decision served January 16, 1979. These decisions resolved certain primary legal issues, but left the proceeding open so that the parties could submit verified statements containing their computations of the applicable charges, the overcharges, and the undercharges on the articles shipped covered by the 23 bills of lading herein. The parties were given until February 5, 1979, to submit such statements, and the matter was remanded to the Administrative Law Judge for determination of the applicable charges.

Certain letters (with attachments) dated December 27, 1978 (Bagley for respondent), January 12, 1979 (Bagley for respondent), January 31, 1979 (Levenstein for complainant), February 6, 1979 (Bagley for resondent), and February 14, 1979 (Levenstein for complainant) have supplemented the previous record.

Rule 502 of the Rules of Practice and Procedure (46 CFR 502.252) provides that when the Commission finds that reparation is due, but that the amount cannot be ascertained upon the record before it, reparation statements shall be prepared in accordance with Appendix II(4) of the rules. This appendix calls for details of the shipments. Among other things the reparation form requires that the reparation statement include the rates charged, the amounts of the charges paid, as well as the applicable rate and applicable charges, along with weights and measurements and other necessary details.

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

The statements filed by the parties do not jibe in numerous respects, and lack various details. Nevertheless, the Administrative Law Judge with the aid of these statements, and the exhibits of record, has determined below the actual charges collected, the applicable rates, applicable charges, undercharges, and overcharges.

First below is a determination of the charges paid on the shipments.

In Mr. Bagley's letter dated December 27, 1978, the first attachment purports in its second column to show the amounts of freight paid. For example, for bill of lading #120, Dolly Turman, April 5, 1974, respondent shows $8,368.31 as freight paid. This apparently omits bunker fuel surcharge of $934.39 and tollage of $27.70. Total charges paid apparently were $9,330.40 on bill of lading #120. Similarly other computations of Bagley fail to state the total applicable charges.

For bill of lading #123, Dolly Turman, April 5, 1974, respondent on December 27, 1978, shows $31,066.61, to which must be added bunker fuel surcharge $3,468.85, heavy lift charge of $2,169.33, and tollage of $38.80. Total charges paid apparently were $36,743.59.

For bill of lading #124, Dolly Turman, April 5, 1974, freight charges paid were $3,706.81, plus bunker fuel surcharge of $413.90, heavy lift $176.08, and tollage $9.44. Total charges paid apparently were $4,306.23.

For bill of lading #125, Dolly Turman, April 5, 1974, freight charges paid were $4,731.17 plus bunker fuel surcharge of $528.28, heavy lift $464.23 and tollage $11.61. Total charges paid apparently were $5,735.20

For bill of lading #126, Dolly Turman, April 5, 1974, freight charges paid were $487.20 plus bunker fuel surcharge of $54.40 and tollage of $0.59. Total charges paid apparently were $542.19.

For bill of lading #132, Dolly Turman, April 5, 1974, freight charges paid were $4,495.18, plus bunker fuel surcharge of $501.93 and tollage of $2.48. Total charges paid apparently were $4,999.59.

For bill of lading #133, Dolly Turman, April 5, 1974, freight charges paid were $18,205.29, plus bunker fuel surcharge $2,032.78 and tollage $18.82. Total charges paid apparently were $20,256.89.

For bill of lading #58, Gulf Shipper, April 12, 1974, freight charges paid were $6,841.19, plus bunker fuel surcharge $763.88 and tollage $22.65. Total charges paid apparently were $7,627.72.

For bill of lading #59, Gulf Shipper, April 12, 1974, freight charges paid were $5,016.64, plus bunker fuel surcharge of $560.15 and tollage of $7.88. Total charges paid apparently were $5,584.67.

For bill of lading #73, Gulf Shipper, April 12, 1974, freight charges paid were $6,769.69, plus bunker fuel surcharge $755.89 and tollage $22.41. Total charges paid apparently were $7,547.99.

For bill of lading #164, Thompson Lykes, April 25, 1974, freight charges paid were $407.27, plus bunker fuel surcharge $45.48 and tollage $0.86. Total charges paid apparently were $453.61.

For bill of lading #93, Thompson Lykes, April 25, 1974, freight charges paid were $15,601.82, plus bunker fuel surcharge $1,742.08, heavy lift charge $549.12, and tollage $15.81. Total charges paid apparently were $17,908.83.

For bill of lading #94, Christopher Lykes (as per bill of lading, also referred to by the parties as Sheldon Lykes), May 3, 1974, freight charges paid were $299.06, plus bunker fuel surcharge $33.39 and tollage $0.99. Total charges paid apparently were $333.44.

For bill of lading #136, Mayo Lykes, April 24, 1974, freight charges paid were $20,043.71, plus heavy lift $158.18 and bunker fuel surcharges $2,238.05. Total charges paid apparently were $22,439.94.

For bill of lading #141, Solon Turman, July 30, 1974, freight charges paid were $14,843.83, plus heavy lift $312.83, bunker fuel surcharge $1,657.44, tollage $25.33 and 15 percent port detention surcharge applicable on and after May 31, 1974, of $2,273.50 based on the freight charges plus heavy lift charges. Total charges paid apparently were $19,112.93.

For bill of lading #119, Sheldon Lykes, July 2, 1974, freight charges paid were $224.57, 15% detention surcharge of $33.69, bunker fuel surcharge of $25.08 and tollage of $0.38. Total charges paid apparently were $283.72.

For bill of lading #73, Solon Turman, August 6, 1974, freight charges paid were $190.31, plus 15% detention charge of $28.55 and bunker fuel surcharge of $21.25. Total charges paid apparently were $240.11.

For bill of lading #133, Charlotte Lykes, September 3, 1974, freight charges paid were $13, 964.93, plus heavy lift $831.41, 15% detention $2,219.45, and bunker fuel surcharge of $1,559.31. Total charges paid apparently were $18,575.10.

For bill of lading #45, Christopher Lykes, September 14, 1974, freight charges paid were $1,933.58, plus 15% detention $290.04, bunker fuel surcharge $215.90 and tollage $2.40. Total charges paid apparently were $2,441.92.

For bill of lading #33, Adabelle Lykes, October 14, 1974, freight charges paid were $379.88, plus 15% detention $56.98, bunker fuel surcharge $42.42 and tollage $1.68. Total charges paid apparently were $480.96.

For bill of lading #8, Aimee Lykes, October 24, 1975, freight charges paid were $863.20, plus 15% detention $129.48 and bunker fuel surcharge $96.38. Total charges paid apparently were $1,089.96.

For bill of lading #40, Gulf Shipper, November 22, 1974, freight charges paid were $1,355.03, plus 25% detention $338.76 and bunker fuel surcharge $151.30. Total charges paid apparently were $1,845.09. (The Mombasa detention charge was increased from 15 to 25% effective November 10, 1974.)

For bill of lading #83, Gulf Merchant, December 13, 1974, freight charges paid were $256.65, plus 25% detention $64.16, bunker fuel surcharge $28.66, and tollage $0.77. Total charges paid apparently were $350.24.

The above completes the determination of total freight and miscellaneous charges paid.

Secondly, an attempt will be made to determine the applicable charges on the various shipments.

On bill of lading #120, Dolly Turman, April 5, 1974, using item 1875 of the tariff and the rate of $92 W (including $25 per ton Capetown to Mombasa differential), the applicable freight charges on 123,120 pounds (ton of 2,240 pounds) are $5,056.71, plus bunker fuel $934.39 and tollage of $27.70, or a grand total of $6,018.80. This shipment was overcharged $3,311.60.

All references to applicable rates herein will include the $25 per ton Capetown-Mombasa differential.

On bill of lading #123, Dolly Turman, April 5, 1974, for the vibrating screen, using item 2140 of the tariff and the rate of $152.25, the applicable freight charges on 310 cubic feet are $1,179.94. For pumps, using item 2115 and the rate of $152.25,[2] the applicable freight charges on 127[3] cubic feet are $483.39. For the flotation machine and other related pieces, using item 2140 and the rate of $152.25, the applicable freight charges on 5,040 cubic feet are $19,183.50. These pieces being packed 24,400 lbs. to a package were subject to heavy lift charges of $14.35 per 40 cubic feet, or $1,808.10. For more flotation machines and pieces, the applicable freight charges on 1993 cubic feet are $7,585.86. Four packages each weighing 15,600 lbs. were subject to heavy lift charges of $7.25 per 40 cubic feet, or $361.23. For V-Belt drive guards, using item 2140 and the N.O.S. rate of $175.50, the applicable freight charges on 387.58+ cubic feet, rounded to 388 cubic feet, are $1,702.35. For a jaw crusher, using item 2140 and the crushing machine rate of $152.25, the applicable freight charges on 20 cubic feet are $76.13. For the rod mill, using item 2140 and the $152.25 rate, the applicable charges on 27 cubic feet are $102.77. On the automatic sampler mechanism, using item 2140 at the N.O.S. rate of $175.50, the applicable charges on 36 cubic feet are $157.95. On the flotation machinery using item 2140 at the $152.25 rate, the applicable charges on 227 cubic feet are $864.02. On the total cubic feet of 8163 in bill of lading 123, the bunker fuel charge at $17 per ton is $3,469.28. The total applicable charges on bill of lading #123 are $36,974.52, plus tollage of $38.80, or a grand total of $37,013.32. On bill of lading #123, these shipments were undercharged $269.73.

On bill of lading #124, Dolly Turman, April 5, 1974, for the whale back apron feeder, using item 2140 and the rate of $152.25, the applicable charges on 370 cubic feet are $1,408.31. Heavy lift charges on 18,400 lbs. at $8.90 per 40 tons as freighted on 370 cubic feet are $82.33. On the jaw crusher, item 2140 and the rate of $152.25, the applicable charges on 21,000 lbs. are $1,427.34. Heavy lift charges on 21,000 lbs. at $10 per ton as freighted are $93.75. On the chain cases, item 2140, N.O.S. rate of $175.50, the applicable charges on 68 cubic feet are $298.35. On the drive guard, same N.O.S. rate, the applicable charges on 144 cubic feet are $631.80. On the hydraulic jack and parts, same N.O.S. rate, the applicable charges on 945 lbs. are $74.04. Bunker fuel charges on 21,945 pounds at $17 per ton as freighted are $166.55, and on 582 cubic feet as freighted are $247.35. Tollage was $9.44. The grand total of applicable charges on bill of lading #124 was $4,439.26. The undercharges on bill of lading #124 were $133.03.

On bill of lading #125, Dolly Turman, April 5, 1974, both parties agree that the applicable charges, including $11.61 tollage total $6,457.78. It is so found. Undercharges on this bill of lading are $722.49.

---

[2] Contract, rather than non-contract rates are used since Joy was a contract shipper.

[3] Based on 76 inches × 45 inches × 64 inches, rounded to nearest cubic foot.

On bill of lading #126, Dolly Turman, April 5, 1974, both parties are in agreement except for a $3 error in addition. It is found that the total applicable charges are $616.59. Undercharges are $74.40.

On bill of lading #132, Dolly Turman, April 5, 1974, on the crane girder, item #2115, rate of $175.50, the applicable charges on 1,875,820 cubic inches, or 1086 cubic feet, are $4,764.83. Since the pieces were about 59 feet long, extra length charges at $5.30 per 40 cubic feet were $143.90 and heavy lift charges on 9,132 lbs. at $4.50 per ton as freighted on 1086 cubic feet were $122.18. On the hoist and trolley, item 2140, rate of $152.25, the applicable charges on 86,833 cubic inches, or 50 cubic feet, are $190.31. On the conductor bar assembly, item 2140, N.O.S. rate of $175.50, the applicable charges on 13 cubic feet are $57.04. On the bridge drive-motor and gear box, item 2380, rate of $174.50, the applicable charges on 19 cubic feet are $82.89. Bunker fuel charges on 1168 cubic feet at $17 a ton are $496.40. Please note that while the total cubic feet listed on the bill of lading is 1181, the attached packing list for Exhibit #6 shows a total of only 1168 cubic feet. Tollage is $2.48. The total applicable charges on bill of lading 132 are $5,860.03. Undercharges on bill of lading #132 are $860.44.

On bill of lading #133, Dolly Turman, April 5, 1974, on the motor feeder, item 2140, rate of $152.25 on feeders, the applicable charges on 25 cubic feet are $95.16. On softener piping, item 2140, N.O.S. rate of $175.50, the applicable charges on 48 cubic feet (47.5 rounded to 48) are $210.60. On iron pipe and fittings, item 1875, rate of $107.75 the applicable charges on 25 cubic feet are $67.34. On iron pipe and valves on 78 cubic feet, item 1875, rate of $145.75, the applicable charges on 78 cubic feet are $284.21. On iron pipe (laterals), item 1875, rate of $107.75, the applicable charges on 17 cubic feet are $45.79. On P/E solution tank, item 625, rate of $182.75, the applicable charges on 17 cubic feet are $77.67. On steel drums anthralift for filters, item 2140 filters, rate of $152.25, the applicable charges on 864 cubic feet are $3,288.60. On sand for filters, item 625, N.O.S. rate of $182.75, the applicable charges on 360 cubic feet are $1,644.75. On gravel for filters, item 1655, rate of $109.50, the applicable charges on 20,784 lbs. are $1,016.00. On filter tanks, item 625, N.O.S. rate of $182.75, the applicable charges on 2005 cubic feet are $9,160.34. On resin, item 3070, rate of $77, the applicable charges on 180 cubic feet are $346.50. On gravel, item 1655, rate of $109.50, the applicable charges on 2132 lbs. are $104.22. On gravel, same item, and rate, the applicable charges on 1932 lbs. are $94.44. On softener tank, item 625, rate of $182.75, the applicable charges on 362 cubic feet are $1,653.89. On brine tank, same item and rate, the applicable charges on 134 cubic feet are $612.21. Bunker fuel charges on 4115 cubic feet at $17 per ton are $1,748.88, and on 24,848 lbs. are $188.58. Tollage was $19.48. The total applicable charges on bill of lading 133 are $20,658.66. Undercharges are $401.77 on bill of lading #133.

On bill of lading #58, Gulf Shipper, April 12, 1974, the parties are agreed that the total applicable charges are $7,627.72. It is so found. There are no overcharges and no undercharges on this bill of lading.

On bill of lading #59, Gulf Shipper, April 12, 1974, the parties are agreed that the total applicable charges are $6,350.76. It is so found. Undercharges on this bill of lading are $766.09.

On bill of lading #73, Gulf Shipper, April 12, 1974, the parties are agreed that total applicable charges are $7,547.99. It is so found. There are no overcharges and no undercharges on this bill of lading.

On bill of lading #164, Thompson Lykes, April 25, 1974, on electric motors, item 2380, rate of $174.50, the applicable charges on 95,256 cubic inches each in 2 boxes, or 110 cubic feet are $479.88 plus bunker fuel charges of $46.75 and tollage of $0.86, or total applicable charges of $527.49. Undercharges on bill of lading #164 are $73.88.

On bill of lading #93, Thompson Lykes, April 25, 1974, on filtrate receiver tanks, item 2140, N.O.S. rate of $175.50, the applicable charges on 164 cubic feet are $719.55. On flotation machines, item 2140, rate of $152.25, the applicable charges on 1665 cubic feet are $6,337.41. Heavy lift charges on 2 packages each of 15,600 lbs. at $7.25 per 40 cubic feet are $301.78. On flotation machine parts, same item, same rate, the applicable charges on 1665 cubic feet are $6,337.41, and heavy lift charges are $301.78. On dual cell drive guards, item 2140, N.O.S. rate of $175.50, the applicable charges on 294 cubic feet (each crate has a different measurement) are $1,289.92. On the lab sample splitter, item 2140, N.O.S. rate of $175.50, the applicable charges on 30 cubic feet are $131.63. On air compressors, item 2140, rate of $152.25, the applicable charges on 282 cubic feet are $1,073.36. Bunker fuel charges on 5100 cubic feet at $17 per 40 cubic feet are $2,167.50. Tollage was $15.81. Total applicable charges on bill of lading #93 are $18,676.15. Undercharges on bill of lading #93 are $767.32.

On bill of lading #94, Sheldon Lykes (or Christopher Lykes on bill of lading), May 3, 1974, the parties are agreed that the total applicable charges are $333.44. It is so found. There are no overcharges and no undercharges on bill of lading #94.

On bill of lading #136, Mayo Lykes, May 5, 1974, the parties are nearly in agreement that the total applicable charges are the same. The complainant computes charges of $24,602.62, and adding tollage makes its total $24,619.29. The respondent computes charges of $24,607.58 plus tollage of $16.67, or a grand total of $24,624.25. The parties apparently agree on the applicable rates but differ in computations of cubic feet, for example 518 cubic feet of motors (complainant) and 519 cubic feet in total of motors (respondent). As noted in the decision of the Commission, "all cargo shall be measured on the overall measurements of the individual packages." The respondent computed charges by individual packages and their measurements, whereas the complainant, apparently for convenience totalled similar packages. Therefore it is found that the charges as computed by respondent are correct for bill of lading #136. The total applicable charges for this bill of lading, including tollage are found to be $24,624.25. Undercharges on bill of lading #136 are $2,184.31.

On bill of lading #141, Solon Turman, July 30, 1974, the parties are in substantial agreement, that is, the complainant shows total applicable charges of $21,029.14 (includes correction from $29.98 to $34.26 of complainant's third listing), whereas the respondent shows total applicable charges of $20,904.29.

The difference between the parties is accounted for by the lower rates shown applicable by the respondent for splice plates, item 1875, rate of $106.75, for floor plates, same item and rate, and for threaded rods, item 1875, rate of $92.00. Accordingly, it is found that the total applicable charges on bill of lading #141 are $20,904.29. Undercharges on bill of lading #141 are $1,791.36.

On bill of lading #119, Sheldon Lykes, July 2, 1974, the complainant's computations appear correct. (The respondent divides the first box on the packing list into two items at two rates, but consistency calls for one rate for each box or package.) Complainant's total applicable charges of $321.46 are accepted. (These include bunker fuel of $25.08 not listed by complainant.) Undercharges on bill of lading #119 are $37.74.

On bill of lading #73, Solon Turman, August 6, 1974, on electrical equipment, item 2140, N.O.S. rate of $175.50, the basic applicable charges on 49 cubic feet are $214.99 plus 15% detention $32.25, bunker fuel $20.83 and tollage $0.26. Total applicable charges on bill of lading #73 are 268.33. Undercharges on bill of lading #73 are $28.22.

On bill of lading #133,Charlotte Lykes, September 3, 1974, complainant's third item lists 51,180 pounds, which apparently should be 49,310 pounds. Thus complainant added $195.57 too much to this calculation. The respondent consistently has calculated charges on individual packages, rather than by totalling various packages. Accordingly, the calculations of the respondent are accepted for bill of lading #133. Total applicable charges on this bill of lading including tollage are $19,629.32. Undercharges on bill of lading #133 are $1,054.22.

On bill of lading #45, Christopher Lykes, September 14, 1974, respondent's calculations are accepted. Total applicable charges on this bill of lading are $2,672.84. Undercharges on bill of lading #45 are $230.92.

On bill of lading #33 Adabelle Lykes, October 14, 1974, respondent's calculations are accepted. Total applicable charges on this bill of lading are $480.95. Overcharges on this bill of lading are one cent.

On bill of lading #8, Aimee Lykes, October 24, 1974, respondent's calculations are accepted. Total applicable charges on this bill of lading are $1,143.48. Undercharges on bill of lading #8 are $54.42.

On bill of lading #40, Gulf Shipper, November 22, 1974, respondent's calculations are accepted. Total applicable charges on this bill of lading, including tollage are $1,852.23. Undercharges on bill of lading #40 are $7.14.

On bill of lading #83, Gulf Merchant, December 13, 1974, the parties' calculations agree when tollage of $0.77 is included. Accordingly, it is found that the total applicable charges on this bill of lading are $350.24. On bill of lading #83 there are no overcharges and no undercharges.

The total overcharges on the various bills were $3,311.61. The total undercharges on the various bills of lading were $9,457.48. Net undercharges, considering offsetting overcharges, are $6,145.87. Stated otherwise, total charges paid were $188,229.51, and total applicable charges were $194,375.38. Net undercharges are $6,145.87.

(S) CHARLES E. MORGAN
Administrative Law Judge

WASHINGTON, D.C.
March 5, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–41

AGREEMENT NOS. 8200, 8200–1, 8200–2, AND 8200–3 BETWEEN THE PACIFIC WESTBOUND CONFERENCE AND THE FAR EAST CONFERENCE

Interconference ratemaking agreement is found not justified and is disapproved pursuant to section 15 of the Shipping Act, 1916.

Elkan Turk, Jr. for Far East Conference and its member lines.
Edward D. Ransom for Pacific Westbound Conference and its member lines.
Michael B. Crutcher and *Jonathan Blank* for the Port of Seattle.
Samuel H. Moerman and *Paul M. Donovan* for Port Authority of New York and New Jersey.
Gary E.Koecheler for Maryland Port Administration.
John Robert Ewers, C. Douglass Miller and *L. Malleson Longstreet* for Bureau of Hearing Counsel.

REPORT AND ORDER

April 18, 1979

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

This proceeding was initiated by the Commission on September 13, 1974, to determine whether Agreement Nos. 8200, 8200–1, 8200–2, and 8200–3 (collectively, the Agreement) between the member lines of the Pacific Westbound Conference (PWC) and the member lines of the Far East Conference (FEC)[1] should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. 814). The Agreement, as initially approved by the Commission in 1952, authorized the conferences to establish rates, rules, and regulations applicable to the port-to-port transportation of certain cargo from U.S. Pacific, Atlantic, and Gulf Coast ports to destinations in the Far East.[2] A

*Commissioner Karl E. Bakke's dissenting opinion will follow.

[1] The FEC member lines are: Barber-Blue Sea Line; Galleon Shipping Corporation; Japan Line, Ltd.; *Kawasaki Kisen Kaisha, Ltd.*; Maritime Company of the Philippines, Inc.; Mitsui O.S.K. Lines, Ltd.; Moller-Maersk Line, A.P.; Nippon Yusen Kaisha; United *States Lines, Inc.*; Waterman Steamship Corporation; and Yamashita-Shinnihon Steamship Co., Ltd. The PWC membership consists of the eleven FEC carriers as well as the following ten lines: American President Lines, Ltd.; The East Asiatic Co., *Ltd.*; Knutsen Line; Korea Marine Transport Co., Ltd.; Phoenix Container Lines (1976) Ltd.; Scindia Steam Navigation Ltd.; Sea-Land Service, Inc.; *Seatrain Pacific Services*, S.A.; Showa Line, Ltd.; and Zim Container Service.

[2] The Agreement expressly proscribes inter-conference discussion and agreement on PWC overland rates, although as a practical matter, information supplied by FEC lines pursuant to the Agreement is utilized by the PWC lines in setting their overland rates. Certain bulk commodity items are also exempted from the Agreement.

subsequent amendment to the Agreement[3] established the joint ratemaking procedures currently employed by the proponent lines in implementing the original agreement. Agreement 8200-3, which is before the Commission at this time, would extend the Agreement, as amended, indefinitely.

By its September 13, 1974, Order the Commission commenced an investigation into whether continuation of the Agreement was necessitated by legitimate transportation objectives, and also approved the Agreement *pendente lite* to preserve the status quo. Participating parties were the proponent lines, the Commission's Bureau of Hearing Counsel (Hearing Counsel), and three port authorities: the Port Authority of New York and New Jersey (NY/NJ), the Maryland Port Administration (Maryland), and the Port of Seattle (Seattle), which were granted leave to intervene. Administrative Law Judge William Beasley Harris (Presiding Officer) issued an Initial Decision on December 1, 1975, approving the Agreement until further order of the Commission, with minor modifications.[4] The approval was based on the alleged public benefits in stabilizing and maintaining the Far East trade from West and East Coast ports, and in avoiding destructive rate competition. The Presiding Officer also attached importance to the long history of the Agreement and its series of previous short-term approvals. Seattle filed exceptions to which all other parties except Maryland replied. Oral argument was heard by the Commission on April 7, 1976.

THE AGREEMENT

The Agreement requires the PWC and FEC member lines to meet regularly and authorizes the two conferences to agree to create or modify rates, tariff rules or regulations relating to the assessment of rates or the computation of charges. Decisions are reached by a separate vote of the membership of each conference; quorum and voting requirements for each conference are governed by the respective conference agreements. The Agreement also authorizes the formation of joint committees which may discuss rates and other matters and offer recommendations to the conferences. The conferences are required under the Agreement to exchange information with each other, *i.e.*, "copies of their respective tariffs, circulars, memoranda[5] and minutes." Each conference is also required, upon receipt of requests by shippers for tariff reductions, or for the establishment of rates for new tariff items, to furnish to the other conference detailed information concerning the shippers' request.[6] A decision to effect a tariff change requires notification to the other conference, and a tariff reduction entitles the

[3] Agreement No. 8200-2, approved October 16, 1968.

[4] The Presiding Officer imposed the following conditions: (1) the Agreement be modified to reflect that PWC overland rates are based in part on information obtained from FEC pursuant to Agreement No. 8200-2; (2) the Agreement reflect that each conference relays to the other information it receives from shippers requesting rate reductions; (3) the Commission be provided with a copy of each conference's annual cargo statistics; and (4) both conferences maintain records of interconference oral, telex and teletype communications regarding proposed rate actions.

[5] The term "memoranda" is not defined in the Agreement or explained by the record, and consequently, the scope of this provision is unclear.

[6] The information required to be furnished is:

1. Nature of cargo and use.
2. Export packaging.
3. Weight and measurement per package and cubic feet per 2,000 lbs.
4. Invoice value at shipping point.
5. Point of origin.

corresponding conference to make a similar or lesser reduction. A tariff increase entitles the corresponding conference to make a greater or lesser increase, or none at all; the initiating conference may then further adjust or rescind its action to correspond with the action of the other conference.

When one conference establishes a rate or when both conferences agree on commodity rates for a new tariff item,[7] the Agreement requires that the initial difference by which the FEC rate may exceed the PWC rate shall not exceed $6.00 per revenue ton, nor shall it be less than the accessorial charges assessed the commodity by the PWC member lines. On established commodity rates, where the FEC rate exceeds the PWC rate by less than the PWC accessorial charges, PWC may adjust its rate to reflect a differential of not more than the accessorial charges; where the FEC rate exceeds the PWC by more than $6.00 per revenue ton, FEC may adjust its rates to achieve a differential of not less than $6.00. The rate differential provisions do not apply to the relationship between PWC overland rates and either PWC local rates or FEC rates.

When it is not practicable to schedule a meeting, the conferences are authorized by the Agreement to confer on rates, rules, and regulations by any means of communication, provided that final action taken pursuant to such discussions be recorded and filed with the Commission within 30 days. The Agreement also preserves the right of each conference to take independent action. When a conference determines that conditions affecting its operations require an immediate change in its tariffs, it may do so, providing that the corresponding conference is given 48 to 72-hour advance notice.[8]

POSITION OF THE PARTIES

PWC, FEC, and NY/NJ (collectively, Proponents), all favor approval of the Agreement for essentially the same reasons.[9] Proponents contend that very little justification is required for approval because this is an extension of a long-standing, previously approved agreement. They allege that the Agreement, in authorizing price-fixing and requiring inter-conference exchange of information, is necessary to prevent all-out rate competition between PWC and FEC. Its fundamental benefit, Proponents claim, is that it serves as a stabilizing influence for the North American/Far East trade.[10] The exchange of information allegedly allows more intelligent ratemaking, ensures accuracy of shipper information, prevents "whipsawing" tactics of shippers, and allows the conferences to be more informed of and therefore more responsive to shippers' needs. Proponents also contend that the prescribed rate spread between PWC and FEC allows FEC

6. Estimated annual tonnage.
7. Period of movement.
8. Reason for tariff change, including foreign competition, if any
9. Manner in and date upon which the rate matter will be considered, *i.e.*, if at a conference meeting, the scheduled date of the meeting.
10. Any committee recommendations with respect to the request.
11. Any other data of an informative nature relative to the request.

[7] Except for open rates and certain bulk commodity items which are specifically excluded from coverage by the Agreement.

[8] 48 hours if notice is given by telegram, and 72 hours if given by air mail.

[9] These parties occasionally presented slightly differing viewpoints, but none of the differences is relevant to the Commission's disposition of this proceeding. Maryland filed no briefs in this proceeding.

[10] This is alleged to be particularly important because of the recent advent and growth of containerization, which involves increased capital investment and provides numerous opportunities for hidden rate competition in the form of differences in complex and specialized tariff rules.

to compete effectively without there being a parity of rates, or such a large differential in rates that destructive rate competition would result.

Seattle vigorously protests the specific rate differentials chosen by the PWC and FEC, claiming that the $6.00 maximum spread is too little. Seattle argues that the FEC rates should be substantially higher than PWC rates, as West Coast ports and shippers should benefit from lower costs reflecting their relative proximity to the Far East, and the rates should more accurately reflect the disparity in costs of services for eastern versus western ports and shippers.[11] Seattle's exceptions all refer to its conclusions regarding the rate differentials.[12]

Hearing Counsel argues that the Agreement's benefits are overrated by Proponents, but nonetheless concludes that the orderly exchange of information and the establishment of a rational differential between PWC and FEC rates justify the Agreement's allegedly limited anticompetitive effects.

Discussion

Upon review of the entire record the Commission concludes, for the reasons set forth below, that the Agreement fails to achieve legitimate commercial objectives that would justify its anticompetitive effects. The Agreement will therefore be disapproved.

Because the Agreement calls for the fixing of prices, it constitutes a *per se* violation of section 1 of the Sherman Antitrust Act (15 U.S.C. 1). An agreement which violates the antitrust laws is approvable only if it 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. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 243 (1968). None of the Agreement's alleged benefits is substantial enough to warrant approval under these standards.

Proponents argue that the long history of short-term approvals granted this Agreement merits the Agreement a more relaxed standard for justification at this time. However, the Commission has previously found that a

> 'history of prior approvals,' no matter how long, may be an indication of nothing more or less than a failure to scrutinize operations under the particular agreement, which failure may or may not have been justified in the particular case . . . . Moreover, a prior approval under sec. 15, no matter how long ago granted, may not be converted into a vested right of continued approval simply because the parties to the agreement desire continued approval. *Investigation of Passenger Steamship Conferences Regarding Travel Agents*, 10 F.M.C. 27, 34, n. 6 (1966), *aff'd sub nom. Svenska, supra.*

Each extension must stand alone and be judged in light of present circumstances. Recent developments in the trades covered by the Agreement make a thorough review of its justification particularly appropriate.[13]

---

[11] Seattle has not shown, however, how it or any other West Coast interests have suffered as a result of the $6.00 maximum differential, nor has it proposed a modification. As to those provisions of the Agreement to which Seattle has no objection, it recommends a one-year approval requiring periodic Commission review as opposed to an unlimited extension as sought by the Agreement's proponents.

[12] Specifically, Seattle argues that the Presiding Officer:

1. Improperly allocated the burden of justification for continuation of the existing rate differentials;
2. Erroneously concluded that the record contained insufficient information to require modification;
3. Failed to evaluate the anticompetitive effect of the differential provisions;
4. Failed to find that the West Coast ports and shippers are discriminated against as a result of the differentials;
5. Erroneously made the Agreement presumptively approvable; and
6. Failed to find that changed transportation circumstances require modification of the Agreement.

[13] *See, infra*, at 15.

Proponents argue that the proposed inter-conference information confers an important public benefit. The exchange of information concerning the details of the shippers' requests undoubtedly furnishes the carriers with useful market data. What is desirable to the conferences, however, is not necessarily a need, benefit or purpose which satisfies the *Svenska* requirements. The repeated contentions in the record that these "open channels" and the rate differentials prevent the inter-conference competition from deteriorating into a rate war are neither self-evident nor supported by the record. References to a rate war in the trade prior to World War II do not compensate for the absence of convincing evidence of such a possibility in the trade at present, or, if such circumstances did exist, that this Agreement provides a remedy.[14]

On the other hand, there are several indications that destructive rate practices between the conferences are not likely to occur. The Agreement specifically does not apply to the relationship between PWC overland rates and FEC rates, yet the midwestern-source cargo, to which PWC overland rates are most likely to apply, is the most probable source of competition between the two conferences. Moreover, in recent years,[15] there has been a dramatic increase in intermodal transportation in the trade, particularly minilandbridge carriage westbound from East Coast ports.[16] The difference in inland areas served by the conferences and the exclusion from the Agreement of overland rates, open rates and certain bulk commodities greatly diminish any stabilizing effect the Agreement may have upon the trade generally.

Proponents' contention that the rate differential provisions are necessary to the stability of the trade is particularly unpersuasive. The differential regulations, as are all the provisions of the Agreement, are subordinate to the conferences' right to independent action. Also, they are merely permissive in nature; the conferences are under no obligation to meet or respond at all to each other's rate adjustment. It is apparent from a reading of the Agreement that the $6.00 per revenue ton maximum spread is mandatory only for "new" commodity items. FEC counsel confirmed at oral argument that after a rate has been in effect for as little as one day, the commodity item is no longer "new."[17] The continued existence of any particular differential, therefore, is not mandated, and the differential provisions are at best merely a guideline.[18]

---

[14] We also note that Agreement No. 10135, the FEC and PWC Discussion Agreement, already permits the member lines of those conferences to discuss, consider, and agree upon recommendations to the conferences regarding several items of mutual interest; Agreement No. 10135 overlaps considerably the subject matter in the instant Agreement. Agreement No. 10135-6, which would extend Agreement No. 10135 indefinitely, was conditionally approved by the Commission by order served March 23, 1979, subject to the deletion of its provisions authorizing rate discussions.

[15] The instant record was compiled in 1975.

[16] An FEC application for intermodal ratemaking authority was denied in *Agreement No. 17-34 Application of the Far East Conference for Intermodal Authority*, ____ F.M.C. ____, 18 S.R.R. 1685 (1979), and that conference, therefore, offers only port-to-port service. PWC has offered overland/OCP rates from Pacific ports to the Far East since 1923, and was granted intermodal ratemaking authority in 1976. *Agreement No. 57-96—Pacific Westbound Conference Extension of Authority for Intermodal Services*, 19 F.M.C. 289, 16 S.R.R. 159 (1975). PWC published a minibridge tariff effective February 1, 1977, and PWC minibridge cargo comprises an increasingly substantial portion of U.S./Far East trade. *See North Pacific Trade Study—A Staff Report*, F.M.C., at 4, 5 and 18. A PWC interior intermodal (microbridge) tariff was filed on May 18, 1978, but was voluntarily cancelled before it took effect. Agreement No. 57-96, however, authorized individual PWC member lines to publish independent microbridge tariffs, and a few have done so, offering service from Denver, Chicago, Minneapolis/St. Paul, Kansas City/St. Louis, and Milwaukee. The microbridge service has yet to achieve the same level of commercial acceptance with shippers as has minibridge service.

[17] *See*, Oral Argument Transcript, at 36, 38.

[18] When FEC Chairman Flynn was asked, "In your opinion, is a rate spread really necessary? I mean, is a provision like the $6.00 provision actually necessary?", he testified: "I think it acts as a barometer to some degree as to the levels of future pricings with regard to both Conferences. As to its abstract necessity, I have mixed emotions, frankly, personally" (Transcript, at 500).

That the differential provisions are of less than crucial importance to the stability of the trade is further evidenced by the record. Exhibit 23, entitled "PWC/FEC Rate Spreads on Commodities Moving in Substantial Quantities by Each Conference," shows that in 1974, 46 of the commodities listed in that Exhibit had differentials exceeding $6.00, while only 41 had spreads at or below the "maximum." Even more significant is the fact that the spreads had been increasing dramatically each year. We cannot concur either with Proponents' contention that the differentials are necessary to structure a balanced relationship between the conferences, or with Seattle's argument that the $6.00 "maximum" has had a significantly detrimental and discriminatory effect on West Coast shippers and ports.

The relative stability in the Far East trade from 1965 to 1968 further belies the exaggerated threats of instability absent approval of this Agreement. This period followed the Commission's order that the conferences cease operation of their unfiled agreements implementing the original Agreement No. 8200,[19] and preceded approval of Agreement No. 8200-2, under which the conferences currently operate. There was in those years no instability or "rate war" in the trade, even absent an agreement authorizing differentials and establishing inter-conference communications.[20]

FEC and PWC membership has changed since the record was closed on August 20, 1975. Every member of FEC is now a member of PWC. Moreover, the record indicates, as common sense would suggest, that a carrier with dual membership will, in voting in one conference, take into consideration its company policy and the effect of its vote on its company's trade from the opposite coast.[21] The prediction of a rate war between two conferences in which the membership of one is completely subsumed by the other requires a degree of conjecture not appropriate in application of the *Svenska* criteria.

In conclusion, the Commission finds that the commercial objectives offered in justification for the Agreement are largely theoretical and are too meager to justify its anticompetitive potential, particularly in light of the recent growth of intermodalism, the decline in all-water transport from East Coast ports, and the overlapping membership of the conferences. The Proponents have not met their burden of showing that the 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.[22]

THEREFORE, IT IS ORDERED, That Agreement No. 8200, 8200-1, 8200-2 and 8200-3 are disapproved; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

---

[19] *Joint Agreement Between Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference* 8 F M.C. 553 (1965)

[20] Proponents counter that the reason for this period of stability was that the lines were "exercising diligence and not taking random and wild-eyed actions" because they were planning and negotiating a future inter-conference agreement at the time (Transcript, FEC witness Flynn, at 508–511) This Commission is not persuaded that the proposed *per se* violation of the antitrust laws can be justified by the conferences' bald assertion that the Agreement is the conferences' only protection against their own threats of irresponsible business behavior

[21] *See, e g* , Exhibit 21 at 3, testimony of PWC witness John E Teubner, at 121

[22] Because the Agreement is disapproved in its entirety, it is unnecessary to address Seattle's specific exceptions to portions of the Agreement approved by the Presiding Officer

Commissioner Karl E. Bakke, dissenting: For the reasons stated hereafter, I disagree with the conclusion of the majority that proponents have not met their burden of justifying approval of this Agreement under the standards of section 15.

The majority decision is premised on a rigid, mechanistic application of the *Svenska* standards:

"Because the Agreement calls for the fixing of prices, it constitutes a *per se* violation of section 1 of the Sherman Antitrust Act (15 U.S.C. 1). An agreement which violates the antitrust laws is approvable only if it 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. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, 243 (1968). None of the Agreement's alleged benefits is substantial enough to warrant approval under these standards."[1]

"Substantial" is an equivocal word in any context, but particularly so in making factual determinations where the burden of persuasion (justification) requirement is flexible, varying as a direct function of the degree of anticompetitive effect. The commission has long recognized that in considering an agreement under the *Svenska* standards, the scope and depth of proof required may vary from case to case in relation to the degree of invasion of the antitrust laws. See *Agreement No. 8760-5—Modification of the West Coast United States and Canada/India, Pakistan, Burma & Ceylon Rate Agreement,* 17 F.M.C. 61 (1973), and *Agreement No. 57-96—Pacific Westbound Conference Extension of Authority for Intermodal Services,* 16 SRR 159, 19 F.M.C. 289 (1975). Indeed, the D.C. Circuit Court of Appeals is of the same view. In *U.S. Lines v. FMC,* F.2d (D.C. Cir., 1978), it expressly held that the extent of justification required for approval of an agreement under section 15 depends upon the severity of the anticompetitive impact of the agreement, not merely upon whether the agreement is or is not a *per se* violation of the antitrust laws:

"But the fact that a given practice is considered under a rule of reason, rather than as a *per se* violation, does not mean that the dangers to competition in any particular circumstances are necessarily lower: clearly, certain practices which are not *per se* violations may, depending upon the facts of the particular case, restrict competition more severely than would *per se* restraints." (Slip opinion, p. 16, n. 31.)

The facts of record in this case clearly demonstrate that even though the Agreement provides for concerted action on rates and the fixing of rate differentials, there are provisions that significantly diminish the present and potential anticompetitive impact of the Agreement on rate structures in the trades involved. The authority to agree on rates and rate differentials is permissive only. All activity under the Agreement is subject to the right of each conference to take independent action. Furthermore, the Agreement affects only a portion of the cargo carried by the conferences; it does not apply to open rate cargo (including most commodities moving in bulk), nor to overland cargo carried by PWC. Under these circumstances, it seems to me that the quantum mark of justification required for approval under *Svenska* is somewhere at the lower end of the dipstick, well immersed in the facts of record concerning benefits to be derived from approval.

[1] Report and Order, p. 9.

In this connection, the majority opinion also fails to give any weight to the fact that this Agreement has received prior Commission approvals over a substantial number of years. The statement that "each extension must stand alone and be judged in the light of present circumstances"[2] appears to be squarely at odds with recently stated Commission policy regarding the proper weight to be given a history of prior Commission approval. In Agreement No. 9929-3—*Pendente Lite Extension of Combi Line Non-Lash Service*, Order on Remand served March 15, 1979, the Commission stated:[3]

"Absent information indicating that a previously approved section 15 arrangement with a demonstrated record of commercial acceptance is unfair to competing carriers, ports or shippers, the arrangement's continuation for a further reasonable period of time is a matter which should ordinarily result in section 15 approval."

This is an eminently sensible position to which violence should not—and need not—be done in this case.[4] The continued past approval of this Agreement and the lack of any substantial evidence that it has operated in a manner inconsistent with the standards of section 15, coupled with absence of any protest concerning anticompetitive effect, should weigh strongly in favor of continued approval of the Agreement.

I further disagree with the rather cavalier dismissal by the majority of the pre-World War II rate war as some indication of what could now happen in the trade absent continued approval of this Agreement. The Agreement has been in force since 1952, with one brief hiatus from 1965 to 1968. Completely writing off pre-agreement history of rate war conditions in these trades places the proponents in the difficult position of trying to prove a negative.

The fact that pre-agreement rate war conditions in these important Far East trades have been avoided during a lengthy period of operations under Agreement Nos. 8200, 8200-1 and 8200-2 is a relevent factor weighing in favor of continued approval of the Agreement. It is not necessary that the proponents of this Agreement, given its rather limited anticompetitive effects, prove that absent approval of the Agreement the trades involved would "deteriorate into a rate war." In my view, it is sufficient to show, as has been done, that the Agreement will continue to be a healthy stabilizing influence on the rate structures of the important trades covered by these conferences.[5]

In conclusion, it is my view that the record clearly dictates a finding that the orderly exchange of information and the maintenance of a rational relationship between the rate structures of these two competitive conferences is in the public

---

[2] Report and Order, p. 10

[3] Slip Opinion, p. 10.

[4] Despite the fact that the agreement has been approved and in effect since 1952 (with one brief hiatus from 1965 to 1968), and Agreement 8200-2 has been approved by various orders of the Commission since October 16, 1968, and the further fact that a full evidentiary hearing and investigation into the continued approvability of Agreement 8200-2 was begun in this proceeding on September 13, 1974, no party has urged that the Agreement should be disapproved under the standards of section 15. (The limited arguments of the Port of Seattle with respect to the $6.00 differential between FEC and PWC initial rates were properly rejected by the ALJ.)

[5] The implication in Footnote 14 on page 11 of the Report and Order, that conditional approval of Agreement No. 10135-6 on March 23, 1979, grants authority which overlaps authority contained in Agreement 8200-2 is incorrect. The exchange and discussion of information and recommendations concerning "general technological improvements, increased efficiences in service, fuel conservation, environmental studies and upgrading of the neutral body system" permitted by Agreement 10135-6 is substantially different from the rate discussion and agreement authority covered by Agreement 8200-2.

interest. This is particularly true at the present time, in light of the changing competitive relationships between the conference trades arising from the recent and continuing growth of intermodalism.

Accordingly, I would approve extension of the Agreement for a further two year period, subject to the modifications recommended in the Initial Decision.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 71–29

BATON ROUGE MARINE CONTRACTORS, INC.

v.

CARGILL, INCORPORATED

Cargill, Incorporated's charge to stevedores found to be reasonable within the meaning of section 17 of the Shipping Act, 1916.

Edward S. Bagley for Complainant Baton Rouge Marine Contractors, Inc.
Edward J. Sheppard, Edward Schmeltzer and *Victor Anderson* for Respondent Cargill, Incorporated.
John Robert Ewers, C. Douglass Miller and *Patricia Byrne* for Hearing Counsel.

REPORT AND ORDER

April 19, 1979

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

PROCEEDINGS

This proceeding arose as a result of a complaint filed by Baton Rouge Marine Contractors, Inc. (BARMA), alleging that Cargill, Incorporated (Cargill) had violated and continued to violate sections 15, 16, and 17, Shipping Act, 1916 (the Act) (46 U.S.C. 814, 815 and 816), by unilaterally modifying a lease agreement between Cargill and the Greater Baton Rouge Port Commission (Port), which agreement had previously been approved by the Commission. BARMA contended that the modification resulted in the imposition of unlawful charges and conditions upon stevedoring companies conducting business at the marine grain elevator at Port Allen, Louisiana, and was not filed with the Commission as required by section 15.

In a Report and Order served January 3, 1975, in *Baton Rouge Marine Contractors v. Cargill, Inc.*, 18 F.M.C. 140 (1975), the Commission found that Cargill's imposition of charges and conditions did not constitute an unfiled modification of the lease agreement between Cargill and the Port. While the Commission did not find a violation of section 16, it did find that certain charges and conditions imposed by Cargill on stevedores were not reasonably related to the economic or commercial benefit derived by those stevedores from their use of

* Commissioner Leslie Kanuk will issue a separate opinion.

the facilities and services provided by Cargill and thus constituted unjust and unreasonable practices in violation of section 17. The Commission remanded the proceedings for a determination of a proper allocation formula based on the actual benefits derived by stevedoring companies from their use of Cargill's terminal facilities and the appropriate charge against stevedores based thereon.

On February 12, 1976, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's decision. *Cargill, Inc. v. Federal Maritime Commission,* 530 F.2d 1062 (D.C. Cir.), *cert. denied,* 429 U.S. 868 (1976).

On November 30, 1977, Administrative Law Judge William Beasley Harris (Presiding Officer) served a "Supplemental Decision on Remand" (Remand Decision I), in response to the Commission's 1975 Report, in which he concluded that the record was inadequate to resolve the issues raised by that Report. The Presiding Officer accordingly recommended that the proceeding be reopened, and in the alternative, suggested other dispositions of the proceeding.

BARMA and Cargill excepted to the Presiding Officer's recommended reopening. The Commission's Bureau of Hearing Counsel (Hearing Counsel), though opposed to reopening, took the position that "the very deficiencies which caused the Commission to remand this proceeding for further hearing still exist."[1]

On April 4, 1978, the Commission again remanded the proceeding, noting that if the Presiding Officer deemed the record inadequate, then the Presiding Officer should have "*sua sponte* reopened the proceeding rather than issue his Supplemental Decision."[2] The Presiding Officer has now served a second "Supplemental Decision on Remand," (Remand Decision II), in which he concludes that Cargill has failed to present a proper allocation of the services and benefits to stevedores based on actual use which would justify a charge against stevedores other than as found in the Commission's 1975 Report.

BARMA, Cargill, and Hearing Counsel have filed Exceptions to the Presiding Officer's Remand Decision II and Replies to Exceptions.

THE REMAND DECISION II

In his Remand Decision II, the Presiding Officer found that Cargill had failed to justify its ten cent per ton charge against stevedores.[3] He concluded that except to the extent found lawful by the Commission, Cargill had failed to establish that stevedores derive actual benefits from their use of Cargill's services and facilities. Accordingly, he found that Cargill's charge could not be justified by allocating a percentage of the cost of those services and facilities to stevedores.[4]

[1] Alternatively, Hearing Counsel urged the Commission to consider the prevailing service and facilities charges in *the area* as a measure of benefit and find Cargill's charge not to be in violation of section 17.

[2] At the hearings held in response to the Commission's 1975 Report and remand, only Cargill presented evidence. At the second remand hearing, held in response to the Commission's April 4, 1978 Order of Remand, Cargill advised that its cost analysis (a Freas-type study) had been fully presented to the extent that such was available (Cargill had not done a full-scale Freas study). Because the Presiding Officer believed he was constrained by the Commission's 1975 Report, he would not permit Cargill to introduce any further evidence intended to justify Cargill's service and facilities charge on a "value of service" or "prevailing practice in the area" basis. The Presiding Officer did, however, accept Cargill's offer of proof and closed the record.

[3] On August 15, 1977, Cargill increased its service and facilities charge to stevedores from 8 cents to ten cents per ton.

[4] As used in this Report, the term "stevedore" refers to that entity which contracts to load grain vessels. It should not be confused with the stevedores' employees, the longshoreworkers, who actually perform the loading operations.

The Presiding Officer also determined that the charge against stevedores was not justified on a "cost of service basis" (a Freas type study), or on a "value of service" or prevailing practice in the area basis, as proposed by Cargill and Hearing Counsel.

The Presiding Officer found that productivity is presently the "major factor in determining the worth or value of an elevator to a stevedore."[5] He also found that of the nine grain elevators on the Mississippi River in Louisiana, Cargill's Baton Rouge facility ranks third—along with five others—in terms of productivity.[6] Cargill's elevator at Baton Rouge can deliver on the average 1000 to 1100 tons of grain per hour and can reach a peak of 1500 tons per hour. This throughput is surpassed only by Cargill's elevator at Reserve, Louisiana (1700 to 1900 tons per hour) and the Bunge Corporation's elevator at Destrehan, Louisiana (on the average, 1200 to 1300 tons per hour). The Public Grain Elevator at New Orleans delivers grain on the average of 600 tons per hour and is the least productive. The Presiding Officer also determined that, although the productivity of the elevators varies, all are similarly constructed and charge stevedores at least ten cents per ton of grain loaded, as a service and facilities charge.

Stevedores operating at Louisiana elevators were found to have one major cost—the wages of the longshoreworkers hired to load a vessel. In this regard, the Presiding Officer noted that, under the existing labor contract with the International Longshoremen's Association (ILA), Rogers Terminal Shipping Corporation (Rogers),[7] and every other Mississippi River grain stevedore is required to pay each longshoreworker hired a six-hour minimum guarantee each time the longshoreworker is employed except at the public elevator at New Orleans and Cargill's Baton Rouge elevator where the minimum guarantee is four hours. The ILA contract further provides that one gang will be assigned to each spout. The Presiding Officer found that at Baton Rouge the basic gang consists of five men, [8] while at the other elevators on the Mississippi River in Louisiana, the basic gang consists of eight men.[9]

In the remand proceedings before the Presiding Officer, Cargill argued that its services and facilities charge had been justified on a "cost of service basis" through the testimony of Messrs. Linnekin, Mabrey, and Graving. Cargill also contended that this testimony justified its service and facilities charge on a "prevailing practice in the area basis" and on a "value of service to the stevedore basis." Hearing Counsel agreed that Cargill's charge is reasonable because of the benefits derived by the stevedores from the use of the facilities and because Cargill's charges are consistent with the prevailing practice in the area.[10] The

[5] Productivity is defined as the amount of grain per hour that an elevator can deliver to the stevedore for loading aboard a vessel.

[6] The other elevators competing with Cargill at Baton Rouge are: St. Charles Grain Elevator Company, Destrehan, La.; Farmers Export Company, Ama, La.; Continental Grain Company, Westwego, La.; Mississippi River Grain Elevator, Inc., Myrtle Grove, La.; Cargill, Inc., Reserve, La.; The Public Grain Elevator of New Orleans, Inc., New Orleans, La.; and The Bunge Corporation, Destrehan, La.

[7] Rogers is a wholly-owned subsidiary of Cargill and operates as a general cargo and grain stevedore/steamship agent with operative offices at Baton Rouge, Louisiana.

[8] Stevedores pay $121 per hour for one gang and $191 per hour for two gangs at Baton Rouge.

[9] At the other elevators, stevedores pay $163 per stevedoring gang.

[10] Hearing Counsel took this same position on exception to the Remand Decision I. However, on exception to the Remand Decision II, Hearing Counsel suggests that the Commission issue section 21 orders to the other elevators in the area to determine their ratemaking practices before adopting "the prevailing practice in the area basis" as the standard for measuring Cargill's charges.

Presiding Officer rejected Cargill and Hearing Counsel's argument on the ground that the evidence and the theories relied upon by those parties did not conform to the Commission's remand directive in its 1975 Report. Thus, he explained in his Remand Decision II:

There is lacking valid testimony as to the regulatory reasonableness or public interest as well as conformity with the Commission's directive in its January 3, 1975 Order herein that the allocation of services and facilities benefits to stevedores be based on actual use as outlined therein. It is very interesting to note that there are no facts as to the actual use of services and facilities pointed out or stressed by Cargill, only theories are expounded. The grounds for the ten cents charge not having conformed to the Commission's directive nor having applied the facts of the case to them or acceptable or valid regulatory tests, at least, should be and are regarded as unsatisfactory, if not arbitrary and without support under the facts and circumstances of this case. (Remand Decision II, at 14).

Accordingly, the Presiding Officer in his Remand Decision II found that Cargill had failed to justify a charge against stevedores other than as approved by the Commission in its 1975 Report. The Presiding Officer accordingly directed Cargill to supply to the Commission within 30 days of his decision, complete annual records as to the charges imposed on the stevedores, "so as to aid the Managing Director and the Commission in assessing the charges." He also directed Cargill to "suggest to the Managing Director and the Commission how the charges should be collected as well as management and reporting procedures covering the sum collected." (Remand Decision II at p. 24).

POSITIONS OF THE PARTIES[11]

Hearing Counsel

Hearing Counsel argues that Mr. Linnekin's studies and testimony contain the same deficiencies as found by the Commission in its 1975 Report. However, Hearing Counsel submits that a Freas type study need not be applied to Cargill's Baton Rouge operations. In support of this position, Hearing Counsel points out that both the Court of Appeals, in its decision on review of the Commission's 1975 Report in this proceeding, and the Commission, in its decision in *Crown Steel Sales, Inc. v. Chicago Marine Terminal Association,* 12 F.M.C. 353, 374, found that a Freas type study allocating cost and benefits is academic because the costs are passed on to the consumer in any event.

Hearing Counsel notes that the Commission has, in the past, recognized that costs are but one factor in determining the reasonableness of ocean freight rates. *In the Matter of Discounting Contract/Noncontract Rates Pursuant to the Provisions of Item 375 Note 2, of the India, Pakistan, Ceylon and Burma Outward Freight Conference Tariff No. 10,* 12 F.M.C. 20, 23. Hearing Counsel therefore agrees with Cargill that the Commission should measure the reasonableness of Cargill's charges on the basis that it is less than the prevailing charge in the area for comparable services and facilities. However, although Hearing Counsel in its exceptions to the Remand Decision I urged the Commission to find Cargill's charge reasonable based on a prevailing practice basis, it now submits that the record is inadequate to support such a finding. Hearing Counsel therefore suggests the following alternatives:

[11] Exceptions to the Remand Decision I are not separately discussed here; however, those exceptions are essentially similar to those that have been filed to the Remand Decision II.

1. The Commission hold this case in abeyance and institute a Commission investigation to establish alternative standards for determining the reasonableness of service and facilities charges;

2. The Commission reopen the proceeding for the limited purpose of taking evidence on Cargill's "dominant elevator" theory; and

3. The Commission hold the case in abeyance and direct section 21 orders to other elevators in order to determine whether the "dominant elevator" theory or an alternative theory of rate making is appropriate.

Hearing Counsel favors the third alternative because it would possibly require the least amount of time.

Hearing Counsel submits that Cargill has failed to establish that a stevedore's productivity (*i.e.* a stevedore's profit) varies with the elevator's investment cost and facilities. It notes that productivity is affected by the type and grade of the grain being delivered and by conditions in the headhouse. Additionally, Hearing Counsel points out, that while Cargill produced evidence which indicates that Rogers makes a profit at all of the Mississippi elevators and that productivity is tied to profits, Cargill's evidence further indicates that stevedoring charges do not vary with the productivity of each elevator. Hearing Counsel notes that in fact Rogers charges more at Cargill's Baton Rouge facility than it does at any other elevator including those that are allegedly more productive.

Hearing Counsel dismisses Mr. Linnekin's 95%-45% allocation as being arbitrary and in complete disregard of the Commission's 1975 Report.

Finally, Hearing Counsel submits that the Presiding Officer properly "resisted" BARMA's "secondary boycott" allegation by refusing to accept its amended complaint. Hearing Counsel argues that BARMA's secondary boycott claim is derived from the alleged section 15 and 16 violations raised by BARMA in its original complaint in this proceeding and relates to BARMA's initial proposed findings of fact. Therefore, Hearing Counsel submits that the Commission has already considered and disposed of BARMA's secondary boycott claim.

BARMA

BARMA continues to insist that the Commission never addressed the secondary boycott issue raised in its original complaint. BARMA argues that: (1) the Commission erred in denying its Petition for Reconsideration and in denying BARMA's appeal from the Presiding Officer's dismissal of BARMA's supplemental and amended complaint (see the Commission's Order of November 2, 1977); and (2) the Commission's Office of the Secretary erred in not accepting a further amended and supplemental complaint which allegedly raised the secondary boycott issue.

BARMA also excepts to the Presiding Officer's finding that Cargill may assess some charge against stevedores, based upon services and facilities which the Commission found in its 1975 Report, to be properly attributable to stevedores. BARMA argues that the Commission's finding that Cargill could assess a charge, based in part on the cost of utilities and overhead, was dependent on Cargill establishing that *other* costs associated with the elevator were properly attributable to stevedores. BARMA agrees with the Presiding Officer's finding that Cargill has failed to justify the allocation of any other elevator cost to stevedores, other than as found reasonable by the Commission. BARMA therefore concludes that there should *not* be *any* charges assessed against stevedores at Cargill's Baton Rouge facility.[12]

BARMA maintains that the facts and theories relied upon by Cargill (and presumably Hearing Counsel) in this remand proceeding to support Cargill's service and facilities charge are the same facts and theories relied upon and rejected by the Commission in the original 1972 proceeding.[13] BARMA argues that the prevailing practice—dominant carrier theory—cannot be applied here, for that theory requires a dominant force and competition between the entities in the service area. This requirement has allegedly not been met here because there is not a dominant elevator on the Mississippi and the only competition on the Mississippi is between the stevedores and not the elevators.

Finally, BARMA submits that Cargill has failed to justify its charges on any theory and has in fact ignored the 1975 decision, which BARMA submits, is *res judicata*. BARMA points out that Mr. Linnekin admitted that he did not follow the Commission's 1975 decision in reducing his allocations to stevedores. BARMA views the Commission's 1975 Report and the Court of Appeals decision affirming that Report as holding that the charges to stevedores can *only* be based upon benefits derived from actual use. Furthermore, BARMA submits that, in any event, Cargill's own evidence indicates that elevator efficiency (productivity) is *not* a conclusive factor in determining the worth or profitability to a stevedore because Rogers charges more for its stevedoring services at Cargill's Baton Rouge elevator than it does at Farmer's Export, although the average productivity of the two elevators is the same. BARMA also cites Mr. Mabrey's testimony that productivity is contingent not only upon the speed of the conveyor belts but also the conditions in the headhouse.

BARMA concludes that a charge against stevedores is in violation of the Commission's rules and past precedent and notes that even Mr. Linnekin testified that but for Cargill's lease, he would have preferred to allocate the cost of the shipping gallery and wharf to the vessel as has previously been done in the port industry.

Finally, BARMA states that this litigation has gone on long enough, and should not now be postponed as suggested by Hearing Counsel.

CARGILL

Cargill takes the position that the Presiding Officer erred in failing to consider factors other than the costs of services and facilities in determining the reasonableness of its charge. Cargill argues that even if it had not justified its charges on a cost of service basis, a point it does not concede, there is evidence in the record and other available evidence, which Cargill was not permitted to produce, which establishes the reasonableness of Cargill's service and facilities charge on a prevailing practice in the area basis. Cargill submits that the Commission has recognized other factors including the "value of service" and the "prevailing

[12] In the alternative, BARMA asserts that if a charge is made against stevedores based on the utilities and overhead allocations approved by the Commission, such a charge would only amount to seven-tenths of a cent per ton based upon 1976 crop figures.

[13] BARMA notes that in the original proceeding, Cargill presented testimony to show that other elevators on the Mississippi had instituted a services and facilities charge against stevedores and that these charges were generally equivalent to the charges and facilities at Cargill's Baton Rouge elevator. BARMA also points out that Hearing Counsel, in the original proceeding, contested Cargill's prevailing practice theory on several grounds including relevancy and lack of evidence with respect to the similarity between the other elevators on the Mississippi and Cargill's Baton Rouge facility.

practice in the area,'' as proper standards to measure the reasonableness of terminal rates. *Investigation of Ocean Rate Structures,* 12 F.M.C. 34, 56-57 (1968); *Crown Steel Sales v. Port of Chicago Marine Terminal Assn.,* 12 F.M.C. 353, 375 (1967); and *Evans Cooperage, Inc. v. Board of Commissioners of the Port of New Orleans,* 6 F.M.B. 415 (1961). In Cargill's view, the record in this proceeding clearly establishes the reasonableness of its service and facilities charge.

Cargill argues that the Presiding Officer in his Remand Decision II found all the necessary facts to support a finding that its charge was reasonable on a ''value of service'' or ''prevailing practice in the area'' basis, yet improperly failed to so find. Thus, Cargill cites the Presiding Officer's findings that productivity is now the major factor in determining the worth or value of an elevator to a stevedore; that elevators on the Mississippi vary as to productivity, yet all of these elevators charge a ten cents per ton service and facilities charge to stevedores for comparable services; and that the stevedores' per hour revenue increases with the number of tons of grain loaded because the hourly wages of longshoreworkers are fixed.

Cargill maintains that BARMA is barred by the doctrine of *res judicata* and doctrine of the ''law of the case'' from attempting to relitigate, through the guise of its supplemental and amended complaints, issues which have previously been considered by the Commission and the Court of Appeals. Cargill likewise argues that the doctrine of *res judicata* bars BARMA from now urging the Commission to find that Cargill may not assess *any* charge against stevedores.

Discussion

The threshold issue presented for our consideration is whether the Commission intended, by its 1975 Report, to limit Cargill's proof on remand to cost allocations developed through a Freas type study, based upon benefits realized by stevedores from their actual use of Cargill's facilities. If the Commission did not intend to so limit Cargill's proof, we must then determine if the evidence Cargill has presented on remand is nevertheless adequate to support a finding that its charge to stevedores is reasonable within the meaning of section 17 of the Act. For the reasons set forth herein, we conclude that the Commission did not intend to limit Cargill's proof and that Cargill has proved, through the evidence presented, the reasonableness of its charges to stevedores within the meaning of section 17.

In its 1975 Report, the Commission found Cargill's charges, as assessed against stevedores, unreasonable within the meaning of section 17, and directed that the proceeding be remanded to determine the proper charge to be assessed against stevedores. The Court of Appeals, in affirming the Commission's ultimate holding and its application of the ''actual use'' analysis of the section 17 standard, noted the finding of the Supreme Court in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission,* 390 U.S. 261, 19 L.Ed. 2nd 1090 (1968), that:

> . . . [E]ven though the benefits received are clearly substantial the proper inquiry under section 17 is, in a word, whether the charge levied is reasonably related to the service rendered.[14]

[14] *Cargill, Inc. v. Federal Maritime Commission,* 530 F.2d 1062, at 1068 (1976).

Thus, although the Commission's 1975 Report found that Cargill's charges were unreasonable based upon Cargill's evidence of "actual use," we do not believe that actual use is the only basis which may be used to determine if a charge is reasonably related to the service rendered for the purpose of section 17.[15] Such conclusion is not inconsistent with our 1975 Report nor with the Court of Appeals decision on review of that Report.[16] While the Commission's 1975 Report may have anticipated that Cargill on remand would supplement its evidence of "actual use," the Commission could not have intended to abrogate the Congressionally enacted standards of section 17 as interpreted by the Supreme Court in *Volkswagenwerk, supra*. Indeed, the Commission and its predecessors have previously recognized that costs are but one factor in determining the reasonableness of terminal rates[17] and carrier rates[18] under section 17.

The Commission therefore did not intend, by its 1975 Report, to limit Cargill's proof on remand to a cost allocation developed through a Freas type study based upon the benefits realized by stevedores through their actual use of Cargill's services and facilities. Having so found, we must now determine if Cargill has demonstrated, by any recognized standard, that its charge is reasonably related to the services rendered. *Volkswagenwerk, supra*. The resolution of this issue turns, in part, on a specific finding made by the Commission in its 1975 Report, which must be clarified in view of the uncontroverted evidence developed on remand.

In its 1975 Report, the Commission found that stevedores do not benefit from their use of the shipping gallery to the same extent as do the cargo and the vessel. The Commission explained that:

> [I]t can be argued that the speed and efficiency of the shipping gallery *works to the detriment of stevedores, providing shorter working hours by fewer men and therefore less revenues to the stevedores*. 18 F.M.C. at 162. (Emphasis added).

Upon reflection we find that argument wanting. While the speed and efficiency of the shipping gallery may work to the detriment of the longshoreworkers—an interest not in issue in this proceeding—the record on remand clearly establishes that stevedoring companies do derive benefits from the expeditious and efficient operation of the shipping gallery by reducing their major cost, the hourly wages of the longshoreworkers hired to load the vessels. Cargill established, through the uncontroverted testimony of Mr. Mabrey, that the productivity of the elevator—in terms of delivery capability—is the major, if not the sole, factor in determining the value of an elevator to a stevedore. This is due to the fact that stevedores generally charge their customers a flat rate per ton

[15] That the Commission limited its analysis to actual use in its 1975 Report is consistent with Cargill's proof, for the Commission advised that it would "examine *only* the factors which were used [the benefits derived by stevedores for the use of Cargill's facilities for which it contends it should be reimbursed] to determine the charge as to the reasonableness of each such factor." 18 F.M.C. at 161 (emphasis added).

[16] Indeed, the court itself noted, in response to the arguments of the Departent of Justice, that the Commission's 1975 Report suggested that the Commission would approve Cargill's charge on grounds other than actual use. *Cargill, Inc., supra*, 1065-1066, 1071.

[17] *Crown Steel Sales, Inc., et al. v. Port of Chicago Marine Terminal Association, et al.*, 12 F.M.C. 352, 372, 375 (1967), local practice; *Evans Cooperage, Inc. v. Board of Commissioners of the Port of New Orleans*, 6 F.M.B., 415, 419 (1961), prevailing practice; *Terminal Rate Structure–California Ports*, 3 F.M.B. 57, 59 (1948), value of service and other factors which must be considered in determining the level of rates.

[18] *E.g., Atlantic Refining Company v. Ellerman and Bucknall Steamship Company, Ltd.*, 1 U.S.S.B. 242, 252 (1932), value of service.

for each ton of grain loaded, and have one major cost, the wages of the longshoreworkers hired to load the vessel.[19]

Thus, the record developed on remand supports the finding that to the extent the shipping gallery provides the principal means by which stevedores may minimize their costs while increasing revenues, it serves to benefit rather than harm them. The shipping gallery provides the stevedoring company a method by which it may relatively quickly and easily earn its flat rate per ton loaded, while simultaneously minimizing its major cost, wages. Because the productivity of the shipping gallery relates directly to the productivity of the stevedores, we find that stevedores derive benefits from their actual use of that facility and that a portion of the cost of the shipping gallery is properly attributable to them.[20]

In reaching the above conclusion, we are aware that there is evidence of record that Rogers charges more at Cargill's Baton Rouge facility than it does at equally productive elevators. We believe, however, that this anomaly is attributable to the competitive nuances of rate setting in the stevedoring industry, generally, a matter beyond the scope of this proceeding. Thus, Mr. James F. Carrier testified at the original hearings in this proceeding that prior to the utilization of the shipping gallery, when the grain was carried by hand to the vessel, stevedoring rates per ton loaded produced a profit to the stevedores of approximately 75 cents per ton, but that after the construction of the shipping gallery, stevedores reduced their per ton rate to a level which, at least at the time the testimony was taken, yielded a profit of only approximately two cents per ton.[21] While we might speculate as to the basis for Rogers' drastic rate reduction and proportionate reduction of profits, we need not do so here in view of the fact that the uncontroverted evidence developed on remand establishes that the speed and efficiency of the shipping gallery does reduce the stevedores' major cost, labor, with a resultant increase in revenue.

We shall now direct our attention to the grain dock-wharf. The Commission in its 1975 Report, concluded that Cargill's charge, insofar as the charge was based upon the allocations of the cost of the grain dock-wharf, was an unreasonable practice within the meaning of section 17.[22] On remand, although Cargill, through the testimony of Mr. Linnekin, indicates that it modified the allocation of the cost of the grain dock-wharf, Mr. Linnekin nevertheless assigned 95% of that cost—as opposed to 100% in the original hearing—to the stevedoring function. While the testimony and other evidence on this point is not totally clear, Mr.

[19] Because the stevedores charge a flat rate per ton loaded, it now appears that the speed and efficiency of the shipping gallery do not benefit cargo.

[20] As we have heretofore explained, section 17 requires that we measure the reasonableness of terminal rates by determining if the "charge levied is reasonably related to the service rendered." In this proceeding, we have found that Cargill's charge is reasonably related to the service rendered because of the prevailing practice in the area and because of the value of the service provided stevedores. Accordingly, given the fact that Freas type cost allocations are not the product of immutable equations, we shall not quantify with precision the specific percentage of shipping gallery costs that are attributable to stevedoring companies, particularly since this exercise would serve no useful purpose in this proceeding. In any event, as noted by the Court of Appeals, it makes "no difference in the long run whether the cost of the grain elevator is charged to the stevedore rather than the vessel . . . [for] the stevedore's charge will be borne by the ultimate beneficiary of the services, the consumer, regardless of whether the stevedore is employed by and paid in the first instance by the vessel or shipper." *Cargill, Inc., supra,* at 1068.

[21] In the remand proceeding, while Mr. Mabrey testified that Rogers makes a profit on all its stevedoring transactions, he did not indicate Rogers' actual per ton profit.

[22] The Commission found that to the extent the grain dock-wharf allocation included the "use of the barge unloading facility, the pile clusters, the dust collection system, and the spouts, to the extent assessable against cargo or vessel, [it constitutes] an unreasonable practice under section 17." *Baton Rouge Marine Contractors, supra,* at 163.

Linnekin seems to have made this allocation by applying his "judgment"[23] to the entire costs involved in the construction of the grain dock-wharf, except for the cost of the barge unloading facilities situated on the wharf.[24]

While the cost of the grain dock-wharf is one factor to be considered in determining the reasonableness of Cargill's charge to stevedores, there are other factors which must be evaluated in determining the reasonableness of Cargill's *total* charge for the use of its services and facilities. For this reason, and because Mr. Linnekin considered cost associated with unloading operations, we shall only consider Mr. Linnekin's "judgment" with respect to the benefits derived by stevedores from their use of the grain dock-wharf.

We turn then to an examination of the benefits derived by stevedores from their use of the grain dock-wharf. The grain dock-wharf houses the supports for the spouts that are used to load the holds of the vessel. The five spouts, which are at the river end of the shipping gallery, and which are supported by the grain dock-wharf, are extended, withdrawn, and moved from hold to hold by a Cargill employee at the direction of the stevedoring company's employees. Accordingly, at least to the extent the grain dock-wharf provides support for the spouts, it provides actual benefits to stevedores. Further, and as found by the Commission in its 1975 Report, the grain dock-wharf provides benefits to stevedores by providing ingress and egress for their employees during loading operations. Finally, because the wharf pilings provide the physical support for the grain dock wharf, which in turn supports the facilities discussed above, we find that the stevedores derive benefits from those pilings. Therefore, because the grain dock-wharf, like the shipping gallery, serves to increase the productivity of the stevedoring companies, we find that the stevedoring companies derive benefits from their use and dependency on the grain dock-wharf and that a portion of the cost of the grain dock-wharf is therefore properly allocable to them.[25]

The final matter to be considered is the liaison cost associated with Cargill's service and facilities charge to the stevedoring companies. Mr. Lloyd Graving testified that Cargill employed a "spoutman" who, at the direction of the stevedoring company's employees, raises and lowers the spouts to the holds of the vessel, moves the spouts from hold to hold, and increases and decreases the flow of grain. This activity relates directly to the stevedores' loading responsibility and contributes to their productivity, for the "spoutman" makes it possible for the stevedore to utilize the speed and efficiency of the shipping gallery and quickly and efficiently load the vessel. Accordingly, we find the cost of the "spoutman" to be properly attributable to stevedores.

[23] As the Court of Appeals noted in *Cargill, supra*, note 13 at 1069, the Freas Formula is not an immutable equation but, "[R]ather it is a set of principles which when combined with the *judgment* of a trained analyst, provides a reasonable assessment of cost and a fair and reasonable allocation of those costs." (Emphasis added).

[24] Except to the extent it relates to the barge unloading facilities, the record on remand is not sufficiently clear to allow us to determine with specificity those elements of the grain dock-wharf which were not considered by Mr. Linnekin on remand. Likewise, the record does not detail all the elements of the grain dock-wharf Mr. Linnekin did consider in making his allocations. The record does indicate that he considered the "pilings that the wharf is on," the "portion of the dock on which barges are moored during unloading operations," and "the walkways used by the personnel of Cargill who unload the barges." Based on Mr. Linnekin's testimony and other evidence in this proceeding, it also appears that Mr. Linnekin took into consideration the loading spouts that are supported by the wharf for they provide the means by which the stevedoring companies actually load the vessel. Mr. Linnekin also testified that he considered the "walkways used by personnel of Cargill who unload the barges." We believe that these are the same walkways which the Commission found in its 1975 Report to be beneficial to the stevedores by providing a means of ingress and egress during loading operations.

[25] As with the shipping gallery (see footnote 20, *supra*), we do not believe it necessary to quantify the specific percentage of the grain dock-wharf costs that are attributable to the stevedoring companies.

We also find the cost of a second Cargill employee, who is engaged in liaison activities, to be properly allocable to the stevedore. This Cargill employee relays messages to and from the stevedore, responds to inquiries regarding vessels scheduled to call at the elevator, and provides the stevedore with information relating to specific operations and conditions. It appears from the record evidence on remand that the allocation of 10% of this employee's salary to the stevedoring function is commensurate with the services provided.

Having found that stevedores derive benefits from the use of Cargill's services and facilities, for which they may be charged, we must now determine whether Cargill's present charge to stevedores of ten cents per ton is unjust or unreasonable within the meaning of section 17 of the Act. For the reasons stated below, we conclude that the record is insufficient to support a finding that Cargill's charge to stevedores is violative of section 17.

As we have heretofore indicated, costs are but one factor in measuring the reasonableness of terminal rates. Where, as here, costs and benefits are identifiable but not readily allocable, the Commission must consider other rate making factors to measure the reasonableness of the rates in issue. The services and facilities provided by Cargill to the stevedore relate directly to stevedore's productivity and hence profitability, for the stevedoring companies charge their customers on a "ton loaded basis." It follows, therefore, that Cargill's services and facilities are of "value" to the stevedore to the extent these facilities and services provide the means by which stevedoring revenue is earned while minimizing the stevedore's principle cost, *i.e.*, the wages of the longshoreworkers hired to load the vessel.

While the services and facilities in issue in this proceeding have not been allocated to stevedores in past Commission proceedings, the "rate making process at individual ports, whether or not based upon the Freas Formula, must be varied to recognize local differences in practices, procedures and objectives." *Crown Steel Sales, supra,* at 372. In this proceeding, the record clearly establishes that the local practice and custom in the area is to assess a charge against the stevedores for the services and facilities provided.

Indeed, the record on remand reveals that all of the grain elevators on the Mississippi River assess a ten cents per ton service and facilities charge against stevedores. This not only supports our finding that a charge against stevedores is an established local practice, but also militates in favor of Cargill's charge being reasonably related to the value and benefits derived by the stevedores from their use of Cargill's services and facilities. The record on remand establishes that these elevators, which compete for grain sales, are generally similarly constructed and provide the stevedoring companies the same measure of benefit and value as provided by Cargill's Baton Rouge facility. Each of the competing elevators provides the stevedores, albeit in varying degrees, the means with which they may quickly and efficiently load the vessel, thus earning their charges while minimizing their costs.

We therefore find that when the value of this service is considered in connection with the benefits derived by stevedoring companies and the local custom and practice in the area, Cargill's charge of ten cents per ton to those companies is reasonably related to the services provided and therefore is not unjust or unreasonable within the meaning of section 17 of the Shipping Act, 1916.

In reaching our decision, we have considered the entire record developed in this proceeding. Though we deem it unnecessary to expressly address each matter raised on exception, we nevertheless believe it appropriate to briefly discuss two issues raised by BARMA's exceptions. First, BARMA argues that the Presiding Officer failed to find that Cargill may not assess *any* charges against stevedores including charges for the cost of water, toilets, telephones and utilities. BARMA's argument squarely contradicts the Commission's 1975 Report, the Court of Appeals decision, and our Order of November 2, 1977, denying Hearing Counsel's Motion to Enforce. In its 1975 Report, the Commission clearly found that the "allocation to stevedores of $933 per year for water, toilets, telephones and utilities does not appear to be so unreasonable as to justify disapproval," pursuant to section 17. *Baton Rouge Marine Contractors, Inc., supra,* at 163. Furthermore, as noted in our November 2, 1977, Order and as specifically recognized by the Court of Appeals, the Commission found in its 1975 Report that certain of Cargill's allocations to stevedores were *not* unreasonable within the meaning of section 17 and that the Commission's 1975 Report should not be construed to prohibit Cargill from "filing the tariff carrying charges consistent with section 17 and the Commission's rulings thereon." *Cargill, supra,* at 1070. BARMA's exception to the contrary is therefore denied.

Also rejected is BARMA's exception that the Commission, the Presiding Officer, and the Office of the Secretary have all erroneously failed to give consideration to the "secondary boycott issue" raised in BARMA's original and amended complaints. BARMA's "secondary boycott" allegation was first raised in BARMA's original complaint and was subsumed with BARMA's allegations of sections 15 and 16 violations. The matter was investigated by the Commission in its initial consideration of the sections 15 and 16 allegations in this proceeding. This same "secondary boycott" allegation was again rejected by the Commission on November 2, 1977, when it denied BARMA's Petition for Reconsideration.

Having found Cargill's charge to stevedoring companies to be reasonabaly related to the services rendered and not shown to be unjust or unreasonable within the meaning of section 17 of the Shipping Act, 1916 (46 U.S.C. 816),

It is Ordered that this proceeding be discontinued.

Commissioner Leslie Kanuk, concurring and dissenting in part. Upon review of the Report and Order, I am compelled to dissent in part. As noted by the majority, the Commission has considered certain aspects of this case previously and has had its decision affirmed by the Court of Appeals for the District of Columbia Circuit. *Cargill, Inc. v. Federal Maritime Com'n,* 174 U.S.App.D.C. 210 (1976), 530 F.2d 1062 (1976), cert. denied, 429 U.S. 868 (1976). For reasons not adequately articulated, the Commission has now stepped away from the approach affirmed by the Court in 1976.

I concur in the majority's rejection of BARMA's argument that *no* charges may be assessed against stevedores. Moreover, I do not except to the majority's rejection of the secondary boycott issue raised in BARMA's pleadings. I agree with the majority that the stevedore can potentially realize certain financial benefits from the operation of the grain elevator. My difference of opinion is based on the fact that the record in this proceeding does not document that such a financial benefit actually exists, and therefore whether a user charge is actually warranted, and what would be a fair and reasonable charge if such a benefit does in fact exist.

The Commission earlier determined that the assessment of terminal charges which did not accurately reflect actual user benefits represented an unreasonable practice under section 17 of the Shipping Act, 1916, 46 U.S.C. 816. This position was upheld by the Court of Appeals.

The record in this proceeding contains no exposition of the relative benefits accruing to stevedores and other segments of the distribution channel. We have before us no indication from the record that increased efficiencies at this elevator have actually resulted in increased profits to the stevedore. The record reveals no comparison of relative benefits between vessels, stevedores, and other beneficiaries of this facility. The majority report relies heavily on what it views to be an "established local practice" (Report at 27) as support for the assessment of charges against stevedores.

It previously has been a bedrock position of this agency that charges such as those assessed here must reflect actual use. See *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968); *Pacific Northwest Tidewater Elevators Association*, 11 F.M.C. 369, 388 (1968). The question before us in section 17 cases is "whether the charge levied is reasonably related to the services rendered." *Volkswagenwerk, supra*, at 390 U.S. 282. If approaches other than actual use are employed, the results still must bear a reasonable relationship to those which would have been achieved by comparing the value of service rendered to the charge assessed. "Actual use" is not a magical concept; it is merely a sound, common-sense method of testing rate practices against the requirements of section 17. It has the further advantage of having passed muster before the Court of Appeals in the District of Columbia Circuit.

The earlier Commission Report and the Court of Appeals decision establish that the allocation of charges among the various users of the Cargill facility is important. In a portion of the Court's decision not fully quoted by the majority, it was stated that:

> One can make the economic argument that there is no difference in the long run whether the cost of the grain elevator is charged to the stevedore rather than the vessel, because the charges will be passed on to the party, usually the vessel, employing the stevedore to load and trim the vessel. In the long run, the stevedore's charge will be borne by the ultimate beneficiary of the services, the consumer, regardless of whether the stevedore is employed by and paid in the first instance by the vessel or the shipper. *But at least in the short run, different consequences will attach to differences in the immediate incidence of the charges, depending on the documents negotiated and entered into by the parties prior to the imposition of the new charges. Moreover, the separation out and identification of the various charges may have a kind of psychological spillover effect on the behavior of the various parties, which the Commission can properly take into account.* [Emphasis supplied.] *Cargill, Inc. v. Federal Maritime Com'n*, 174 U.S.App.D.C. 210, 216-217 (1976); 530 F.2d 1062, 1068-1069 (1976).[1]

[1] The majority report abbreviates this passage in a manner which obscures its import. See Fn. 20, page 20. The critical language is that underscored above.

Furthermore, the Court upheld our prior determination that the costs attendant upon efficient grain elevator operations are more directly related to the activities of such beneficiaries as shippers, consignees, and vessel operators, and less related to those of stevedores. Our earlier finding that the efficiency of this type of grain facility is of less importance to stevedores than other interests was not dependent on whether longshoremen receive hourly wages or stevedore charges are computed on a per-unit volume rate. The majority's attempt to part with this earlier conclusion is undermined by the fact that this record contains absolutely no evidence that BARMA's stevedoring operation has experienced an actual increase in profit margin as a result of grain elevator efficiencies.

Finally, whatever the benefits enjoyed by stevedores at this elevator, the Commission has failed to conduct any comparative analysis of the relative benefits inuring to the several users of the facility. This comparison was at the heart of the Commission's earlier approach and is essential to a determination that "the charge levied is reasonably related to the service rendered."

I fear that the majority has placed undue reliance on stevedore charges at other elevators on the Lower Mississippi. Absent some evidentiary showing of similarity of costs and benefits, the charges at other facilities tell us little of the reasonableness of Cargill's charges at Baton Rouge. Charges at other grain installations are not irrelevant to our inquiry here, but they acquire significance only when some demonstrable basis of comparison is developed on the administrative record.[2] Our task is to determine that the costs of a *particular* facility are being allocated among its users in a manner consistent with the "just and reasonable practices" language of section 17.

(S) FRANCIS C. HURNEY
Secretary

---

[2] Whatever the significance of rate practices at competing elevators, it tells us nothing about the *allocation* of charges at the Baton Rouge facility. It is a specious argument to cite the existence of these charges as evidence of Cargill's charge "being reasonably related to the value and benefits derived by the stevedores from their use of Cargill's services and facilities." Majority Report at 27.

FEDERAL MARITIME COMMISSION

No. 78–54

PUERTO RICO MARITIME SHIPPING AUTHORITY

v.

SEA-LAND SERVICE, INC.

MOTION TO WITHDRAW COMPLAINT GRANTED; PROCEEDING DISMISSED

Finalized April 20, 1979

Puerto Rico Maritime Shipping Authority (PRMSA) has filed a motion seeking permission to withdraw its complaint. In support of this motion PRMSA says:

1. On December 6, 1978, PRMSA filed a complaint against Sea-Land Service, Inc, (Sea-Land) on the basis of two Sea-Land tariff rules (Rule No. 340 and new Rule No. 350, Tariff Nos. 270, FMC-F No. 36 (1st Rev. pp.71-74) and 271, FMC-F No. 37 (1st Rev. pp. 40-44)), providing for a reduction of Sea-Land's tariff rates by 2.5 percent for shippers who stated "Insurance Not Required" on bills of lading prior to shipment. PRMSA complained that Sea-Land's "insurance discount" rules violated Sections 16, First and 18(a) of the Shipping Act, 1916. PRMSA requested the Commission find Sea-Land in violation of these sections of the Shipping Act, order Sea-Land to cease and desist from applying the insurance discount rules, and that Sea-Land pay PRMSA reparation for such violations.

2. On March 5, 1979, Sea-Land filed revised Rule No. 340 and Rule No. 350, Tariff Nos. 270, FMC-F No. 36 (2nd Rev. pp. 71-74) and 271, FMC-F No. 37 (2nd Rev. pp. 40-44) for effect April 5, 1979. PRMSA was notified of these tariff revisions by a letter dated March 6, 1979 from Sea-Land's counsel to the Presiding Administrative Law Judge.

3. As a result of Sea-Land's decision to revise its tariff so as to eliminate the insurance discount rule, PRMSA has determined that it has no interest in using its resources and those of the Commission to pursue this matter.

Since, as the Commission has recognized on several occasions, there is no way to compel a complainant to prosecute his cause, the motion of PRMSA is granted and the case is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

March 16, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-54

PUERTO RICO MARITIME SHIPPING AUTHORITY

v.

SEA-LAND SERVICE, INC.

NOTICE

April 20, 1979

Notice is given that no appeal has been filed to the March 16, 1979 order of dismissal in this proceeding, and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, review will not be undertaken.

(S) FRANCIS C. HURNEY
Secretary

TITLE 46–SHIPPING

Chapter IV–Federal Maritime Commission

[GENERAL ORDER NOS. 13 AND 38; DOCKET NO. 78–30]

April 27, 1979

Part 531—Filing of Freight and Passenger Rates, Fares, and Charges in the Domestic Offshore Trade, Publication and Posting; and

Part 536—Filing of Tariffs by Common Carriers by Water in the Foreign Commerce of the United States and by Conferences of Such Carriers

ACTION: Reconsideration of Final Rule

SUMMARY: Upon reconsideration, the Commission has amended two newly created tariff filing provisions by requiring all ocean carriers to: (1) publish in their tariffs that shippers may file overcharge claims within two years of the date *the cause of action accrues;* and (2) respond only to *written* overcharge claims, by advising claimants of the tariff provisions *actually applied* by the carriers (changes underscored).

DATES: Effective as to both new and existing tariffs July 15, 1979.

SUPPLEMENTARY INFORMATION:

This proceeding was instituted by Notice of Proposed Rulemaking published September 5, 1978, in the *Federal Register* (43 Fed. Reg. 39399) to amend the Commission's tariff filing regulations. By order served January 31, 1979, the Commission adopted rules which required ocean carriers to: (1) indicate in their tariffs that shippers may file overcharge claims with the Commission up to two years of the date the vessel sails or the date the disputed charges are paid, whichever is later; and (2) acknowledge overcharge claims within twenty days by written notice to the shipper of the governing tariff provisions and its rights under the Shipping Act, 1916 (46 U.S.C. 801, *et seq.*).[1] Several parties[2] have petitioned for reconsideration of certain portions of the final rules pursuant to Rule

[1] The rules required that the tariffs contain at minimum the following provisions:

(A) Claims seeking the refund of freight overcharges may be filed in the form of a complaint with the Federal Maritime Commission, Washington, D.C. 20573, pursuant to section 22, Shipping Act, 1916 (46 U.S.C. 821). Such claims must be filed within two years of the date the vessel sails or the date the disputed charges are paid, whichever is later.

(B) Claims for freight rate adjustments shall be acknowledged by the carrier within 20 days of the receipt by written notice to the claimant of all governing tariff provisions and claimant's rights under the Shipping Act.

[2] Latin American/Pacific Coast Steamship Conference; Pacific Coast European Conference; Pacific Coast River Plate Brazil Conference; Associated Latin American Freight Conference and its Member Conferences; American West African Freight Conferences; Australia-Eastern U.S.A. Shipping Conference; Marseilles North Atlantic U.S.A. Freight Conference; Med-Gulf Conference; North Atlantic Mediterranean Freight Conference; U.S. Atlantic and Gulf/Australia-New Zealand Conference; U.S. North Atlantic Spain Rate Agreement; U.S. South Atlantic/Spanish Portuguese, Moroccan and Mediterranean Rate Agreement; and Sea-Land Service, Inc. (Petitioners).

261 of the Commission's *Rules of Practice and Procedure* (46 C.F.R. 502.261). All Petitioners but Sea-Land also requested a stay of the effective date of the rule pending reconsideration.[3] By order dated March 23, 1979, the Commission stayed the effective date of the rules until further order.

Petitioners' objections[4] to the first rule focus on the time period in which shippers may file complaints. Petitioners argue that by allowing the two years to run from the date the shippers make payment on the disputed charges, the rule encourages shippers to delay paying their bills and rewards delinquent shippers with additional time in which they may file overcharge claims. Petitioners also allege that the Commission's action in defining the statute of limitations was not properly noticed in the Notice of Proposed Rulemaking; was not the purpose of this rulemaking proceeding; and is not within the Commission's jurisdiction.

Because the Commission does not wish to encourage late shipper payments, this rule shall be amended so that the statute of limitations is stated in terms of the statute, *i.e.*, "within two years of the date the cause of action accrues."[5] It is unnecessary, therefore, to address the arguments that our previous action in this regard was improperly noticed and was outside the purpose of the rulemaking and the Commission's jurisdiction.[6]

Objections to the twenty-day notification period are that it is too brief; that it is unclear when the twenty days begin to run; and that it is unclear which "claimant's rights" are referred to in that rule. Petitioners are especially critical of the requirement that the carrier must cite to the complaining shipper all governing tariff provisions, and that the carrier is bound in future litigation to the provisions it cites. The "binding" requirement, argue Petitioners, is unfair and extremely burdensome to the carriers, does not serve a stated purpose of the rulemaking, and was not properly noticed in the Notice of Proposed Rulemaking. It is also alleged that, by binding a carrier to an erroneously cited tariff provision rather than simply applying the correct tariff regardless of what was cited by the carrier, the rule violates section 18(b) of the Shipping Act, 1916 (46 U.S.C. 817).

Upon reconsideration, the rule will be amended to permit the carriers to notify claimant-shippers of "tariff provisions actually applied," rather than of "all governing tariff provisions." Notification by the carrier of the provisions it actually relied upon should serve to initiate productive communications between shipper and carrier which may avoid adjudicatory proceedings, while not proving burdensome to the carrier. While we are not mandating that carriers be bound by their notification, we expect that once the carrier has stated which tariff provisions it applied in assessing the disputed charge, it will generally not alter that explanation in future litigation.

The rule will also be amended to make it clear that carriers need acknowledge only claims for freight rate adjustments filed in writing.[7]

---

[3] North European Conferences filed a reply supporting the Petition for Reconsideration and Stay of Australia-Eastern U.S.A. Shipping Conference, *et al.*

[4] The arguments advanced by Petitioners occasionally differed, but they will be discussed collectively for the purpose of this summary. All Petitioners' arguments have been considered and, except as specifically noted, granted to the extent they are consistent with the rule and denied in all other respects.

[5] This tracks the language of section 22 of the Shipping Act, 1916 (46 U.S.C. 821).

[6] We note, however, that the Notice of Proposed Rulemaking stated that a purpose of the rulemaking was "clarifying the statute of limitations."

[7] The twenty-day period will begin to run upon receipt of the written claim.

The twenty-day time period was fully considered previously when it was enlarged from the original ten-day proposal. We note that the period is particularly undemanding in light of the instant amendments to the rule made herein. The time period shall remain at twenty days.[8]

THEREFORE, IT IS ORDERED, That pursuant to section 4 of the Administrative Procedure Act (46 U.S.C. 553) and sections 14 Fourth, 22 and 43 of the Shipping Act, 1916 (46 U.S.C. 813, 821, 841(a), sections 531.5(b) (8) (xvi), 531.5(b) (9), 536.5(d) (20), and 536.5 (e) of 46 C.F.R. are amended as follows:

531.5(b) (8) (xvi) *Overcharge Claims*. Tariffs shall contain a rule which states that shippers or consignees may file claims for the refund of freight overcharges resulting from errors in weight, measurement, cargo description or tariff application. This rule shall clearly indicate where and by what method such claims are to be filed with the carrier and shall further advise that such claims may also be filed with the Federal Maritime Commission. At a minimum, tariffs shall contain the following provisions:

(A) Claims seeking the refund of freight overcharges may be filed in the form of a complaint with the Federal Maritime Commission, Washington, D.C. 20573, pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. 821). Such claims must be filed within two years of the date the cause of action accrues.

(B) Claims for freight rate adjustments filed in writing shall be acknowledged by the carrier within twenty days of receipt by written notice to the claimant of the tariff provisions actually applied and claimant's rights under the Shipping Act, 1916.

531.5(b) (9). Additional rules which affect the application of the tariff shall follow immediately the rules specified above and shall be numbered consecutively, commencing with number 17.

536.5(d) (20) *Overcharge Claims*. Tariffs shall contain a rule which states that shippers or consignees may file claims for the refund of freight overcharges resulting from errors in weight, measurement, cargo description, or tariff application This rule shall clearly indicate where and by what method such claims are to be filed with the carrier and shall further advise that such claims may also be filed with the Federal Maritime Commission. At a minimum, tariffs shall contain the following provisions:

(i) Claims seeking the refund of freight overcharges may he filed in the form of a complaint with the Federal Maritime Commission, Washington, D.C. 20573, pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. 821). Such claims must be filed within two years of the date the cause of action accrues.

(ii) Claims for freight rate adjustments filed in writing will be acknowledged by the carrier within twenty days of receipt by written notice to the claimant of the tariff provisions actually applied and claimant's rights under the Shipping Act, 1916.

536.5(e). Additional rules which affect the application of the tariff shall follow immediately the rules specified above and shall be numbered consecutively, commencing with number 21

IT IS FURTHER ORDERED, That sections 531.5(b) (8) (xvi) and 531.5(b) (9), and sections 536.5(d) (20) and 531.5(e) shall take effect on July 15, 1979. Ocean carrier tariffs which do not contain a rule in conformity with these sections on that date shall be subject to cancellation or rejection.

By order of the Commission.

(S) FRANCIS C. HURNEY
Secretary

[8] *We have also clarified that the "claimant's rights" refers again to the shipper's right to file an overcharge claim with the Commission as explained in the first rule.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–57

MATSON NAVIGATION COMPANY—PROPOSED RATE INCREASES IN THE UNITED STATES PACIFIC COAST/HAWAII DOMESTIC OFFSHORE TRADE

DOCKET NO. 76–43

MATSON NAVIGATION COMPANY—PROPOSED RATE INCREASES IN THE UNITED STATES PACIFIC COAST/HAWAII DOMESTIC OFFSHORE TRADE

ORDER ON RECONSIDERATION

April 27, 1979

Matson Navigation Company (Matson) and the Military Sealift Command (MSC) have petitioned the Commission to reconsider its decisions in Docket Nos. 75–57 and 76–43, served simultaneously on December 12, 1978. MSC seeks reconsideration of Docket No. 76–43 only on the issue of what remedy is to be applied in that case. Matson's petition as well as the replies of the Commission's Bureau of Hearing Counsel and MSC in Docket No. 75–57 have been incorporated by reference into the respective submissions of the parties in Docket No. 76–43. The Commission has consolidated these cases for purposes of reconsideration and the discussion of the issues raised in Docket No. 76–43 will therefore dispose of the issues raised by Matson in Docket No. 75–57 as well.

Docket Nos. 75–57 and 76–43 were instituted to determine the justness and reasonableness of rate changes filed by Matson during 1975 and 1976 in the U.S. Pacific Coast/Hawaii trade.[1] The Commission concluded that a 13% rate of return on equity was the maximum reasonable rate of return for a carrier in Matson's situation. This conclusion was based on the findings that the average rate of return of all U.S. industries during the relevant period of time was approximately 12% and that the peculiar risk characteristics of Matson's operation warranted an additional 1% "risk premium" above the national average.

In Docket No. 75–57 it was determined that the added revenues resulting from the rate increases did not cause the rate of return to exceed the 13% maximum. In

[1] Docket No. 75–57 involved a variable or "multi-tiered" increase which averaged 5.4% for all of Matson's rates. This increase took effect April 7, 1976 for most rate items and May 1, 1976 on the balance of effected items. The Initial Decision was served July 21, 1978. Docket No. 76–43 involved an across-the-board increase of 3.5% effective August 2, 1976. The Initial Decision in this case was also served July 21, 1978.

Docket No. 76–43, however, the Commission found Matson to have exceeded the reasonable maximum rate of return by .98%. This finding resulted, in part, from the recomputation of Matson's rate base by increasing the portion of its deferred income tax reserves deducted from the rate base.[2,3] The increased deduction was accomplished by excluding investment tax credits from Matson's total capital figure in calculating the service-rate-base-to-total-capital ratio.[4] With the rate base thus decreased, the rate of return found by the Commission exceeded that found by the Presiding Officer. Upon finding that the rate increase was excessive, the Commission discontinued the proceeding.[5]

POSITION OF THE PARTIES

Matson's Petitions

Matson advances two primary arguments. The first, raised only in Docket No. 76–43, is that the exclusion of the investment tax credits from total capital in calculating the deferred tax deduction violates section 203(e) of the Revenue Act of 1964,[6] which prohibits Federal agencies from reducing the stated cost of service of regulated industries by taking account of the investment tax credits inuring to the benefit of the regulated enterprise. The second argument, advanced in both cases, is that the evidence of record entitles Matson to a 15% rate of return on equity as opposed to the 13% allowed by the Commission. Numerous contentions are presented in support of these two major arguments.[7]

MSC argues that the Commission's rate of return determinations were correct. With regard to the treatment of the investment tax credits, MSC argues that section 203(e) deals only with the stated cost of service of the carrier and not the treatment of the resulting accumulated fund in the carrier's rate base; that only the computation of the deferred tax deduction is at issue and not the investment tax credit itself; that there are fundamental distinctions between the two which warrant different treatment in this case. MSC defends the finding that a 13% return on equity is the reasonable maximum in this case and states that Matson's

[2] Deferred income tax reserves are the aggregate amount of tax savings accruing to Matson under the accelerated depreciation provisions of the Internal Revenue Code. *See* footnote 13, *infra*.

[3] The Presiding Officer found Matson's rate of return on equity to be 13.92%, which was modified by the Commission to 13.98% due to this adjustment. Without the adjustment Matson's excess revenues would have been $903,949.96 (.92% excess return on equity of $54,531,764 with an effective tax rate of 44.5%) as compared with that found by the Commission of $974,136.69 (.98% excess return on equity of $54,372,732 with an effective tax rate of 45.3%) for a total difference of $70,186.73.

[4] The service-rate-base-to-total-capital ratio is used to determine the proportion of the deferred income tax reserves which are deducted from the service rate base. *See* footnote 13, *infra*.

[5] At the time of the Commission's decision, the subject rates had been superseded by two subsequent rate increases. This decision predated the effective date of P.L. 95–475, which conferred on the Commission the power to order direct refunds of excess revenues under such circumstances, 46 U.S.C. 845.

[6] 78 Stat. 33, P.L. 88–272, note following 16 U.S.C.A. 38.

[7] Matson argues that it was erroneous to exclude investment tax credits from total capital not only because such action contravenes section 203(e), but also because tax credits are not conceptually different from deferred taxes (other than repayment) and that there is no relation between their inclusion in total capital and their deduction from rate base. Matson also alleges that the 13% return on equity is inadequate because the U.S. average is greater than 12%. Finally Matson contends that it is entitled to more than a 1% risk premium in view of the fact that: (1) variations on earnings, the only valid test of risk, are greater than average on earnings per share, return on total capital, return on equity, and in comparison with the trucking and airline industries; (2) its financial leverage, including leases, and business leverage are greater than average; (3) earnings variations are not at a high level and, even if at a high level show more risk than average; (4) the high cost of money indicates a higher than 12% national average return on equity and old investors are entitled to the same consideration as investors of new capital; and (5) the disruptive competition faced by Matson in 1969 more accurately reflects competitive conditions in the trade than does Matson's 1970-1976 experience.

assertion to the contrary merely reargues matters already fully considered in the proceeding. MSC nevertheless addresses each of Matson's allegations.[8]

Hearing Counsel states that the Commission's 13% rate of return ceiling for Matson was justified based upon legitimate subjective factors such as Matson's market dominance, as well as the objective statistical risk analysis submitted by Matson at the hearings.

MSC's Petition

MSC faults the Commission for not providing a remedy for Matson's collection of excessive rate increases under the superseded tariffs. MSC urges that not only should Matson be forced to divest itself of the excess revenues and use these funds for the benefit of the shipping public,[9] but that its present rates should be rolled back to the extent they are based on the past unlawful levels. Alternatively, MSC argues that if the Commission has decided not to take corrective action in this regard both the Administrative Procedure Act and the Commission's Rules require that it state its reasons for such a decision.[10]

Matson's reply to MSC's petition argues that the Commission's only source of "reparation authority" is section 22 of the Shipping Act, 1916 (46 U.S.C. 821) and the Commission has no general equitable powers to devise remedies not specifically provided in its enabling statutes. Matson also submits that a rollback of present rates below a reasonable level because of past profits enjoyed by the regulated company would be a violation of due process. Finally, Matson argues that inflation has eliminated any excess profits which may have resulted from past rates and any subsequent increases are determined only on current analysis and not on stale data of past experience.

Hearing Counsel essentially agrees with MSC's petition, but recognizes there are several problems inherent in the proposals which warrant further proceedings should the Commission elect to act affirmatively in this regard.

Discussion

A. *The Treatment of Investment Tax Credits*

The issue concerning section 203(e) of the Revenue Act of 1964 is essentially one of statutory interpretation.[11] It is clear that in enacting the investment tax credit (16 U.S.C. 38), Congress intended that regulated industries enjoy the

---

[8] MSC submits that the higher than 12% average return on equity allegation is not supported by evidence of record, the statistical earnings variation is not the sole or even most recognized test of risk measurement; vessel leases exist on only 2 of Matson's 12 vessels and are offset by fully depreciated vessels in the fleet; high variations in earnings of Matson are due to extremely high past earnings; if Appendix II of the Report and Order overstates recent returns, this reduces the co-efficient of variation and if the variations are understated, this would indicate better recent returns trends than found.

[9] MSC cites *Bebchick v. Public Utilities Comm.*, 318 F.2d 187 (D.C. Cir. 1963), *cert. den.* 373 U.S. 913 (1963).

[10] MSC cites 5 U.S.C 557(c) and 46 C.F.R. 502.225, respectively.

[11] Section 203(e) provides:

TREATMENT OF INVESTMENT CREDIT BY FEDERAL REGULATORY AGENCIES.—It was the intent of the Congress in providing an investment credit under section 38 of the Internal Revenue Code of 1954, and it is the intent of the Congress in repealing the reduction in basis required by section 48(g) of such Code, to provide an incentive for modernization and growth of private industry (including that portion thereof which is regulated). Accordingly, Congress does not intend that any agency or instrumentality of the United States having jurisdiction with respect to a taxpayer shall, without the consent of the taxpayer, use—

(1) in the case of public utility property (as defined in section 46 (c) (3) (B) of the Internal Revenue Code of 1954), more than a proportionate part (determined with reference to the average useful life of the property with respect to which the credit was allowed) of the credit against tax allowed for any taxable year by section 38 of such Code, or

(2) in the case of any other property, any credit against tax allowed by section 38 of such Code,

to reduce such taxpayer's Federal income taxes for the purpose of establishing the cost of service of the taxpayer or to accomplish a similar result by any other method.

direct benefit of reduced taxes derived therefrom. It also clearly allowed such regulated industries to enjoy a secondary benefit in that Federal regulatory agencies are not permitted to reflect this savings when computing the cost of service of the regulated company for regulatory purposes.[12] However, a third level benefit is enjoyed by regulated companies in that, like deferred taxes, this tax break provision results in a significant accrual of funds that the company can utilize to earn a return.

The third level benefit of realizing a rate of return on investment tax credits may or may not be mandated by section 203(e) although the provision only speaks to the treatment of these funds in cost of service calculations and not rate base calculations. However, if, as is the case in present FMC practice, the carrier is allowed to realize a rate of return on these funds and is not required to deduct a portion of them from its rate base, it should not be allowed to reap a fourth level benefit by including such funds in its total capital figure for purposes of decreasing the deferred tax deduction from rate base.[13] Conversely, if it is not entitled to earn a return on these funds and must deduct a portion of them from the service rate base, fairness would dictate that it be included in total capital for purposes of such calculations.[14]

There is no reasonable basis for concluding that Congress intended to make this fourth level benefit available to regulated companies. Indeed, Matson relies entirely on its interpretation of the concluding phrase of section 203(e) for this proposition. There are no reported cases on this narrow tax question and a review of the legislative history of the Revenue Act of 1964 reveals that Congress did not consider the third level benefit described above, much less contemplate the further extension now urged by Matson.

Both the House and Senate Reports on section 203(e) describe its purpose as follows:

> (c) (iii) *Treatment of investment credit by Federal regulatory agencies.*—Your Committee has added a provision to the bill making it clear that it was the intent of Congress in providing an investment credit last year, and that it is the intent of Congress this year in repealing the reduction in basis required with respect to investment credit assets, to provide an incentive for the modernization and growth of private industry, including regulated industries.
>
> As a result, the bill specifies in two paragraphs the intent of Congress as to the treatment of the investment credit by Federal regulatory agencies. It states in the case of public utility property that these regulatory agencies are not, without the taxpayer's consent, for the purpose of establishing the cost of service of the taxpayer, to treat more than a proportionate part of an investment credit (determined with reference to the useful life of the property) as reducing the taxpayer's Federal income tax liabilities. Nor are they to accomplish a similar result by any other method. Public utility property for this purpose includes property of electric, gas, water, telephone, and telegraph public utilities which under present law is eligible for what in effect amounts to a credit of 3 per cent.
>
> The bill also provides restriction for Federal regulatory agencies in the case of other regulated companies—such as natural gas pipelines, railroads, airlines, truck and bus operators, and other

[12] The Commission promptly recognized the mandate of section 203(e) and has consistently followed its directives in the administration of the Intercoastal Shipping Act, 1933. *See*, General Counsel's Legal Opinion dated August 13, 1964.

[13] In Docket No. 73–22, *et al.*—*Matson Nav. Co.–Increased Rates*, 18 S.R.R. 649, 654, n. 6 (1968), the Commission determined that the deferred tax deduction from rate base should be the same portion of the total deferred tax reserve that the rate base is in relation to total capital. If the carrier is allowed to overstate its total capital, this decreases the relative percentage ratio of total capital represented by the rate base. This in turn will decrease the deferred tax deduction from rate base as this same percentage ratio is applied to the deferred tax credit fund to compute the deduction from rate base.

[14] This is precisely the analysis Matson advanced in arguing that deferred taxes should be included in total capital in computing the deduction from rate base.

types of public carriers—which receive an investment credit of 7 percent of the investment in qualified property. It provides that Federal regulatory agencies are not, without the taxpayer's consent, for purposes of establishing the cost of service of the taxpayer, to treat any investment credit allowed him as reducing his Federal income taxes. Nor are the agencies to accomplish a similar result by any other method.

As indicated above in the case of the public utility property Congress is merely directing the Federal regulatory agencies not to "flow" the benefits of the investment credit "through" to the customers over any period shorter than the useful lives of the property involved. In the case of the other property Congress is directing the Federal regulatory agencies not to "flow" this benefit "through" at any time. This difference in treatment is attributable to the fact that Congress provided what in effect is a 3-percent credit for the public utility property rather than 7-percent credit because last year it was recognized that in their case part of the benefit from the investment credit would be likely to be passed on eventually to the customers in lower rates." H. Rept. 749, 88th Cong., 2nd Sess. 34-35 reprinted in 1964 U.S. Code Cong. & Ad. News 1346-1347.[15]

This language indicates that Congress was concerned with the practice of certain agencies to require the disclosure of current investment tax credits and reduce the reported income tax of the regulated company and thereby reducing the total costs of operation and the corresponding revenue needs. This would lead to lower rates than if no tax credit was calculated into the costs of the company and was characterized as the "flow through" method of regulatory tax accounting.[16] The agencies were also prohibited from treating the credit as a form of income to the carrier, increasing the reported revenues thereby, and accomplishing a "similar result by another method."

The situation presented in this case does not involve Matson's costs or revenues, neither does it involve income tax computation. It involves the computation of the actual investment of the carrier in the regulated service. While a significant issue would be presented as to whether Congress intended carriers to earn a rate of return on the accumulated fund resulting from the accrued credits over time, this issue is not now presented.[17] Rather, the question is whether the Commission must consider these funds as part of an ocean carrier's total capital for purposes of computation of the rate base in matters collateral to the treatent of the investment tax credits *per se*. In order to answer this question in the affirmative there must be evidence of a legislative intent not only to prohibit regulatory agencies from "flowing through" the benefit of the tax credit to ratepayers in cost and revenue calculations but also to require agencies to affirmatively "flow through" all possible benefits of the tax credit to the regulated company. An intent that beneficial treatment be given to both cost and revenue calculations and also to the computation of the company's actual investment in the regulated enterprise is not fairly discernible from section 203(e) or from its legislative history.

[15] The Senate Report is virtually identical. S. Rep. 830, 88th Cong., 2nd Sess. 44-45 reprinted in 1964 U.S. Code Cong. & Ad. News 1716-1717.

[16] For a full discussion of the distinctions between the "normalization" versus "flow through" methods of tax accounting as to deferred taxes, *see*, *Public Systems v. Federal Regulatory Energy Commission*, _____ F.2d _____, Case Nos. 76-1609 and 76-1830, slip opinion at 4-6 (D.C. Cir., Feb. 16, 1979); *Alabama-Tennessee Natural Gas Co. v. F.P.C.*, 359 F.2d 318, 326-27 (C.A. 5, 1966); Dockets Nos. 73–22, et al.—*Matson Navigation Co.–Increased Rates*, 17 S.R.R. 145, 161 (I.D., 1977). For the comparative effects of these methods on rate levels, *see generally*, E. Brigham and J. Pappas, *Liberalized Depreciation and the Cost of Capital* (1970, MSU Public Utilities Studies). Because the fundamental issue involved with both tax accounting issues is virtually identical, *i.e.*, the reporting of taxes actually paid by carriers as opposed to a hypothetical calculation not considering specialized tax advantages, these discussions are, to a large extent, equally applicable to both tax provisions.

[17] This issue may indeed be dealt with in future proceedings. Docket No. 76–43—*Matson Navigation Co.–Rate Increases*, Report and Order, at 6 n. 7, 18 SRR 1351, 1353 n. 7 (1978).

There remains the question of how investment tax credits should be handled as a policy matter. The Commission's Report and Order in Docket No. 76–43, *supra,* expressed no opinion as to the ultimate treatment of the investment tax credits in the rate base. The Commission did, however, hold that, due to the similarity of these funds to deferred taxes—it is provided by the ratepayers and not the carrier—if the carrier is to be allowed to earn a return on these funds by not deducting them from the rate base, it should not be allowed to treat them as carrier provided capital for purposes of other rate base deduction calculations. Matson has advanced no valid reason for reversing this policy, and accordingly, this part of Matson's Petition will be denied.

B. *The Rate of Return on Equity*

Matson has not shown any clear error of fact or law in the Commission's imposition of a 13% rate of return ceiling. The decisions in Docket Nos. 75–57 and 76–43 clearly comply with the applicable legal standards enunciated by the Supreme Court.[18] Matson's contentions constitute reargument of matters already fully considered and rejected by the Commission, [19] and, accordingly, this portion of Matson's Petition will also be denied.

C. *Remedies*

The Commission found the Docket No. 76–43 rate increase to be unreasonable, but discontinued that proceeding without determining what remedy, if any, would be invoked to compensate shippers for the excess revenues retained by Matson.

The remedial actions proposed by MSC—the "Bebchick Remedy" and a rollback of present rate levels,[20] are unprecedented in the administration of the Shipping Act but do appear to have a valid foundation in the law. Before any remedy is applied, however, it is necessary to examine the carrier's *present* circumstances to ensure that the approach taken meets the various regulatory purposes of the Shipping Act and would not unduly penalize the carrier for overestimating its revenue needs.[21] The administrative burden that would be imposed on the carrier and on the Commission must be offset by some tangible, legitimate benefit accruing to those shippers which paid the unreasonable rates when they were in effect.

In weighing these factors in the present proceeding, the Commission has concluded that the fundamental deficiency in the remedies proposed by MSC is that there is no way to ensure that those who actually paid the rates will reap the

[18] *Permian Basin Area Rate Cases,* 390 U.S. 747, 791-792 (1968); *see also, American Public Gas Ass'n v. Federal Power Comm.,* 567 F.2d 1016, 1029-1030 (D.C. Cir. 1977).

[19] For the first time in its Petition for Reconsideration Matson contests the finding that U.S. industries realized an average 12% return on equity during the relevant time period. This finding was based on the uncontroverted testimony of Dr. Ellsworth (Ex. 55), to which Matson did not take exception.

[20] The "Bebchick Remedy" was first enunciated in *Bebchick v. Public Utilities Comm., supra,* and cited with approval by the Commission in *Alaska Steamship Co.–General Incr. in Rates,* 3 S.R.R. 1014, 1016 (1964). It essentially forces a carrier to disgorge excess revenues derived from unjust and unreasonable general rate increases and to pay those revenues over to the shipping public in some appropriate manner.
On the theory that the subsequent rate levels are based in part on a prior unlawful rate increase, the proposed rollback of rates is argued as being within the scope of section 4 of the Intercoastal Shipping Act, 1933 notwithstanding the fact that the subject rates are no longer in effect. *See, contra, Sea-Land Service, Inc –Gen. Incr. in Rates,* 14 S.R.R. 1569, 1570 (1975); *Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade,* 11 F.M.C. 168 (1967).

[21] *Cf., Gilbertville Trucking Co. v. United States,* 371 U.S. 115, 130 (1962). Consideration must be given to the fact that violations of section 18(a) of the Shipping Act, 1916 (46 U.S.C. 817(a)) and section 4 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 845a) do not require proof of any form of scienter or unlawful intent.

benefit of these procedures.[22] Only if there were no feasible alternative and these difficulties could be solved efficiently, might the Commission consider such methods. However, in this case the remedies proposed by MSC cannot be implemented with reasonable efficiency[23] and the Commission has determined that a feasible alternative, and one more solidly founded on direct statutory authority, does exist.

The Commission finds that, in the circumstances presented by this case, the determination that the subject general rate increase was unjust and unreasonable gives rise to a cause of action under section 22 of the Shipping Act, 1916 by any shipper who actually paid these tariffed rates when they were in effect. While the rate increase was unreasonable *from the date it became effective* (*see Gillen's Sons Lighterage v. American Stevedores*, 12 F.M.C. 325, 339 (1969)), the two-year limit on filing of reparation claims did not begin to run until the Commission found the rates to be unjust and unreasonable. (*See Crown Coast Front Co. v. U.S.*, 386 U.S. 503 (1967)). The cause of action under section 22 therefore did not accrue until the Commission's final determination. This cause of action is distinct from any cause of action the shipper may have had at the time the freight rates were paid and is not dependent upon a particular defect in the carrier's *rate structure*.[24] The essential elements of this cause of action are: (a) the carrier instituted an across-the-board uniform increase in rates;[25] (b) the shipper actually paid the increased rates while they were in effect; and, (c) the increase was subsequently found to be unjust and unreasonable in a Commission-instituted investigation. In such a case, the Commission's decision is itself evidence in support of any action that may hereafter be instituted by shippers.

THEREFORE, IT IS ORDERED, That the Petitions for Reconsideration of Matson Navigation Company are denied; and

IT IS FURTHER ORDERED, That the Petition for Reconsideration of Military Sealift Command is granted to the extent that it is consistent with this Order and denied in all other respects; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[22] This problem was specifically noted as to the Bebchick Remedy in the cases of *Moss v. CAB*, 521 F.2d 298 (D.C. Cir. 1975), *cert. den.* 424 U.S. 966, *reh. den.* 425 U.S. 966 (1976) and *Dem. Cen. Comm. of D.C. v. Wash. Metro. Area Transit Comm.*, 436 F.2d 233 (D.C. Cir. 1970). As to the rollback proposal, this same problem undermines the validity of the application of this procedure as it relates to the Commission's discretionary power to apply a remedy in addition to the potential legal obstacles stated in footnote 16.

[23] In order to comply with the standards stated in *Moss v. CAB*, *supra*, extensive further hearings would be required.

[24] Shippers could have maintained reparations claims under section 18(a) at the time the freight charges were paid on the theory that the *specific transportation factors* affecting a particular commodity rate were such that the rate charged was unjust or unreasonable.

[25] Because each commodity bore the general rate increase by the same percentage proportion, the extent to which it was found to be excessive applies equally to all commodities that took the increase. The contrary would be true, however, if this case involved a multi-tiered general increase in rates designed to bring the comparative levels of commodity rates into line with their individual transportation factors.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–4

AGREEMENT NOS. 9902–3, ET AL.
(MODIFICATION OF EURO-PACIFIC JOINT SERVICE)

ORDER ON RECONSIDERATION

May 22, 1979

The Proponents of Agreement No. 9902–8 have petitioned the Commission for partial reconsideration of its March 29, 1979, decision conditionally approving that agreement.[1] Proponents seek a modification in the Commission's order that would approve Agreement No. 9902–8 under conditions allowing ICT to participate in the Euro-Pacific Joint Service and including the combined ICT/French Line marketing arrangement originally proposed. Alternatively, the Commission is requested to defer the effective date of French Line's separate marketing operations until September 30, 1979. The Commission's Bureau of Hearing Counsel submitted a "Reply to Petition" indicating general agreement with the relief sought by Proponents.

The Petition offers no basis for altering the Commission's original determination that ICT's participation in the Euro-Pacific Joint Service was not justified on the record by legitimate transportation conditions. The record citations mentioned by Proponents fall far short of establishing that ICT's participation is essential to the commencement and continued viability of the Joint Service. Neither have the Proponents demonstrated that the record justifies joint marketing of the container cargo space allocated to Hapag-Lloyd and CGM under present Agreement No. 9902–8.[2]

The uncontroverted affidavit of Euro-Pacific's General Manager does establish, however, that French Line cannot develop an effective marketing capability independent of ICT and Hapag-Lloyd by May 31, 1979. New sales representatives must be retained and standard procedures must be established in several different and widely separated locations. Accordingly, the Euro-Pacific Joint Service will be permitted to continue using its present marketing arrangements until September 30, 1979.

THEREFORE, IT IS ORDERED, That the "Petition for Reconsideration" of Hapag-Lloyd Aktiengesellschaft, Compagnie General Maritime and Interconti-

[1] The Proponents are Hapag-Lloyd Aktiengesellschaft (Hapag-Lloyd); Compagnie Generale Maritime (French Line); and Intercontinental Transport, B.V. (ICT), all of which are common carriers by water in the foreign commerce of the United States.

[2] Indeed, Proponents argued that the independent marketing of Hapag's allocated share was a pro-competitive feature supporting approval of the Agreement.

nental Transport, B.V., is granted to the limited extent indicated above, and denied in all other respects; and

IT IS FURTHER ORDERED, That the Commission's March 29, 1979, Report and Order is amended by including a new further ordering clause between the third and fourth such clauses which states that:

> The Proponents may, in their discretion, include a second Proviso clause in Article 6 of their amended Agreement that provides for the Joint Service to operate with its existing marketing arrangements until September 30, 1979.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79–8

AGREEMENT NO. 10285–
SINGAPORE/U.S. ATLANTIC & GULF RATE AGREEMENT

DISCONTINUANCE OF PROCEEDING

May 2, 1979

This proceeding was initiated to determine the approvability under the Shipping Act, 1916, of Agreement No. 10285. Hearing Counsel have now requested that the proceeding be discontinued on the ground that Agreement No. 10285 has been withdrawn by the parties.

By telex dated April 6, 1979, the Straits New York Conference informed the Commission of its withdrawal of Agreement No. 10285 and its request for section 15 approval of the Agreement. On this basis, Hearing Counsel urge discontinuance since there is no longer an agreement requiring section 15 approval, and any issues related thereto are now moot. We agree.

Therefore, it is ordered that proceedings in this matter are hereby discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–41

TRAILER MARINE TRANSPORT CORPORATION—
PROPOSED REDUCED AND INITIAL THROUGH RATES AND PROVISIONS
BETWEEN U.S. ATLANTIC AND GULF PORTS IN THE U.S.
VIRGIN ISLANDS

NOTICE

May 16, 1979

Notice is given that no exceptions were filed to the April 5, 1979, initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, the initial decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78–41

TRAILER MARINE TRANSPORT CORPORATION— PROPOSED REDUCED AND INITIAL THROUGH RATES AND PROVISIONS BETWEEN U.S. ATLANTIC AND GULF PORTS IN THE U.S. VIRGIN ISLANDS

Finalized on May 16, 1979

Respondent carrier has instituted a new service between South Atlantic and Gulf ports and the U.S. Virgin Islands. This new service features reduced rates on 20-foot containers, a single bill of lading, simplified billing, and greater vessel efficiency. Only one party protested the new rates, a carrier operating between Puerto Rico and the Islands, alleging that the new rates are noncompensatory, designed to attract certain high density cargo, and will endanger the carrier's continued existence. The other parties, namely, the Commission's Bureau of Hearing Counsel and the Government of the Virgin Islands, support the new rates. The evidence of record shows the following:

(1) The new reduced rates are compensatory on a fully distributed cost basis and are thus just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933;

(2) The protesting carrier has failed to furnish any evidence in support of its allegations; moreover, the record shows that the new rates are aimed at attracting cargo from a different carrier and are not predatory;

(3) There is no evidence that the new rates will harm or unduly prefer any shipper nor that any shipper will be unreasonably forced to use the carrier's higher rates on 40-foot containers; indeed, the record shows no complaints from any shipper regarding the respondent's rate structure.

A carrier has the right to meet existing competition within certain limits. Respondent has exercised this right and has not exceeded permissible limits in so doing.

The fully distributed cost standard is an acceptable measure of the compensatoriness of a carrier's rates although different measures are evolving which may prove superior. In any event, cost finding is not an exact science and all that is required is that the method produce a reasonable approximation of costs.

William F. Roush and *Donald C. O'Malley*, for respondent.

Rudolph Francis and *Jose F. Beauchamp*, for intervenor International Marine Transport Services, Inc.

William L. Blum, for intervenor Government of the Virgin Islands.

John Robert Ewers, *C. Douglass Miller*, and *Bruce Love*, for Bureau of Hearing Counsel.

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

This proceeding is an investigation begun by the Commission under its Order of Investigation and Hearing, served October 20, 1978. The investigation seeks

[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.

to determine the lawfulness of new through service initiated by respondent Trailer Marine Transport Corporation (TMT) between certain ports on the U.S. Atlantic and Gulf coasts and the U.S. Virgin Islands. This new service was reflected in a tariff (FMC-F No. 2) published by TMT which established reduced rates becoming effective October 15, 16, and 30, 1978. This tariff (later superseded by tariff FMC-F No. 5 which made no substantive changes in rates) established two separate columns of trailerload minimum weight rates stated in cents per hundred pounds. One column set forth rates for trailers not exceeding 20 feet in length, the other set forth rates for trailers exceeding 20 feet in length.

The filing of TMT's new tariff generated a protest which was filed by a carrier known as International Marine Transport Services, Inc. (IMTS) which carries trailers and wheeled vehicles between San Juan, Puerto Rico, and the U.S. Virgin Islands. IMTS claimed that TMT's new rates are unjust and unreasonable, noncompensatory, and represent destructive competition which would cause IMTS irreparable harm. Furthermore, IMTS claimed that the new reduced through rates offered by TMT in conjunction with a subsidiary or an affiliated carrier known as Interisland Intermodal Lines, Inc. (IIL) involved selected major moving commodities carried by IMTS and essential to its survival, were geared to attract high density cargo, and were drastically lower for the smaller trailers.

In reply to the protest, TMT contended that its new reduced rates were designed to be competitive with a carrier known as Tropical Shipping and Construction Co., Ltd. (Tropical), a carrier which operates a direct service between Florida ports and the U.S. Virgin Islands and that TMT's rates on the smaller 20-foot containers are compensatory.

The Commission stated that suspension of the new through reduced rates designed to meet the competition of another carrier's through service would not be warranted since establishment of higher rates than those of the existing dominant carrier in a particular trade area would place the new carrier in a noncompetitive position. However, the Commission believed that certain conditions appeared to necessitate investigation because of the different rates applying to the 20 and 40-foot containers at the higher rates, and the concern that the lower rates on the 20-foot containers might be noncompensatory. Therefore, the Commission wishes to determine two specific issues: (1) Whether there are any circumstances under which shippers would be required to accept a 40-foot container with its attendant higher rates; and (2) Whether TMT's rates applying to containers not exceeding 20 feet are designed to recover total costs attributable to the carriage of cargo in such containers. (See Order, p.3).[2] The Commission ordered these issues to be determined under section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 817, 845a)[3] on an expedited basis. TMT was given approximately 60 days to submit

[2] Although the Commission did not specifically frame such an issue, its Order cited IMTS's contention that TMT's lower rates on 20-foot containers are designed to attract high-density cargo involving certain selected commodities essential to the survival of IMTS. This matter may be subsumed under the general issue of the justness and reasonableness of TMT's new rates arising under sections 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933. I will deal with the contention in the body of the decision.

[3] Section 18(a) of the Shipping Act, 1916, requires that "every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges . . . and just and reasonable regulations and practices relating thereto. . . ." Section 4 of the Intercoastal Shipping Act, 1933, authorizes the Commission to "determine, prescribe, and order enforced a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge, or a just and reasonable classification, tariff, regulation or practice . . . ."

its direct testimony and exhibits in support of its rate changes. Hearing Counsel and intervenors were given 30 days to furnish comparable information supporting their positions. The parties were ordered generally to provide access to underlying material supporting the testimony and exhibits. Following these steps, a prehearing conference was to be convened by the presiding judge for the purpose of limiting issues and fashioning appropriate procedures to resolve them. The Commission ordered the record to be closed no later than February 20, 1979, an initial decision to be issued by the presiding judge on or before April 23, 1979, and the Commission's decision to be served on or before June 25, 1979. (See Order, p. 4).[4]

As instructed by the Commission, respondent TMT submitted its testimony and exhibits on November 22, 1978, and Hearing Counsel did likewise on December 22, 1978. IMTS, which has become an intervenor on November 29, 1978 (see Intervention Granted, that date) submitted nothing. Another intervenor, the Government of the Virgin Islands (the V.I. Government) was granted intervention on January 4, 1979, submitted written testimony after that date, which, while not opposing TMT's new rates, expressed the Government's concern over possible withdrawal of carriers serving the U.S. Virgin Islands.

A prehearing conference was held on January 10, 1979, attended by TMT and Hearing Counsel and four persons who gave testimony in order to amplify the record and avoid the necessity of conducting further trial-type hearings. (See Report of Rulings Made at Prehearing Conference and Other Matters, January 15, 1979). No one appeared for protestant-intervenor IMTS nor for the Government. However, the V.I. Government had advised me before the conference that it would not attend but merely wished to submit a statement. Some time after the conference, on February 2, 1979, IMTS, which, as noted, submitted nothing and did not appear at the conference, contacted me by telephone in the person of Mr. Rudolph Francis, President, who inquired as to the status of the case. Mr. Francis acknowledged that IMTS had failed to comply with the Commission's instructions and indicated that IMTS was busily engaged in reorganization under Chapter XI of the Federal Bankruptcy Act. He made no request and did not comment on the merits of the case and was advised that I planned to issue an initial decision, as to which, according to the Commission's rules, IMTS could file exceptions.[5]

At the prehearing conference the evidentiary record was virtually completed. The written testimony of three witnesses (Mr. O'Malley of TMT; Messrs. Farmer and Stilling of the Commission's staff) was admitted as exhibits 1, 2, and 3, respectively. At a later date the written testimony of Ms. Judith A. Weiss, the V.I. Government witness, was admitted as exhibit No. 4. In addition, oral testimony of Messrs. O'Malley, Farmer, Stilling, and Mr. Norman Lee, of the Commission's staff, was taken to supplement the written testimony. The four exhibits and the oral testimony essentially constitute the complete factual record

[4] As the Commission's Order notes (Order, p. 3, footnote), this procedure closely follows the new procedures established for expedited decisions in rate cases mandated by the enactment of P.L. 95-475 for general rate increases or decreases occurring after the present case. See Docket No. 78–47, General Order No. 16, Amdt. 28, 44 Fed. Reg. 9593, February 14, 1979.

[5] I also advised Mr. Francis that although the rules permitted IMTS to file exceptions to the Initial Decision, the failure of IMTS to comply with various procedural orders might place IMTS in a difficult position before the Commission if IMTS did file anything after the Initial Decision.

in this case. A summary of factual findings follows with specific record references since the parties were not required to file briefs.

FINDINGS OF FACT

History of the Trade and Types of Services Provided

The Atlantic and Gulf-U.S. Virgin Islands trade has been characterized by instability with respect to the comings and goings of carriers. Between 1971 and 1976, for example, such carriers as Alcoa, Amerind, Atlantic, Berwind, Trailer Ship Lines, Wallenius, West India, and others were in and out of the trade. As with other trades regulated by this Commission, carriers may enter without the need to obtain certificates or other forms of license. Furthermore, unlike most domestic offshore trades, the U.S. Virgin Islands are exempt from cabotage legislation (the so-called Jones Act, section 27, Merchant Marine Act, 1920, 46 U.S.C. 883) (Ex. 4, p.2). This means that carriers operating vessels registered under the laws of foreign nations may serve the trade.

Respondent TMT and its corporate affiliate IIL[6] have been involved in the U.S. Virgin Islands trade for about two years. Prior to the establishment of TMT's new through, single factor rates, there were two different methods of shipping between U.S. Atlantic and Gulf ports and the U.S. Virgin Islands. The first method involved a direct service between the port of Palm Beach, Florida, and the Islands, which service was and is being offererd by Tropical Shipping and Construction Co., Ltd., mentioned above. Tropical's tariff publishes rates on both 20 and 40-foot containers per weight or measurement ton subject to a minimum of 850 cu. ft. or 30,000 lbs., whichever produces the greater revenue. (Ex. 1).

The second method of shipping involves a combination of rates in which two carriers link up at San Juan, Puerto Rico, where containers are transshipped from one vessel to a feeder vessel operating between San Juan and the U.S. Virgin Islands. Six carriers participated in this type of service. Puerto Rico Maritime Shipping Authority (PRMSA), Sea-Land Service, Inc. (Sea-Land), Seatrain Gitmo (Seatrain), and TMT would carry from the U.S. mainland to San Juan for linkage with feeder vessels operated by IMTS or IIL. This combination-of-rates method was somewhat cumbersome because one carrier published rates per cubic foot and the other, per hundredweight, and some conversion would be necessary for the shipper to determine the through cost. (Ex. 1, Tr. 24). Moreover, other charges were added on. (Ex. 1). TMT's new tariff simplifies matters by publishing a single through rate, although still utilizing IIL's feeder service between San Juan and the Islands. Furthermore, TMT's tariff now offers rates on 20-foot containers, whereas previously a shipper utilizing TMT's service would be paying 40-foot container rates even if he shipped only a 20-foot container. (Tr. 24-25).[7]

TMT's New Tariff

TMT's new tariff not only simplifies matters by establishing single factor through rates but also causes a reduction in rates because it offers rates based on

[6] Both TMT and IIL are owned by the Crowley Maritime Corporation. (Ex. 3, p. 2).

[7] The record shows, however, that the vast majority of cargo in the trade (nearly 75%), at least from February through October 1978, moved via 35 or 40-foot containers. (Ex. 1, "Exhibit A").

movement by 20-foot containers which are lower than the pre-existing 40-foot rates utilized by itself and other combination-of-rates carriers. The TMT tariff (FMC-F No. 5) which superseded the initial through rate tariff (FMC-F No. 2) placed under investigation, offers these lower 20-foot container rates subject to various minima (usually 40,000 lbs. but sometimes 12,000 or 20,000 lbs.).[8]

TMT's tariff, which now publishes through rates on 20-foot containers, is essentially a trailerload tariff patterned after that of Tropical with respect to rates and commodities applicable to the 20-foot containers. (Ex. 1; Tr. 21, 25, 28). Both tariffs are also basically trailerload tariffs. (Tr. 28, 30). However, Tropical's tariff does provide for a less-than-trailerload (LTL) service. (Tr. 31). TMT can service shippers offering LTL shipments who can use consolidating non-vessel operating common carriers (NVO's), which carriers can utilize the freight-all-kinds (FAK) rate in the TMT tariff. (Tr. 29, 30; Tariff FMC-F No. 5, page 221, "Freight All Kinds"). In attempting to pattern its tariff after that of Tropical, however, TMT erred somewhat by publishing minimum weights amounting to 40,000 lbs., rather than 30,000 lbs. which Tropical publishes in its Virgin Islands Tariff. (Tr. 26).

The Purpose and Impact of TMT's New Tariff

In publishing its new tariff, TMT is seeking to attract cargo in competition with Tropical which, as noted, offers a through service from the port of Palm Beach, Florida, in the Miami area. Evidence of record indicates that cargo originating in this area moving to the U.S. Virgin Islands is substantial. After excluding cargo originating in Puerto Rico, which amounts to 45 percent of the total volume in the trade, fully 47 percent of the remainder of 55 percent originates in the Miami, Florida area served by Tropical. (Ex. 1, "Exhibit B").

Since the primary aim of TMT is to compete for cargo moving via Tropical's direct service out of the Miami area, whatever success TMT has will most probably come at the expense of Tropical, not protestant-intervenor IMTS, which could not carry cargo lifted by Tropical at Palm Beach, Florida, since IMTS does not offer a direct service from the Miami area to the U.S. Virgin Islands. As Mr. Thomas J. Stilling, an economist with the Commission, testified, TMT's new service out of Miami will provide the majority of the competition for Tropical. (Ex. 3). Tropical, however, did not intervene or protest TMT's new rates although realizing that this new service could have a direct impact on Tropical's business in the Miami area.[9] However, Tropical believes that its direct service is based upon quality and dependability and can withstand TMT's competition. (Ex. 3, p. 4). Not only is Tropical's service direct, i.e., without transshipment, in contrast to TMT's, but it moves cargo to the Islands in 74 hours rather than 5 or 6 days which TMT requires. Furthermore, interviews with

[8] TMT's tariff FMC-F No. 5, while not introduced as an exhibit, was made available to me and the parties and is officially noticeable under the Commission's rules. (Rule 226, 46 CFR 502.226). The tariff, plus revisions, shows that the rates applicable to 20-foot containers are almost always subject to a minimum of 40,000 lbs. Tariff FMC-F No. 5 replaced the earlier FMC-F No. 2, in order to conform to the requirements of the Commission's General Order 38, 46 CFR 531, as amended, effective January 1, 1979. (Tr. 20). No substantive changes were made in rates when republishing the tariff. (Tr. 20).

[9] See Ex. 3, p. 5 (Stilling). The V.I. Government, however, contends that Tropical's absence from the proceeding may merely indicate its unfamiliarity with Commission procedures and desire to avoid costly and lengthy litigation. (Ex. 4, p. 2). It could also mean that Tropical believes that the possible loss of business to TMT is so small as to be outweighed by costs of litigation. As I find elsewhere, however, we need not speculate since the record shows that Tropical has good reason to believe that its business can resist TMT's competition.

shippers on the Islands conducted by the Commission's Office of Economic Analysis indicate a high level of satisfaction with Tropical's service. (Ex. 3). TMT is also at a disadvantage compared to Tropical since TMT's minimum on 20-foot containers is usually 40,000 lbs. whereas Tropical's is only 30,000 lbs., as noted above.

TMT does offer its new service out of the ports of Jacksonville, Florida, and Lake Charles, Louisiana, as well as out of Miami, Florida. It is possible, therefore, that TMT will attract cargo from all of these ports that might have moved via PRMSA or Sea-Land, which operate out of South Atlantic or Gulf ports and feed cargo to IMTS at San Juan, Puerto Rico. It is also admitted by TMT that TMT's new 20-foot rates with minima of 40,000 lbs. are especially attractive to high-density cargo such as beer, which can meet the 40,000-lbs. minimum in a 20-foot container. (Tr. 23, 56). However, it is impossible to measure competitive impact on IMTS, which had claimed that it would suffer severely from TMT's new service on the grounds that TMT's 20-foot container rates would attract high-density cargo from IMTS to TMT and could result in termination of IMTS's service between Puerto Rico and the Islands. The reason for this situation is that IMTS has provided no evidence to support its contentions. The record thererfore does not show exactly what or how much IMTS is carrying, from exactly where, or how much in connection with what carriers operating from the mainland.[10] I cannot find therefore that the bulk of IMTS's cargo consists of high-density items. Furthermore, I cannot determine how much diversion of cargo will occur away from PRMSA or Sea-Land to TMT. As Mr. Stilling testified, "IMTS has not provided any information to indicate the amount of cargo that TMT may divert from IMTS. Lacking such information it is impossible to examine the impact of TMT's new service on IMTS. The majority of cargo carried by IMTS originates in areas not served by TMT. If IMTS can provide information of the amount of their cargo originating in areas served by TMT then a review of the impact on IMTS from a diversion of cargo can be undertaken." (Ex. 3, p.8). But IMTS has not provided such information. Furthermore, at the prehearing conference, it was impossible to elicit meaningful testimony from any of the witnesses who testified which would lend support to IMTS's contentions. In fact, the testimony confirmed the fact that TMT was aiming to attract cargo from Tropical, not IMTS, and that no one had any idea how much IMTS cargo originated in Atlantic and Gulf port areas served by TMT. (Tr. 51). For example, it is impossible to determine how much cargo TMT may divert from PRMSA which operates out of New Orleans, which cargo would be fed to IMTS at San Juan. Also, TMT operates out of Lake Charles, Louisiana, but we have no evidence regarding the relative advantages of using TMT's service out of Lake Charles as compared to PRMSA's service out of New Orleans. There is no evidence, furthermore, about shippers' preferences or cost advantages between the two ports which would enable anyone to predict that there would be diversion to TMT. The same problem applies to any other ports which are served by PRMSA or Sea-Land as compared to the ports served by TMT (Jacksonville and Miami, Florida, and Lake Charles, Louisiana). In short,

[10] The record does show that from February through October 1978, IMTS moved 3,474 35 or 40-foot containers received from PRMSA, Sea-Land, or Seatrain, according to one of TMT's exhibits. (Ex. 1, "Exhibit A").

the failure of IMTS to provide any evidence in support of its contentions, despite the Commission's instructions and the requirement that the record be closed by February 20, 1979, has resulted in a failure of IMTS to prove its contentions regarding substantial diversion of cargo from IMTS to TMT, not to mention the alleged adverse impact of TMT's new service on IMTS's financial viability.[11]

The Concerns of the Government of the Virgin Islands

The Government of the Virgin Islands intervened in this proceeding out of concern that if TMT's new through rates were found to be unjust and unreasonable with the result that the competitive balance of carriers serving the Islands would be upset, the V.I. Government would seek appropriate relief. However, if the rates are found to be just and reasonable, the V.I. Government supports the introduction of TMT's new service at reduced rates. The V.I. Government's witness testified that the effect of TMT's new rates is to add competition in the Virgin Islands trade and therefore believes that the new rates will benefit the interests of the shipping public and the business community on the Islands. (Ex. 4). The V.I. Government believes that Tropical is in a strong position to resist TMT's competition and also feels that the addition of another carrier offering direct service from Florida to the Islands, namely, Ace Shipping Co., Inc. under a tariff effective September 21, 1978, will act as a force to keep TMT's rates down. The V.I. Government agrees that IMTS has not presented any information to indicate that TMT will divert significant amounts of cargo. Furthermore, the V.I. Government believes that IMTS which, as noted, is undergoing reorganization under bankruptcy law, has problems which stem from undercapitalization at its inception. The V.I. Government explains also that when IMTS entered the trade, the V.I. Government welcomed the additional service and that IMTS was given additional assistance by the Virgin Islands Industrial Development Commission which granted IMTS the maximum tax benefits available under applicable law. (Ex. 4, p. 5). Nevertheless, as the V.I. Government states, IMTS has not prospered. Most, if not all of these events and difficulties occurred before TMT published its new tariff. Therefore, in large measure, IMTS would have to contend that TMT's new rates should be found unreasonable even though IMTS has been experiencing financial difficulties apparently unrelated to these rates.[12]

Shippers' Required Use of 40-Foot Containers

The Commission is concerned that a shipper might be required to use a 40-foot container at higher rates under TMT's tariff although presumably desiring to use

[11] At the prehearing conference an attempt was made to flesh out the contentions of IMTS with further evidence but it was virtually impossible to sustain these contentions absent the evidence which IMTS should have submitted. (Tr. 51-59).

[12] The V.I. Government expressed some disagreement with witness Stilling with regard to his testimony that if any carrier achieved a monopoly in the Virgin Islands trade, it is not clear that such an event would have an adverse impact on the Islands because such carrier could be subject to Commission regulation. The V.I. Government believes that competition, not regulation, is the effective means to keep rates down and cites the fact that when the Crowley Maritime Corporation acquired IIL, IIL's initial rates were higher than those of the carrier (Berwind) which it succeeded and have since increased. TMT states, however, that the increases have not been as high as the V.I. Government stated and that Commission investigations found IIL's rates to have been just and reasonable. (It should be noted that I am unaware of any Commission investigation or formal findings as to IIL's rates, nor, I am advised, is Hearing Counsel. It is unnecessary to resolve this debate as to the relative merits of competition vis-a-vis regulation in this proceeding. In point of fact, there is no evidence that any carrier is achieving a monopoly in the trade especially since, as the Government itself notes, another carrier (Ace Shipping Co., Inc.) has entered the trade with a direct service and the fact that entry into this domestic trade is open to foreign carriers such as Tropical, which utilizes ships under Panamanian registry. (Ex. 4, p. 2). It is not even clear that IIL will achieve a monopoly in the shuttle trade between Puerto Rico and the Islands since IMTS, the other shuttle carrier, is only undergoing reorganization, not termination, as far as this record shows.

only a 20-foot container. As the Commission recognized, one would not expect a shipper to select a 40-foot container and pay more under such circumstances. (Order, p. 3). TMT admits that there may be times when a shipper might have to use a 40-foot container. If TMT did not have a 20-foot container available, the shipper would either have to wait until such was available or use a 40-foot container. (Or if another carrier had a 20-foot container available (such as Tropical) the Shipper could select that carrier). TMT cites the fact that shippers are expected to pay on the basis of the size of container used and cites the example of PRMSA's tariff FMC-F No. 1, applicable at New Orleans, where shippers must pay higher freight on cargo that could have been loaded into 35-foot containers at lower cost but for the fact that PRMSA has no 35-foot containers available at that port. (Ex. 1, p. 4).

TMT explains why it did not publish an alternation rule in its tariff. Under such a rule, if a shipper desired a 20-foot container and none was available, the carrier could give the shipper a 40-foot container at the lower 20-foot container rates. TMT explains that had it adopted such a rule, this would have undercut carriers such as Sea-Land and PRMSA which handle 35 and 40-foot containers in combination with IMTS, a situation which TMT believes "would have led to the demise of the combination rate structure . . . ." (Ex. 1, p. 4). As TMT explained and as shown in previous findings, TMT's new tariff is aimed at providing competition against Tropical's 20-foot container rates, not at diverting cargo from Tropical's 40-foot containers or Sea-Land's or PRMSA's 35 or 40-foot container services. (Indeed, TMT's rates on 40-foot containers have not been reduced from its previous combination-of-rates service).

In point of fact, the problem of a shipper's having to use a 40-foot container rather than a 20-foot container which was unavailable is purely theoretical. First, the unrefuted testimony is that there is no shortage of 20-foot containers and that there are numerous 20-foot containers available on a moment's notice. (Tr. 34, O'Malley). Second, at the time of the prehearing conference (January 10, 1979) TMT had not yet gotten into 20-foot container movements and all of its carriage was still in 40-foot containers. (Tr. 61, O'Malley). Third, TMT's unrefuted testimony is that it does not expect a big transfer from 40 to 20-foot containers since the cargo that could be converted to the 20-foot container size economically would be limited to some of the heavier, denser cargo such as canned goods or beverages. (Tr. 61). Furthermore, it is apparently the nature of the trade for the vast majority of cargo (almost 75%) to move in 35 or 40-foot containers (Ex. 1, "Exhibit A") and TMT expects that there will be a continuing need for 40-foot container service. (Tr. 61).[13]

Compensatoriness of TMT's Reduced Rates on 20-Foot Containers

The second major concern of the Commission is whether TMT's reduced rates on 20-foot containers would be compensatory, i.e., whether they would recover total costs of carriage.

[13] The reason for the Commission's apparent concern that a shipper might be forced to use a 40-foot container at higher rates rather than a 20-foot container might be the fact that the Commission erroneously believed that "virtually all of the cargo in the . . . trade is presently moving in 20-foot containers." (Order, p. 3). If so, it is reasonable to be concerned that there might be a drain on the number of available 20-foot containers once a new 20-foot service was inaugurated and with resulting shortages. A more valid inquiry might have been the question whether TMT's two-tiered rate structure with 40,000 lb. minimum weight requirements for 20-foot containers would place any shippers at an undue or unreasonable disadvantage because of the nature of their cargo. However, as I discuss below, there is no shipper testimony and no evidence that TMT's rate structure or minimum weight requirements will in fact cause harm to any particular shipper.

One of TMT's reasons for instituting the new 20-foot through service at lower rates was to improve utilization (Tr. 60). This could be done if more revenue could be obtained for a 40-foot slot on a TMT vessel. If TMT can place two 20-foot containers into a 40-foot slot as it intends to do, it is possible for it to derive greater revenue for the same space than if only one 40-foot container were to fill that slot. For example, two 20-foot containerloads of beer or beverages, which are commodities which TMT believes will be attracted to the 20-foot container because of their density, will give TMT $1,920 in revenue as compared to only $1,440 in revenue if only one 40-foot containerload of beer or beverages is placed into the same slot and charged at the minimum weight.[14] But aside from the question of improved utilization, other evidence of record shows that the rates should, with some possible exceptions, more than recover total costs of carriage.

Mr. Thomas L. Farmer, Jr., a staff accountant in the Commission's Office of Financial Analysis was presented as Hearing Counsel's witness and analyzed TMT's costs and revenue. Mr. Farmer reviewed TMT's opening testimony in this area and modified it to some extent but concluded ultimately that with one exception of no great significance, TMT's reduced rates would recover fully distributed costs. Fully distributed costs, as defined by Mr. Farmer, closely resemble the standard enunciated utilized by the Commission in General Order 29, 46 CFR 549.3 (regulations governing the level of military rates). This definition covers all direct and indirect costs, i.e., vessel expenses, non-vessel operating expenses, depreciation, amortization expense, and administrative and general expense. (Ex. 2, p. 2; Tr. 36). Interest expense is not included since that is not considered as an expense under Commission General Order 11. (Id.).

To test whether TMT's reduced rates would recover such costs, Mr. Farmer made three separate analyses in which he compared revenue derived from the lowest-rated commodity, revenue from an average of all rates, and revenue from the highest-rated commodity and matched each of these figures with fully distributed costs. The conclusion reached was that revenue on an average-rate basis and for the highest-rated item more than recovered fully distributed costs. Revenue for the lowest-rated item (rice, at $1.09 per hundredweight, minimum 40,000 lbs.) failed to meet all costs but easily met direct costs and made a contribution of $127 toward indirect costs such as administrative and general expense. On revenue derived from an average of all rates in the tariff, Mr. Farmer testified that TMT would exceed fully distributed costs by $273. (Ex. 2, p. 3). For the highest-rated commodity, of course, the margin over such costs would be much greater. As Mr. Farmer explained, it is unrealistic to expect that the only item which will move in the new service will be rice and there is no evidence regarding typical cargo mix. Therefore, he used the method of calculating revenue from an average of all tariff rates. (Ex. 2, p. 3). As mentioned earlier, in fact, TMT had not yet carried any cargo under its 20-foot container rates, at least at the time of the prehearing conference. Furthermore, as also discussed earlier,

[14] TMT's rates on beer and beverages are $2.40 per hundredweight, minimum 40,000 lbs., for a 20-foot container, and $3.20 per hundredweight, minimum 45,000 lbs., for a 40-foot container. (See TMT tariff FMC-F No. 5, 1st rev. page 219, effective December 11, 1978). If TMT can move two 20-foot containers and charge at the minimum weights, its revenue will amount to $1,920 for the 40-foot slot. But if TMT moved only one 40-foot container and charges at the minimum weight, its revenue for the same slot would be only $1,440.

the new 20-foot rates might not be attractive to all commodities because of density factors.[15]

Mr. Farmer's cost data set forth in his testimony are derived partly from TMT's opening statement and testimony which gave only vessel and non-vessel operating costs as experienced by TMT for the first nine months of 1978. Mr. Farmer, in order to reach a fully distributed cost level, added administrative and general expense plus depreciation and amortization from information contained in General Order 11 statements submitted to the Commission by TMT and IIL for 1977. Mr. Mark Morrison, Controller, Caribbean Division of Crowley Maritime Corporation, the parent company, furnished additional information. Mr. Farmer conducted several procedures to satisfy himself of the reliability of the data involved and also has become familiar with the manner in which TMT keeps its books through on-site inspection in another proceeding. (Tr. 38-39; 49).[16]

In addition to the cost and revenue analysis presented by Mr. Farmer, the record contains another test of the rates in question conducted on the basis of an incremental or "added-traffic" theory propounded by TMT. Under this theory, TMT and IIL are utilizing vessels between the mainland, Puerto Rico, and the U.S. Virgin Islands anyway for the carriage of other cargo. Therefore, the theory runs, any cargo carried under the new 20-foot container rates need only recover direct costs attributable to its carriage so as not to burden other rate payers. In other words, if TMT and IIL can fill otherwise empty slots on vessels moving anyway, if the added cargo pays for its direct costs of handling, no one is harmed. The evidence which TMT presented under this theory shows direct handling costs for two 20-foot containers filling a 40-foot slot to be $548.66. Revenue derived even under the lowest-rated item (rice), as noted above, is far above this cost figure, amounting to $1,520.

DISCUSSION AND CONCLUSIONS

TMT sumamrizes its prepared testimony by stating that it has only met existing competition, that it is not pursuing a predatory policy or attempting to establish a monopoly in the subject trade or engage in destructive or unfair competition. TMT states furthermore that it has simplified a confusing pricing system by establishing a through rate structure which, among other things, provides single carrier responsibility, a single bill of lading, single payment of freight charges, and simplified rates at a competitive level, which rates are also compensatory. Furthermore, states TMT, no shipper would be likely to utilize a higher-rated 40-foot container unless his shipment was too large to fit into a 20-foot container and he could realize a savings by using a 40-foot unit. TMT concludes by stating

[15] It is possible that TMT's new rates may recover fully distributed costs even on rice and that its other rates are even more compensatory than Mr. Farmer's exhibits show. TMT's vessels serve both the Puerto Rican and Virgin Islands trade. If they carry cargo in both trades simultaneously, it would be necessary to allocate certain costs between the trades. See General Order 11, 46 CFR 512.7(c) (2); 512.7(c) (3); 512.7(c) (4). It is not clear from the record if any allocation problem existed although Mr. Farmer did not believe that there was such a problem. (Tr. 43-48). However, even if there should have been an allocation under G.O. 11 formulae and it were performed, the result would be to reduce TMT's costs for the Virgin Islands trade and provide even more proof that TMT's rates were fully compensatory, perhaps even on rice.

[16] The specific cost and revenue figures are shown on Ex. 2, "Exhibit A" which was requested by TMT to be held confidential because it reveals TMT's costs in some detail. Since the conclusions as to the compensatoriness of TMT's rates are supported by the data shown on the confidential exhibit which can be checked by the Commission and are not disputed, I see no reason to disclose them in my decision in case such disclosure could harm TMT competitively. See Rule 167, 46 CFR 502.167

that it has been working diligently with a good reliable service at rate levels which will allow it to place fine equipment into service while holding transportation costs to a minimum.

There is essentially no dispute with TMT on the part of the active participants in this proceeding. Hearing Counsel and the Commission's staff believe that TMT's new rates are generally compensatory, i.e., that they will recover fully distributed costs, and that TMT's direct competitor, Tropical, will not be placed at a disadvantage since Tropical offers faster delivery and has a lower minimum weight requirement. Hearing Counsel concludes that the new service is beneficial to the interests of shippers and urges that it be approved. (See Prehearing Statement of Hearing Counsel, January 9, 1979, pp. 3, 4). The V.I. Government essentially agrees with Hearing Counsel that the new service will be beneficial to the Islands and that Tropical should be able to withstand TMT's new competition. The V.I. Government's concern arose over remarks that if a carrier achieved a monopoly in the trade, such an event would not necessarily have adverse consequences on the Islands. However, the V.I. Government does not charge that any carrier is achieving a monopoly and in fact states that another direct-service carrier has begun service.

The only party that has protested TMT's new service and rates is IMTS, a carrier operating between Puerto Rico and the Virgin Islands. IMTS had alleged that TMT's rates would not recover costs and would have a severely adverse effect on IMTS's ability to remain in the trade. However, IMTS, contrary to the Commission's Order, has provided no evidence in support of these claims.

The record in this case, as discussed above, firmly supports the conclusion that TMT's new service for 20-foot containers is just and reasonable, that the rates for such service are compensatory, and that they are designed to meet competition and not for predatory purposes. There is, furthermore, absolutely no evidence that the new two-columned rate structure for 20 and 40-foot containers is causing shippers disadvantage or harm.

As Hearing Counsel correctly states, it is a cardinal regulatory principle that a common carrier may compete for traffic. Furthermore, such competition is not rendered unlawful merely because the carrier has reduced its rates and succeeded in diverting some traffic from other carriers. *Agreement No. 9955-1*, 18 F.M.C. 426, 486-487 (1975), citing *Agreement-Gulf Mediterranean Ports Conference*, 8 F.M.C. 703, 709 (1965) and *I.C.C. v. New York, N.H. & H.R. Co.*, 372 U.S. 744, 759 (1963). As the Court said in the last case cited, ". . . something more than . . . hard competition must be shown before a particular rate can be deemed unfair or destructive . . . ."

There are, of course, limitations on this right of carriers. A carrier cannot violate prescribed standards of law in the name of competition. For example, it cannot treat shippers unfairly or unjustly discriminate among them or prejudice ports or establish rates which are so low as to be unreasonable under recognized standards or compensatoriness, or establish them for predatory or destructive purposes as regards other carriers. See *Rates from Jacksonville, Florida to Puerto Rico*, 10 F.M.C. 376, 380-381, 385 (1967); *Reduction in Rates—Pac. Coast-Hawaii*, 8 F.M.C. 258, 263; *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184, 206 (1969), affirmed under the name of *Port of New York*

Authority v. Federal Maritime Commission, 429 F. 2d 663 (5 Cir. 1970). It is not even necessarily unlawful for a carrier to do more than merely meet competition, for example, by fixing rates lower than its competitor, if there is valid reason for doing so, such as the carrier's inherent service disadvantage necessitating lower rates. *Rates from Jacksonville, Florida to Puerto Rico,* cited above, 10 F.M.C. at 380; *Agreement No. 9955–1,* cited above, 18 F.M.C. at 481.

Although generally a carrier's rates must meet fully distributed costs or something akin to that standard to be considered compensatory, not every rate in a carrier's tariff is required to meet that standard. It has been recognized that some commodities might not be able to move if forced to recover all costs and that there is discretion on the part of carrier's management to fix rates between direct costs and fully distributed costs. See, e.g., *Investigation of Increased Rates on Sugar/Puerto Rico Trade,* 7 F.M.C. 404, 411-412 (1962); *Rates of Aleutian Marine Transport, Inc.,* 7 F.M.C. 592, 596 (1963); *Matson Navigation Company–Reduced Rates on Flour,* 10 F.M.C. 145, 148-149, 153 (1966); *Inv. of Increased Rates, Atlantic/Gulf Puerto Rico Trade,* 8 F.M.C. 94 (1964); *Gulf Westbound Intercoastal Soya Bean Oil Meal Rates,* 1 U.S.S.B.B. 554, 560 (1936); *Investigation of Ocean Rate Structures,* 12 F.M.C. 34, 37 (1968);[17] Locklin, *Economics of Transportation* (6th Ed. 1966), Chapters 8 and 9. The Commission has even relaxed its requirements that rates generally meet fully distributed costs in the case of carriers which are only starting a new service and are forced to meet existing carriers' competition. See *Reduction in Rates–Pac. Coast-Hawaii,* cited above, 8 F.M.C. at 263-264. In determining a carrier's costs and reasonableness of its rates, furthermore, exactitude is not required. All that is necessary is to make a reasonable approximation using appropriate methodology. *Sea-Land Service, Inc.–Increases in Rates in the U.S. Pacific Coast/Puerto Rico Trade,* 15 F.M.C. 4, 9-10 (1971); *Rates on U.S. Government Cargoes,* 11 F.M.C. 263, 279 (1967);[18] *Investigation of Increased Sugar Rate,* 9 F.M.C. 326, 330 (1966); *Alcoa Steamship Co., Inc.–General Increase in Rates,* 9 F.M.C. 220, 231 (1966); *Increased Rates on Sugar, 1962.* 7 F.M.C. 404, 411 (1962); *Rates of Pacific Northwest Elevators Association,* 11 F.M.C. 327, 401 (1968).

As the above cases illustrate, the usual test of compensatoriness of a rate has been that it recovers fully distributed costs with some exceptions noted above. A slight variation of this standard which the Commission employs to establish compensatoriness of rates is that used in the bidding by American carriers for the transportation of military cargo. See G.O. 29, 46 CFR 549.3; *Regulations Governing Level of Military Rates,* 13 SRR 411, 414-415 (1972). This standard was enunciated in order to ensure that military rates would be maintained at a sufficiently compensatory level so as to protect the financial soundness of the bidding carriers and also avoid unduly burdening non-military rate payers. 13 SRR at 413-414. This does not mean, however, that the Commission is forever

[17] It should be recognized that although these cases constitute Commission precedent, they arose during the old breakbulk days of ocean technology. That is not to say that the principles have no value; however, the measure of direct costs has changed in the container age. See *Hawaiian Trade Study: An Economic Analysis* (F.M.C. Staff October 1978), p. 180.

[18] In this cited case the Commission stated: "Granted that the studies are not as accurate or complete as might be, there is no justifiable reason not to accept them as a fair and honest attempt by the lines to come up with a meaningful story." (Case citations omitted).

wedded to the fully distributed cost standard under its previous definitions or variations.[19] Hearing Counsel states also that the Commission's staff favors a slightly different standard based on long-run marginal costs (LRMC), a standard which gives consideration to elements of demand and excess capacity as well as costs. However, the staff has not yet developed the capability of applying such new standard and believes that the fully distributed cost standard, which approximates LRMC, is acceptable under the circumstances. (See Prehearing Statement of Hearing Counsel, January 9, 1979, pp. 5, 6; cf. *Hawaiian Trade Study, An Economic Analysis* (F.M.C. Staff, October 1978) pp. 179-190).

As discussed above, evidence in this record shows that TMT published its new reduced rates on 20-foot containers to compete with Tropical, whose tariff TMT attempted to copy as regards Tropical's 20-foot container rates. The record shows, however, that TMT did not quite reduce its rates far enough because of its oversight in publishing a higher minimum quantity requirement than Tropical's (40,000 lbs. as against 30,000 lbs.). Furthermore, the record shows that Tropical should be able to withstand this new competition from TMT since TMT suffers from inherent disadvantages regarding time in transit in comparison with Tropical's direct, faster service. Furthermore, TMT's rates on its 40-foot container service are still higher than those published by Tropical. (Ex. 3, p. 3). There is also no evidence that TMT's initiation of service with 20-foot containers is designed to harm protestant IMTS. The record shows rather that TMT is seeking to attract some of the 20-foot container business from Tropical, which business IMTS is not attracting anyway. Although some diversion of cargo from IMTS to TMT could occur, this would happen, if at all, if TMT could attract shippers from using the services of PRMSA or Sea-Land operating out of South Atlantic and Gulf ports since PRMSA and Sea-Land feed cargo to IMTS at San Juan, Puerto Rico. It is, however, totally speculative as to how much diversion could occur in this fashion since IMTS has furnished no evidence to support any of its contentions. The Commission has often said that it cannot base decisions on conjecture or speculation but needs facts. See *Agreement 9955-1,* cited above, 18 F.M.C. at 470; *Alcoa S.S. Co. Inc. v. Cia. Anonima Venezolana,* 7 F.M.C. 345, 361 (1962).[20] Furthermore, even when a party has been found to have the burden of justifying its practices, the Commission has not required the party to prove negatives, i.e., a party does not have to go forward with evidence to show that it will not violate specific provisions of law when no evidence has been presented indicating that it might be violating law.See *Agreement No. 9955-1,* cited above, 18 F.M.C. at 429.

The evidence presented by Hearing Counsel and the Commission's staff shows that TMT's rates should recover fully distributed costs on the basis of a reasonable method of analysis. Even if the rate on rice, the lowest in the tariff, may not recover all such cost, that rate recovers far more than direct costs and, con-

[19] As the Commission stated in Docket No. 78-21, G.O. 11, Amdt. 4, *Average Value of Rate Base*, served January 29, 1979, "The Commission feels that historical acceptance of a particular method does not necessary (sic) preclude the evolvement of a better method." Id., p. 4.

[20] The Commission made remarks in this cited case which bear repeating as regards IMTS's expression of fear of TMT's competition without supporting evidence, stating:

> . . . [S]omething more than a fear of increased competition is necessary to justify a finding that an agreement is unjustly discriminatory or unfair as between carriers, contrary to the public interest, or otherwise merits disapproval under section 15 of the Act. 7 F.M.C. at 361.

sequently, under the case law cited above is not necessarily unlawful. Cf. also *Rates, Hong Kong-United States Trade*, 11 F.M.C. 168, 174 (1967).[21]

There is moreover, no evidence to support IMTS's allegations that TMT's new 20-foot container rates unduly prefer any shippers, place any shippers at a disadvantage, or are designed to divert cargo from IMTS. The only evidence relevant to IMTS's allegations is the admitted fact that the 20-foot container rates are more attractive to higher density cargo. However, IMTS has failed to produce any evidence showing its reliance on high density cargo, which it alleges will be diverted to TMT. Also, the Commission's staff has not identified any shipper who complains about these rates. On the contrary, the staff witness (Stilling) testified that shippers were satisfied with the service provided by Tropical, whose tariff TMT has copied as regards the 20-foot container rate section.[22] Moreover, TMT's witness O'Malley testified that no shipper had yet complained about the minimum weight requirements (40,000 lbs. usually) which were fixed with Tropical's tariff and experience with shippers in the trade in mind. (Tr. 28). Mr. O'Malley granted that with experience some modification in the minimum weight requirements might be made if warranted. (Tr. 28). As noted earlier, shippers of small loads can be accommodated by consolidators who would utilize TMT's FAK rates. In short, there simply is no evidence to support a finding that the rates in question are unjustly discriminatory or unduly preferential or prejudicial. Absent such evidence, which it was incumbent upon the party making such allegations to submit, there is no basis on the record to find the rates to be unlawful on such grounds. See *Agreement No 9955-1*, cited above, 18 F.M.C. at 429, 469-482.[23]

Finally, there is no evidence that shippers will be unreasonably forced to use 40-foot containers at higher rates rather than 20-foot containers at lower rates. The record shows no shortage of 20-foot containers as well as the fact that shippers may select other carriers if they cannot utilize TMT's new service economically. Furthermore, there is no expectation that there will be a large transfer of demand from 40 to 20-foot containers. Although the 20-foot containers rates are more attractive for high density cargo, there is no evidence that shippers have complained or will complain about the particular minimum weight requirements applicable to the 20-foot rates.

---

[21] TMT has, as noted earlier, furnished evidence in support of their new rates based upon incremental cost, also called the "added traffic" theory. Under this theory, rates can be found reasonable if they merely recover direct or incremental costs rather than fully distributed costs under certain circumstances, such as when the cargo moves in a back haul on vessels which must move anyway and which would move empty but for the low, incremental rates which could attract something. Since the record shows that the rates in question are justified on the basis of the regular fully distributed cost basis, it is not necessary to discuss TMT's alternative theory at any length. However, it should be noted that the added traffic theory is applied only under exceptional circumstances, e.g., in back haul movements of empty vessels where outside competition requires low incremental rates in order that anything move at all. Otherwise each rate should share in recovery of all costs of a round voyage, not merely the direct, incremental costs on a back haul. See discussion in *Coal from Southern Mines to Tampa and Sutton, Fla.* 318 I.C.C. 371, 385-392 (1962). There is insufficient evidence on this record to find that the new reduced rates apply to back haul or added-traffic cargo within the meaning of this exceptional doctrine. Indeed TMT has fixed the rates at levels far above incremental costs, a fact which in itself suggests that TMT does not believe that outside competition requires its new rates to plummet to low incremental levels in order to attract cargo for its new service.

[22] The staff's interviews with shippers seem to have focused on the question of their satisfaction with Tropical's quality of service and their feelings about possible carrier monopoly in the trade (Ex. 3, pp. 4, 7). Nevertheless, if there had been any problem regarding the minimum weight requirements or unavailability of service for smaller shippers, the shippers apparently did not mention such problems.

[23] These cited pages are enlightening. In the cited case, various parties alleged that the carrier's rates were discriminatory and preferential because of volume discounts, attraction to high-rated commodities or lack of attraction for commodities which could not be stowed in sufficient quantity to fill a container. However, absolutely no shipper complained or testified that the shipper was prevented from using the carrier's service and the parties' allegations rested on theories, not proven facts, in the trade involved. The Commission refused to find the rates unlawful on such a record.

Events Occurring After Mr. Farmer's Testimony Regarding His Employment

Some time after Mr. Farmer, Hearing Counsel's staff accountant witness, had completed his analysis and testified, an event occurred which made it necessary to clarify his status. Until this matter could be clarified, I deferred issuing this decision, which, even with the temporary delay occasioned by this problem, is being served well within the time period ordered by the Commission, i.e., April 23, 1979.

The evidentiary hearing in which Mr. Farmer concluded his testimony occurred on January 10, 1979. On March 9, 1979, Hearing Counsel served a motion in the form of a letter in which Hearing Counsel called my attention to the fact that Mr. Farmer had been offered employment with the Crowley Maritime Corporation, which owns respondent TMT, and had accepted the offer. Hearing Counsel explained, however, that Mr. Farmer had completed his written and oral testimony in this case more than one month before the offer was made, that he had immediately notified his supervisor when the offer was made and was removed from further participation in the case, a procedure suggested by the Memorandum of Attorney General Regarding Conflict of Interest Provisions of P.L. 87-849 (28 Fed. Reg. 985, Feb. 1, 1963). Thus, Hearing Counsel states that Mr. Farmer had in no way acted improperly and had no control over the situation in which the offer was made. Hearing Counsel asked for a ruling that Mr. Farmer's testimony was in no way influenced or rendered unreliable by these subsequent events and that his testimony remain in the record for all purposes. Hearing Counsel took pains to explain in the motion that any other party could reply within 15 days after date of service of the motion under Rule 74, 46 CFR 502.74, and attached Mr. Farmer's affidavit setting forth the relevant facts in detail. Only one reply was filed, by the Virgin Islands Government, which by letter dated March 14, 1979, stated that it had reviewed the affidavit and did not believe that Mr. Farmer's contracts with the Crowley Corporation had influenced his testimony. Therefore, it had no objection to Hearing Counsel's motion.

Mr. Farmer's affidavit fully explains the facts surrounding the offer of employment and demonstrates convincingly that he acted properly at all times and could in no way have been influenced by the offer of employment when testifying in this case. The critical fact remains that Mr. Farmer had completed his written and oral testimony in this case on January 10, 1979, whereas he was not even contacted by Crowley until more than a month thereafter, on February 14, or 15, 1979. Furthermore, Mr. Farmer immediately notified his immediate supervisor of the offer and upon conducting discussions with Crowley regarding possible employment, discontinued any contact with Commission matters involving Crowley on the instruction of his supervisor, on or about February 21, 1979. Thereafter Mr. Farmer continued discussions with Crowley without discussing Commission proceedings in any way. In addition to his supervisor Mr. Farmer contacted the Commission's Ethics Officer and informed the Bureau of Hearing Counsel and attorneys handling Crowley proceedings that he was no longer free to participate in proceedings involving Crowley, even before he had accepted Crowley's offer of employment. Mr. Farmer's and Hearing Counsel's statements that his analysis of Crowley financial data was in no way influenced by the subsequent offer of employment are fully supported by the detailed factual recitation contained in the affidavit. There is absolutely no evidence or reason to doubt the credibility or integrity of Mr. Farmer who acted in every way as an honest person should when confronted with a difficult situation over which he had no control. I therefore grant Hearing Counsel's request and find that Mr. Farmer's evidence should remain in the record and be considered on its merits without regard to these subsequent ancillary events which patently could have had no effect on his testimony.

ULTIMATE CONCLUSIONS

TMT has begun a new service publishing reduced rates for 20-foot containers. These rates are basically patterned after the tariff of a competing carrier, Tropical Shipping and Construction Company, Ltd., which operates a faster, direct service between Florida and the Virgin Islands. The new service offers a single bill of lading, simplified rates, and greater efficiency. Both Hearing Counsel and the Government of the Virgin Islands believe the new reduced rates to be beneficial and urge their approval by the Commission. The Commission's staff has presented evidence showing that the rates will be compensatory on a fully distributed cost basis and that they will not endanger the continued operations of Tropical which can withstand this new competition. The only party which has protested these new rates, International Marine Transport Services, Inc. (IMTS), has failed to present any evidence for the record, despite the Commission's instructions, which would support its allegations that the new rates are noncompensatory and harmful to the continued existence of IMTS. On the contrary, the record shows that the new rates are primarily aimed at attracting cargo from Tropical, not IMTS. Whatever effect these rates would have on IMTS, which operates between Puerto Rico and the Virgin Islands and is fed cargo from other carriers operating from the mainland, is entirely speculative.

Although it is admitted that the new rates are especially attractive to high density cargo, there is no evidence from shippers or anyone else that TMT's rate structure will harm or unduly prefer any shipper any more than there is evidence that Tropical's similar tariff has harmed or unduly preferred any shipper.

In short, this record shows that TMT is attempting to meet, not eliminate competition, that it is publishing reduced rates which are fully compensatory, and that there will be benefits for shippers as a result of its new service and rates. There is furthermore no probative evidence showing harm to any shipper or competing carrier. Accordingly, I find TMT's new rates to be just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933.

(S) NORMAN D. KLINE
Administrative Law Judge

WASHINGTON, D.C.
March 30, 1979

FEDERAL MARITIME COMMISSION

[46 C.F.R. 547; DOCKET NO. 75-6]

POLICY AND PROCEDURES FOR ENVIRONMENTAL PROTECTION

May 22, 1979

ACTION: Discontinuance of Proceeding

SUMMARY: The Commission has determined that this proceeding, initiated by notice of proposed rulemaking of March 24, 1975 (40 F.R. 13005) should be discontinued and superseded by a new proposed rulemaking designated as Docket No. 79-51.

DATES: Effective upon publication.

SUPPLEMENTARY INFORMATION: None

By the Commission

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–37

RENE D. LYON CO., INC.

v.

AMERICAN PRESIDENT LINES, LTD.

NOTICE

May 22, 1979

Notice is given that no exceptions have been filed to the April 16, 1979, initial decision in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the initial decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78–37

RENE D. LYON CO., INC.

v.

AMERICAN PRESIDENT LINES, LTD.

Finalized on May 22, 1979

Shipments of artifical flowers, Xmas light sets and other like merchandise from origins in the Far East consigned to the Port of San Diego, Calif., found to have been properly delivered to respondent's container yard or container freight station at Chula Vista, Calif., and the subsequent drayage of said merchandise from Chula Vista, after customs clearance, to the Tenth Avenue Terminal in San Diego found to have been at the request of complainant's customs house broker. Complaint dismissed.

David N. Nissenberg for complainant.

J. Donald Kenny for respondent.

INITIAL DECISION[1,2] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

The shortened procedure was followed. The record consists of the complainant's opening memorandum of facts and arguments dated February 6, 1979, the respondent's memorandum of facts and arguments mailed March 6, 1979, and the complainant's reply memorandum of facts and arguments mailed March 20, 1979, each with attached exhibits.

By complaint filed September 26, 1978, the complainant, Rene D. Lyon, Inc., an importer of Christmas tree decorations, alleges that respondent American President Lines, Ltd. (APL), an ocean carrier operating from ports in the Far East to Pacific Coast ports, overcharged the complainant in violation of section 18(b) of the Shipping Act, 1916 (the Act), on certain shipments of Christmas tree decorations from Far East origins to the Port of San Diego made from about November 1975, through January 1978. Complainant also alleges a violation of section 17 of the Act, insofar as it is contended that APL did not observe and enforce a just and reasonable practice relating to the handling and delivery of complainant's merchandise at the Port of San Diego.

Specifically, complainant's goods were delivered to the Port of San Diego at APL's container freight station (CFS) or container yard (CY), both at the same

[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] Another proceeding in which the issues appear to be similar is No. 79–4, *Sol Spitz v. American President Lines, Ltd.*

location, namely *the premises or facilities of California Cartage Company, Inc.* (Cal-Cartage) at 2387 Faivre Street, Chula Vista, Calif. The goods reached Chula Vista in bond and, after customs clearance, were trucked by Cal-Cartage from 2387 Faivre Street to the Tenth Avenue Terminal in San Diego, for which drayage Cal-Cartage billed the complainant.

The alleged overcharges are the above drayage expenses paid by the complainant. The alleged unlawful handling and delivering practices are the delivery of the goods by APL to Chula Vista, rather than delivery to the Tenth Avenue Terminal in San Diego.

The bills of lading designate the cargo in issue variously as artifical flowers, Xmas decorations, candles, musical clown, musical piano, musical auto car, Xmas light sets, Xmas ornaments, marching soldier band, musical metal train passing through tunnel, holiday novelties, Xmas trees, dancing doll, etc.

An analysis of 138 bills of lading shows 66 shipments from Hong Kong, 51 from Keelung, Taiwan, 14 from Tokyo via Yokohama, and 7 from Kobe, Japan. Some of the bills of lading are almost illegible, but generally they all show that the shipments were destined to unnamed overland common points (O.C.P. destinations) in the United States. "O.C.P." is shown on the bills of lading in one or more of three places, namely under "onward routing from port of destination," "for transshipment" or under "marks and numbers." It is apparent and is concluded from the record that the complainant's purpose was to warehouse its O.C.P. shipments at the Tenth Avenue Terminal.

Most of the shipments were less-than-containerloads (l.c.l.) and accordingly went to APL's CFS so that the containers could be stripped and thus divided into shipments to two or more consignees. A few of the shipments herein were containerloads and accordingly went to APL's CY for further handling after release from customs.

Some of the shipments in the list attached to the complaint show cargoes ex "ASIA MARU," ex "ZIM-H.K.," and ex other ships, which do not appear to be those of the respondent. The complaint seeks $6,476.32 in damages. In the complainant's opening memorandum in the affidavit of its Secretary-Treasurer, it is said that complainant paid a total of $5,865.97 to Cal-Cartage for the drayage here in issue. In Exhibit A attached to complainant's reply memorandum, a total of drayage bills of about $5,236.04 is listed.

The respondent points out that the shipments in question moved during 1976 and 1977, and that some of the earlier 1976 shipments are barred by section 22 of the Act, which provides that complaints may be filed within two years after the cause of action accrued. Determination of which shipments may be barred need not be made now, inasmuch as the complainant states in its reply memorandum that should it be found entitled to reparation, it will file a complete reparation statement pursuant to rule 252 of the Commission's Rules of Practice and Procedure (46 CFR 502.252). At that time any barred shipments could be deleted from the reparation statement.

There are certain "non-issues" in this proceeding. The shipments in issue were transported by APL in its ocean service from the Far East origins to its Port of Los Angeles terminal in San Pedro, Calif., and thence were trucked in bond in substituted service to APL's Port of San Diego CFS or CY at Chula Vista. Said

CFS/Cy of APL at 2387 Faivre Street is about one-half mile from the waterfront of San Diego Bay, and is about six miles from the Tenth Avenue Terminal. The complainant alleged in error that APL docked its vessels at Long Beach rather than San Pedro, but this is of no moment to the issues herein.

In its reply memorandum the complainant concedes that at no time has it ever objected to the substituted service (trucking from San Pedro to the Port of San Diego), and that port equalization never has been at issue herein. The complainant is agreeable to the use by APL of any reasonable means to deliver the goods to the Port of San Diego. Rather, the complainant does complain that its goods were delivered to an area (APL's CFS/CY at Chula Vista) assertedly outside of the Port of San Diego.

Another "non-issue" relates to who directed Cal-Cartage to dray the complainant's goods from 2387 Faivre Street to the Tenth Avenue Terminal. In the complaint it was alleged that such drayage was for the convenience of the respondent and not at the request of, or at the direction of, the complainant. The Secretary-Treasurer of the complainant in an affidavit attached to the opening memorandum stated:

> 12. All transportation of goods and packages from Chula Vista to the Port of San Diego were done at the direction of American President Lines and its agent acting on their own and not at the specific request of Rene D. Lyon Co., Inc.

The above affidavit and allegation in the complaint have been refuted by the respondent, and the complainant does not dispute this refutation.

In respondent's memorandum of facts and arguments, the respondent states that the transportation of complainant's cargo from APL's CFS/CY at Chula Vista to the Tenth Avenue Terminal in San Diego was at the direction of Mr. Pres Jenkins, a licensed customs house broker who represented the complainant. At the request of Mr. Jenkins, the complainant's cargo was so handled, following customs clearance and APL delivery procedures. This is sworn to in the affidavit of Raymond J. Reynolds, Manager of the San Diego terminal of Cal-Cartage, which trucking company transported complainant's cargo from APL's CFS/CY at Chula Vista to the Tenth Avenue Terminal on a collect basis, and Cal-Cartage submitted freight bills for this service to the complainant, which paid all such bills promptly and without protest.

The respondent states in its memorandum that should the complainant in its reply memorandum dispute the above matter (as to who authorized the cargo to be moved from APL's CFS/CY at Chula Vista to the Tenth Avenue Terminal) then in that event the respondent requests the right to subpoena and depose Mr. Jenkins on these matters. In its reply memorandum, the complainant does not dispute the matter. Therefore, it is concluded and found that the complainant requested and ordered (through its customs house broker, Mr. Jenkins) that its cargo be transported by Cal-Cartage from APL's CFS/CY at Chula Vista to the Tenth Avenue Terminal.

APL does not use the Tenth Avenue Terminal in San Diego for its operations. Consignees who have made contractual storage arrangements at the Tenth Avenue Terminal or at any other warehouse in the Port of San Diego area must take delivery of cargoes transported by APL at the APL CFS/CY at Chula Vista, unless other arrangements authorized by the tariffs are utilized.

Drayage charges from Chula Vista to the Tenth Avenue Terminal are the same as charges for movement to that location from any point within the city limits of San Diego.

The genesis of the subject proceeding is that on March 27, 1978, the complainant filed a complaint in the Municipal Court of California, County of San Diego, seeking damage from respondent in the amount of $4,570.57. Respondent then moved to stay the Municipal Court proceedings on the grounds that the Federal Maritime Commission had primary jurisdiction. On July 6, 1978, the respondent and complainant stipulated to a stay of the Municipal Court litigation pending adjudication by the Federal Maritime Commission.

General Discussion and Conclusions

Two main issues in this proceeding are, one, whether APL performed its delivery services to the Port of San Diego in accordance with the applicable tariffs and the terms of its bill of lading, and two, if delivery to APL's CFS/CY at Chula Vista was in accordance with the applicable tariffs, whether the designation of the location of APL's CFS/CY for the Port of San Diego at Cal-Cartage's facilities at Chula Vista was a reasonable designation.

APL is required by section 18(b) (3) of the Act not to charge or demand or collect or receive a greater or less 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; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, except in accordance with such tariffs.

In other words, APL must abide by the terms of its tariffs. It must charge the same rates to all shippers obtaining transportation of like cargo from the same Far East origin to the same Port of San Diego destination. APL may not rebate a portion of such charges, by paying for any transportation beyond APL's Port of San Diego CFS/CY. That is, APL may not pay for drayage from its San Diego CFS/CY at Chula Vista to another terminal unless APL's tariff so provides.

Thus, we return to the main question whether APL properly designated Cal-Cartage's facilities at Chula Vista as APL's CFS/CY for the Port of San Diego.

APL's bill of lading provides in Clause 12, in part, that the Carrier without giving notice either of arrival or discharge, may discharge the goods directly as they come to hand at or onto any wharf, craft *or place that the Carrier may select,* (emphasis supplied).

APL's bill of lading provides in Clause 18, in part, that any persons, firm or corporation engaged by the Shipper or Consignee to perform forwarding services with respect to Goods shall be considered the exclusive agent of Shipper or Consignee for all purposes.

APL as a member of the Trans-Pacific Freight Conference of Japan/Korea (TPFC/JK), was subject to its tariffs on shipment herein from Japan to San Diego.

TPFC/JK Tariff No. 35, FMC-6, provides in General Rule No. 23, that on cargo delivered breakbulk ex container, delivery is accomplished by making the cargo available at carrier's CFS, and on cargo delivered in containers delivery is accomplished by making the containers available at carrier's Container Yard (CY).

TPFC/JK's tariff also provides in Rule 46, in part, that for delivery of cargo discharged at other than bill of lading port of destination, the ocean carrier shall arrange at its expense for movement of the shipment via rail, truck, or water, the mode to be determined by the ocean carrier, from the port of actual discharge to the ocean carrier's conventional or container facilities on file with the Conference Chairman for the port of destination. Rule 100(c) of this tariff defines CFS as the location designated by the carrier in the port area defined under Rule 100(H). Rule 100(d) similarly defines CY. Rule 100(E) provides in part that the CY and the CFS may not be shipper's, consignee's, forwarder's or NVOCC's place of business.

Rule 100(H) of this tariff provides in part that the port area at destination ports is:

> that geographic area encompassing those CFS's and CY's on file with the Conference Chairman and in effect on May 18, 1973.

The respondent's memorandum in its attachments or Exhibits F-1, F-2, F-3, and F-4 gives various lists of CY and CFS destinations, effective at various dates. Attachment or Exhibit F-1 shows the CY's and CFS's effective April 19, 1973. Exhibit F-2 was effective August 24, 1976, Exhibit F-4 was effective March 22, 1977, and Exhibit F-3 is for the list of CY's and CFS's effective April 6, 1978.

APL's shipments from Hong Kong and Taiwan are subject to its Hong Kong-Taiwan Freight Tariff No. 5, F.M.C. No. 67. This tariff in its Rule No. 50 provides in part that CFS means the location designated by the carrier or his agent and that such locations must be on file with the Agreement Secretary (Ageement No. 10107, Trans-Pacific Freight Conference HK/Independent Lines Rate Agreement). In the same rule CY is similarly defined as the location designated by the carrier, on file with the Agreement Secretary. All CFS locations must be on the carrier's pier or in the immediate port area as defined by the Chairman or Secretary of Agreement 10107.

Rule No. 175 of this Hong Kong-Taiwan tariff provides, in part, that on cargo delivered breakbulk ex container, delivery is accomplished by making the cargo available at carrier's CFS, and that on cargo delivered in containers, delivery is accomplished by making the container available at carrier's CY. The tariff ocean rates do not include any services beyond delivery to the CFS or CY.

In Tariff No. 1-E of the Port of San Diego, California, San Diego Unified Port District, "Port" is defined as meaning "San Diego Unified Port District" and "District" is defined as encompassing "all of the tideland areas of the Cities of San Diego, National City, Chula Vista, Imperial Beach and Coronado, surrounding San Diego Bay, as well as the navigable waters therein."

The respondent states that the Port of San Diego tariff is not directly relevant to this case, but that it is indicative of the fact that the "port area" as defined by the TPFC/JK tariff is not arbitrary or unreasonable.

Complainant disagrees and submits the affidavit of the Port Director for the Port of San Diego, who states that the only portions of the City of Chula Vista that are within the borders of the San Diego Unified Port District are the tideland areas of that city, that 2387 Faivre "Avenue" (sic) is not in the San Diego Unified Port District, and that APL's CFS at this location is not in the Port of San Diego. It is to be borne in mind that the tariff of the Port of San Diego is designed to meet its own purposes, and is not the controlling tariff setting APL's ocean rates and the services for which these rates apply. It probably is true that the Port of San Diego as a terminal operator or lessor of terminal facilities would be a competitor of Cal-Cartage to some extent insofar as Cal-Cartage is rendering terminal services. Of course, the tariff of the Port of San Diego is pertinent to the issues herein insofar as it may be considered as one factor in the measure of the reasonableness of APL's designation of 2387 Faivre Street as its CFS/CY.

Complainant insists that the literal definition of tideland area is the area between the high and low water marks, but this more properly would seem to be the definition of tideland. Tideland area necessarily encompasses more than tideland, that is, tideland area is the area in the general vicinity of the tideland. In the present case, the tideland area reasonably may encompass many points near the San Diego Bay and local waters, including the Paradise Creek, Sweetwater River, and the Otay River, which empty into the San Diego Bay. However, in any event it is the definition of "port area" in APL's tariffs that is controlling. Of course, the mere filing of a tariff and acceptance of same for filing by the Commission does not make any tariff provision reasonable and lawful, if on complaint it can be shown otherwise.

The complainant insists that APL's CFS at Chula Vista is not directly adjacent to the water (apparently meaning San Diego Bay), although Exhibit A-1 attached to complainant's opening memorandum shows that APL's CFS on Faivre St. (marked with an asterisk on Exhibit A-1, page 2), is very near the Otay River.

Likewise an examination of other CFS/CY locations listed in Exhibits F-1, F-2, F-4 and F-3 shows that a number are not located on piers and docks, but reasonably may be considered to be in the "port area," and even in the tidelands area.

These same exhibits show that not only did APL designate 2387 Faivre Street as its CFS/CY, but also that other ocean carriers designated the same address or facility of Cal-Cartage as their CFS or CY or both. Kawasaki Line, Moeller Line, Maersk Line, Nippon-Yusen-Kaisha Line, and Yamashita-Shinnihon Steamship Co., Ltd., listed 2387 Faivre Street at one time or another. Also respondent states that Sea-Land Service, Inc., established the first CFS in Chula Vista in about 1970, and the use of this area has been popular with conference members.

The complainant argues that Rule 100(H) of the tariff of TPFC/JK defining the port area as the geographical area encompassing the CFS's and CY's on file with the conference is in the nature of an "escape clause," and begs the question of what is a reasonable port area, since Rule 100(H) allegedly sets up no reasonable guidelines for the sites of a CFS. The apparent guidelines have been the commercial customs and practices of the members of TPFC/JK and of Agreement No. 10107 in setting up the locations of their CFS's and CY's. Those practices, that is, the location and use of these CFS's and CY's, have been established for at least 7 or 8 years, and have been commercially accepted apparently by shippers and consignees for some time, even including the complainant, which accepted delivery at APL's Chula Vista location and paid drayage charges from there without protest, for at least 2 years, prior to the filing of the present complaint.

The complainant mistakenly relies on a proposed definition of "Port," which never became effective. Complainant's error is understandable. In the U.S. Government Printing Office publication, entitled, Code of Federal Regulations, 46 Shipping Part 200 To End, Revised as of October 1, 1977, there are two versions of "section 536.1 Definitions." At page 850 of this publication is the version of the definitions effective at the time, and no definition of "Port" is included. At page 871 of this same document is another section 536.1 Definitions, which in subpart (p) defines port as "When used in this part the term 'port' means a place having facilities to originate or terminate water transportation and at which the actual transportation by water commences or terminates as to any particular movement of cargo."

However, this section 536.1 never became effective, see page 870, which states in part, "In order to permit additional time to evaluate petitions for reconsideration, it has been determined to postpone the effective date until further order of the Commission, see 41 FR 44041, Oct. 6, 1976."

In fact, effective January 1, 1978, in Docket No. 72–19, *General Order No. 13, Part 526–Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States*, certain modifications were made and many sections of the regulations were renumbered (mimeographed regulations served November 10, 1977). In this revision, section 536.2 is the "Definitions" section, and again there is no definition of "Port."

In a similar mimeographed publication not here controlling, but of interest, served October 3, 1977, effective January 1, 1978, concerning Docket No. 76–40, *General Order No. 38*, regarding tariffs in the *Domestic* Offshore Commerce, section 531.2 (m) defines "Port" as "a place at which a domestic offshore carrier originates or terminates (by transshipment *or otherwise*) its actual ocean carriage of property or passengers as to any particular transportation movement." (Emphasis supplied.)

The complainant argues that the definition of "Port" as provided in Section 536.1(p), the definition which never became effective, precludes areas inland from the water, and therefore that any tariffs filed by or on behalf of APL containing some other definition of port are in contravention of the Code of Federal Regulations. As seen, complainant relies on a never-effective proposed definition.

Therefore, we must return to the definitions of CFS's and CY's as provided in the tariffs governing APL. APL's designation of its CFS/CY location at Chula Vista was lawful in accordance with APL's tariffs.

The question remains whether or not the tariffs provided reasonable rules.

It appears reasonable from a public and commercial standpoint to designate the Chula Vista location as APL's CFS/CY. An examination of Exhibits F-1, F-2, F-4, and F-3, attached to respondent's memorandum shows that various locations were used for CFS's and CY's for the ocean carriers offering service to the Port of San Diego. Such locations include or included:

(a) Tenth Avenue Terminal San Diego
(b) California Cartage 1421 Sicard Street, San Diego

(c) *La Salle Truck, 690 Anita Street, Chula Vista*
(d) California Cartage, 2387 Faivre Street, Chula Vista
(e) Sky Trucking, 5010 Market Street, San Diego
(f) Sky Trucking, 2163 Hancock Street, San Diego
(g) Port Transport, 415-30th Street, National City
(h) 24th Street Terminal, San Diego
(i) G&H Transportation, Inc., 1950 Newton Street, San Diego
(j) Container Freight Corp., 415-30th Street, National City

A number of the above terminals do not appear to be directly on the San Diego Bay.

In days past when all ships were conventional breakbulk vessels, it was natural to unload the ships at the waterfront and stack the loose pieces of cargo on the pier or in sheds near the water. But, with modern containerships and with limited spaces for handling large containers, apparently it has become feasible to move the containers some distances from the water to container yards for delivery of the full containers to shippers, and in the case of less-than-container loads to container freight stations not right on the water but some distance away, where there is space for appropriate facilities for stuffing and stripping containers.

Some latitude in picking the location of CY's and CFS's is necessary both from an economical standpoint and also from the standpoint of avoiding congestion of trucks. If all trucks do not have to go to the same location, traffic may be spread out, avoiding congestion in limited areas adjacent to the water.

The Administrative Law Judge has no knowledge of the specific situation herein, that is, of any problems of the economics of the location of CY's and CFS's at the Port of San Diego, or of any possible truck congestion, but it would appear wise as a general rule not to unduly limit the sites of CY's and CFS's in the Port of San Diego. A requirement that APL could not select its Chula Vista CFS location, as it did, would seem to be unduly restrictive and unreasonable.

Modern and far-sighted regulation should not tie down a carrier to any narrow technical choice of location of its CY or CFS. Rather, an ocean carrier should be free to select a site for its CY or CFS, provided the location selected is within reason and serves a legitimate public need, and further provided that the location(s) selected is (are) in accordance with applicable tariff provisions.

Of course, selection of Tia Juana, Mexico, as the site for a CFS or CY for the Port of San Diego would be unreasonable under present circumstances, but this record does not support a finding that 2387 Faivre Street, Chula Vista, is an unreasonable location for APL's CFS/CY at the Port of San Diego. A look at a San Diego area map confirms that San Diego, National City, Chula Vista and other nearby cities are all in close proximation to each other and to San Diego Bay and its tributary waters.

It is ultimately concluded and found, that complainant's shipments in issue herein were delivered properly in accordance with respondent's applicable tariffs to respondent's container freight station/container yard at Chula Vista, Calif.; that those shipments were not overcharged; that the complainant has not shown that respondent's designation of its container freight station/container yard at Chula Vista for delivery of goods to the Port of San Diego was an unreasonable designation; that APL's selection of its CFS/CY at Chula Vista and delivery of goods thereto was not an unreasonable practice relating to the handling and delivery of goods consigned to the Port of San Diego; that the drayage of complainant's shipments from Chula Vista to the Tenth Avenue Terminal in San Diego was at the request and direction of complainant, through its customs house broker; and that complainant was aware that the drayage was at its expense and paid such drayage without protest. Complaint dismissed.

(S) CHARLES E. MORGAN
Administrative Law Judge

WASHINGTON, D.C.
April 13, 1979

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 574

INGERSOLL RAND INTERNATIONAL

v.

PERALTA SHIPPING CORP.
FILING AGENT FOR
IRAN OCEAN SHIPPING CO., INC.

DENIAL OF PETITION TO INTERVENE; REMAND OF PROCEEDING

May 23, 1979

Administrative Law Judge John E. Cograve served his initial decision in this proceeding January 8, 1979, wherein he granted the application of Peralta Shipping Corporation, agent for Iran Ocean Shipping Company, Inc., (IROSCO) for permission to waive a portion of freight charges. No timely exceptions were filed. MCT Shipping Corporation, however, later petitioned to intervene and to reopen the proceeding. Replies to these petitions have been filed. We determined to review the initial decision by notice served February 12, 1979.

As part of our review of the initial decision in this matter we have considered the petition of MCT to intervene and have determined that it should be denied. MCT is the disponent owner of the M.V. KOH EUN, the vessel which performed the voyage in question. MCT alleges that IROSCO abandoned the voyage and as a consequence MCT took control of the vessel and completed the voyage. MCT further alleges that it obtained maritime liens on all of the vessel's subfreights. MCT states that inasmuch as it is ultimately entitled to the freights from this voyage, it has an obvious interest in this proceeding because the outcome of this proceeding will determine the amount of freight actually due on the shipment.

The instant proceeding involves an application under section 18(b)(3) of the Shipping Act, 1916, for waiver of a portion of freight charges. The statute authorizes such an application by a common carrier by water and permits a grant of such application where it appears there is an error in a tariff due to inadvertence in failing to file a new tariff. The instant application was filed on behalf of a common carrier and alleges such an inadvertence. For an inadvertent failure to file a tariff to serve as a basis for waiver, it must be determined that a prior agreement or understanding that a particular filing would be made by the carrier existed. Such an agreement or understanding, of course, must be formed prior to the start of the shipment. If such an arrangement was negotiated here it would have been by or for the carrier which issued the bill of lading and which originally took responsibility for the voyage. Obviously, MCT played no part in any such arrangement, as the voyage was initiated some time in November, 1977 and MCT, by its own admission, obtained no interest in the voyage until December 14, 1977. It is apparent that all the events that bear on determining whether there was a previously agreed rate or on what would be the applicable tariff rate absent such an agreement, occurred prior to MCT's arrival on the scene. Because this proceeding is limited to determining if a waiver is authorized based on a finding as to the properly applicable rate, MCT's participation is neither necessary nor warranted. Indeed, MCT's attempts to interject issues regarding whether or not it has a lien on the freights are irrelevant.[1] These issues will be for the District Court to decide. We need only decide the applicable rate and the amount of freight based on that rate. We need not decide who ultimately is entitled to the ocean freight as a result of the alleged abandonment of the voyage.

One point made in MCT's pleadings which is relevant to our determination here is that the record contains evidence that the alleged negotiated rate was not on behalf of IROSCO, but was on behalf of Jeddah Overseas Industrial Sea Transport (JOIST). However, this information is already in the record of this proceeding and MCT's participation is not needed to resolve that question. In light of the above discussion, the petition of MCT to intervene is denied.[2]

Upon review of the record in this proceeding, we have determined to vacate the initial decision and to remand the matter to the Administrative Law Judge for further proceedings and issuance of a supplemental decision. The initial decision would grant the application for waiver on the basis of a finding that a $90 W/M rate was negotiated for the shipment in question. This finding is based on an affidavit supplied by Mr. Jorge Rivera, Peralta's Assistant Line Manager for IROSCO, which confirms a $90 W/M rate quote was given (presumably by Peralta or IROSCO) to the shipper's freight forwarder (SCAC Transport). The Administrative Law Judge, however, did not reconcile this with the evidence of record contained in a December 5, 1978, letter to Peralta from SCAC Transport in which it is stated that a $90 W/M rate was negotiated by SCAC with *JOIST*, and that later a corresponding booking contract was received by SCAC from *JOIST* (emphasis added). Peralta's affidavit in response to MCT's petition to intervene attempts to explain the IROSCO/JOIST discrepancy. It is suggested there that the negotiations were in fact with a Mr. Camuti of IMPACT, an agent for both JOIST and IROSCO, and that SCAC erroneously assumed in its December 5, 1978, letter that negotiations were on behalf of JOIST. This explanation, however, contradicts Peralta's earlier suggestion that it (not IMPACT) was responsible for negotiating and filing the rate on behalf of IROSCO. The above demonstrates that the present record affords no basis for concluding that a $90 W/M rate was negotiated for carriage of the shipment in question by

[1] This finding and our ultimate conclusion here make it unnecessary to rule on MCT's petition for leave to file a supplementary memorandum of law on whether a lien has attached.

[2] Denial of the petition to intervene precludes consideration of MCT's petition to reopen. We have, however, determined on our own motion to reopen and to remand the proceeding to the Administrative Law Judge.

IROSCO. Neither can we determine that the various agents involved were empowered by their agency arrangements to act on behalf of or to bind IROSCO by their actions. It must be established that the carrier *or its authorized representative* agreed to the rate and determined to apply it to this shipment by seeking special docket relief.

Accordingly, it is ordered that the initial decision is vacated and the matter is remanded to the Administrative Law Judge for further proceedings to determine:

(1) Whether a $90 W/M rate for the carriage by IROSCO of the shipment in question was in fact agreed to prior to shipment and inadvertently not filed.

(2) Whether the entity or entities negotiating the alleged rate on behalf of IROSCO was empowered by any agency arrangements to bind IROSCO to such rate, and to file it on IROSCO's behalf.

(3) Whether Peralta was empowered by its agency arrangement with IROSCO to file on behalf of and to bind IROSCO to the conforming tariff of $90 W/M filed, effective May 11, 1978.

(4) Whether Peralta was empowered by its agency arrangement with IROSCO to file the instant special docket application.

(5) Whether the special docket application should be granted.

The Administrative Law Judge is directed, in his discretion, to conduct whatever further proceedings are deemed necessary to resolve these questions and to issue a supplemental decision.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 574

INGERSOLL RAND INTERNATIONAL

v.

PERALTA SHIPPING CORPORATION, FILING AGENT FOR IRAN OCEAN SHIPPING CO. INC.

January 8, 1979

Application granted.

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

Iran Ocean Shipping Co. Inc. (Irosco) through its agent Peralta Shipping Corporation seeks permission to waive collection of $6,345.63 on a shipment of Road Making or Earth Moving Equipment which moved from Norfolk, Virginia, to Jeddah, Saudi Arabia. The shipment consisted of 14 pieces of equipment weighing 76,960 lbs. and measuring 4,615 cu. ft.

In October of 1977 JCAC, a freight forwarder (FMC No. 1773), acting for Ingersoll Rand, negotiated a rate of $90.00 per 2240 lbs. or 40 cu. ft. to be applied to the shipment of road building equipment destined for Jeddah. Peralta, the filing agent for Irosco was instructed to file the $90.00 rate with the Commission. At the time this instruction was given Peralta, Mr. W. Hageman was Peralta's Irosco line manager and Miss Diane Ennis was his secretary. Neither is now in the employ of Peralta. However, Mr. Jorge Rivera states in an affidavit that at the time of the incident in question he was the assistant line manager and worked directly with Mr. Hageman and that,

> Miss Diane Ennis . . did have knowledge of the October 24th, 1977 $90 W/M quote given to SCAC for the movement of Road Building Machinery . . . and I am able to swear that our failure to file this rate resulted solely from an oversight on the part of Miss Ennis who was handling our tariff filings at that time.

When the shipment left Norfolk the applicable rate under the Irosco Freight Tariff No. 1 (FMC 1) was $145.00 W/M, which would have resulted in a total charge of $16,729.38. At the $90 W/M negotiated rate the total charge would have been $10,383.75. The latter was the actually collected charge and permission to waive $6,345.63 is requested.

[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)

Section 18(b) (3) of the Shipping Act, 1916, permits the Commission to waive collection of a portion of the freight charges when there has been an error due to an inadvertent failure to file a new tariff. The error under consideration here is clearly within the statute. The present application conforms to the requirements of Rule 92(a), Special Docket Applications, Rules of Practice and Procedure, 46 CFR 502.92(a). The error which resulted in the inadvertent failure to file the rate is of the kind contemplated by section 18(b) (3).

Therefore, after consideration of the application and the exhibits attached to it I find that:

1. There was an error which resulted in the inadvertent failure to file a negotiated rate which would have been in effect if the error had not been made.
2. The waiver sought here will not result in discrimination among shippers.
3. Prior to applying for the waiver, Irosco filed a new tariff which set forth the rate on which the waiver should be based.
4. The application was filed within 180 days from the date of shipment.

Accordingly, permission is granted to Irosco to waive collection of a portion of the freight charges in the amount of $6,345.63.

(S) JOHN E. COGRAVE
Administrative Law Judge

WASHINGTON, D.C.
January 8, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–7

AGREEMENT NOS. 9929–2, ET AL.
(MODIFICATION OF COMBI LINE JOINT SERVICE AGREEMENT), AND AGREEMENT NOS. 10266, ET AL.
(JOINT SERVICE AGREEMENT BETWEEN INTERCONTINENTAL TRANSPORT, B.V., AND COMPAGNIE GENERALE MARITIME)

ORDER PARTIALLY ADOPTING INITIAL DECISION

June 5, 1979

On January 30, 1979, Administrative Law Judge Stanley M. Levy (Presiding Officer) issued an Initial Decision in the present proceeding which conditionally approved Agreement No. 9929–5 and Agreement No. 10266–2 (Agreements) pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. 814).[1] No exceptions to this decision were filed by the Proponents or Protestants in the case and it is assumed that the Presiding Officer's conditions of approval are acceptable to the parties.[2] A Final Energy and Environmental Impact Statement was served by the Commission's Office of Environmental Analysis on February 16, 1979, which concluded that approval of the Agreements was the environmentally preferable course of action.[3] On March 5, 1979, the Commission determined to review the Initial Decision on its own motion.

Upon examination of the entire record, it has been concluded that the result reached by the Presiding Officer is essentially correct. The Commission does not, however, agree with all of the steps taken to reach that result and finds that further modifications to the Agreements are necessary if they are to be approved. Supplemental discussion is particularly warranted in light of the Commission's intervening decisions in *Agreement No. 9929–3—Pendente Lite Approval of Combi Line Non-LASH Service,* served March 5, 1979, and *Agreement Nos.*

[1] Agreement No. 9929–5 was approved on the condition that Compagnie Generale Maritime not participate in the Combi Line LASH vessel service and that the two remaining parties not concertedly offer LASH service between Mexican and United States ports. Agreement No. 10266–2 was also approved on the condition that the parties not offer joint container/breakbulk service between Mexican and United States ports. Reporting requirements were imposed to assure compliance with the limitation on total carryings established by Article 2.2 of Agreement No. 9929–5.

[2] The Proponents are Hapag-Lloyd Aktiengesellshaft (Hapag); Intercontinental Transport, B.V. (ICT); and Compagnie Generale Maritime (French Line). Protestants are United States Lines, Inc. (USL); Sea-Land Service, Inc. (Sea-Land); Seatrain International, S.A. (Seatrain); and the Commission's Bureau of Hearing Counsel.

[3] By carrying more TEU's per vessel, Proponents can achieve a more fuel efficient operation. Over 500,000 barrels of Bunker C fuel (or its equivalent) could be conserved annually. The use of larger vessels would also increase air pollutants emitted in United States ports by about 11 tons annually, but the additional amounts emitted in each port of call would have only a minimal effect on local air quality.

9902-5 and 9902-8 (Euro-Pacific Joint Service), served March 29, 1979. Accordingly, the Initial Decision will be adopted except to the extent it is inconsistent with the following analysis.

DISCUSSION

The Proposals

Agreement No. 9929-5 has two separate and distinct parts. Part I calls for the *joint operation* of a two vessel LASH service by the three Proponents to be known as "Combi Line." Expenses and revenues would be divided in proportion to each party's capital contributions. Hapag and ICT are each required to contribute a LASH vessel, but French Line's contribution would be limited to one or more feeder vessels, if and when the Joint Service commences a feeder operation at European ports.

Part II of Agreement No. 9929-5 would authorize Hapag, ICT and French Line to cross-charter container space from one another on any and all vessels *separately operated* by these three carriers in the U.S. Gulf and South Atlantic/Continental Europe, United Kingdom, Eire trade.[4] The Proponents may employ whatever vessels they wish, but will limit their *containerized* cargo carryings on these vessels to a combined total of 800 twenty foot equivalent container units (TEU's) per week in each direction (averaged quarterly).[5]

Hapag and ICT presently operate a joint "Combi Line" LASH service, container cargo service and conventional (breakbulk cargo) service, in the trade. The container service features four "Omni Class" container/breakbulk ships which have been or will soon be modified to carry 950 TEU's each. Combi Line now carries approximately 800 TEU's per week under Agreement No. 9929-3, and its container service has been used and been found reliable by shippers since January, 1973. The Proponents would use these modified Omni vessels—all four of which are owned by Hapag—in their proposed "coordinated container service."[6] One or more additional vessels may also be used from time to time. Proponents originally contemplated the use of between four and six new 1,500 TEU containerships, three or four of which would be owned by Hapag, one or two by ICT, and one by French Line. These vessels were scheduled to become available in 1978 and 1979. Proponents have now decided not to employ these vessels in the trade and are unlikely to alter that decision until such time as adequate container facilities are constructed in Mexican ports.[7]

In situations where no conference or other lawful ratemaking body establishes rates for containerized commodities carried by the Proponents, they will themselves agree upon the rates they charge to shippers. No pooling of revenues or

[4] Ports in Scandinavia and along the Baltic are included in Proponents' service area. Mediterranean ports are not.

[5] Of these 800 TEU's, no more than 100 eastbound and 225 westbound (averaged monthly) may be carried to or from U.S. South Atlantic ports and none shall be loaded or discharged north of Charleston, South Carolina. Moreover, no more than 30 TEU's of refrigerated cargo may be carried eastbound and no more than 10 such TEU's may be carried westbound. After the first year of operation the westbound limit may be increased to 15 TEU's and after the second year to 20 TEU's.

[6] Agreement No. 9929-5 does not authorize Proponents to time charter vessels from each other. Any such arrangement must be separately submitted for section 15 consideration.

[7] The U.S. Gulf and South Atlantic/Europe trade is unbalanced in favor of eastbound movements. The Mexico/Europe trade is unbalanced westbound. It is traditional for carriers to follow an itinerary outbound from Europe to Mexican ports, then to U.S. Gulf ports, and then back to European ports. Exhibit 13.

expenses would be allowed under Part II of Agreement No. 9929-5. Approval of Part II would therefore terminate an existing joint container service featuring relatively little competition between the parties and replace it with an arrangement involving a significantly greater level of competition between Hapag and the two other Proponents. In addition, the five-year covenant not to compete contained in the present Combi Line Agreement has been entirely eliminated from Agreement No. 9929-5.

Agreement No. 10266-2 is a joint service arrangement between ICT and French Line whereby these carriers will share all revenues and expenses from the operation of container, conventional and container/breakbulk ships in the trade under a yet to be selected common trade name.[8] As long as ICT and French Line remain parties to Part II of Agreement No. 9929-5, the *containerized* cargo carried by their joint service will be subject to the TEU ceiling imposed by that agreement. Both Part II of Agreement No. 9929-5 and Agreement No. 10266-2 have a term of four years.[9]

Modifications Necessary for Approval

The Commission has determined that certain modifications, in addition to those ordered by the Presiding Officer, must be made before the Agreements can be approved. These modifications stem primarily from the fact that the two agreements before the Commission do not adequately reflect the three distinct section 15 activities proposed by Proponents: (1) a joint Hapag/ICT LASH and conventional vessel service; (2) a joint ICT/French Line container and conventional vessel service; and (3) a Hapag, ICT and French Line cross-charter arrangement for container space. Accordingly, approval of these proposals will be conditioned upon the division of the present two-agreement packages into three separate agreements. Part II of Agreement No. 9909-5 must be revised to contain a complete container cross-charter agreement and will be assigned a new FMC processing number.

Part I of Agreement No. 9929-5 concerns the operation of LASH vessels. Proponents allege, however, that Article 1.2 of Agreement No. 9929-5 also authorizes them to operate a joint conventional vessel service. Article 1.2 simply states that the joint LASH service will "use supplementary space on [the Proponents'] owned and chartered conventional vessels as needed." This language is vague under the circumstances. Most conventional vessels are incapable of carrying LASH barges and it would be unreasonable to assume that an entire conventional vessel service was being authorized through 1986 by this phrase alone, especially since Proponents have not described the working details of their proposed breakbulk operation.

The Commission has consistently interpreted section 15 as requiring a clear and detailed statement of the activities to be engaged in by the parties to a proposed agreement. Nothing in the record indicates that a *joint service arrangement* is necessary to achieve the one-way conventional service Combi Line has been providing for declining amounts of breakbulk cargo.[10] Conventional

[8] Agreement No. 10266-8 is therefore not properly described as a mere "marketing" arrangement.

[9] Part I of Agreement No. 9929-5 has a December 31, 1986 termination date.

[10] In June, 1977, Combi Line's conventional vessel service consisted of four Hapag owned ships with a combined capacity of only 50,000 long tons. Combi's two LASH vessels have a combined capacity of 363,440 long tons. Exhibits 7 and 8.

vessels of the type Combi Line has been employing require a far smaller capital commitment than do the large LASH and container vessels being operated in the trade. The outsized or heavy-lift cargo carried by the Combi conventional vessel service can also be handled by Combi LASH vessels or by Proponents' container vessels. To the extent breakbulk cargo originates at ports not regularly served by those vessels, it could be readily carried by Hapag's conventional vessels (acting individually) or the new ICT/French Line joint service.[11] Accordingly, approval of Part I of Agreement No. 9929–5 will be conditioned upon the deletion of the "supplementary space" clause in Article 1.2. This action is without prejudice to the submission of an adequately justified conventional service agreement between Hapag and ICT.

Agreement No. 9929–5 authorizes the three Proponents to fix rates for containerized cargoes. When they so act, they are fully subject to the Commission's self-policing rules (46 C.F.R. Part 528). The self-policing provisions contained in Appendix A to Agreement No. 9929–5 do not comply with these regulations. Accordingly, approval of Part II of Agreement No. 9929–5 shall be conditioned upon *either* the deletion of the last 13 lines of Article 3.4 *or* the amendment of Appendix A to comply with Part 528 of the Commission's Rules. Because Part I, as conditionally approved herein, is a two party joint service arrangement, it is not subject to self-policing requirements.[12]

One of the major benefits of Part II of Agreement No. 9929–5 is the fact that the Combi Line joint container service is being replaced by an arrangement whereby Hapag will compete with ICT/French Line for container cargo. It is therefore inappropriate for the three Proponents to exercise a single vote on conference matters pertaining to such cargo. Accordingly, Article 3.4 of Agreement No. 9929–5 must be amended to apply only to the Hapag/ICT joint LASH service.

Conversely, Agreement No. 10266–2 does not presently limit ICT and French Line to a single vote on conference matters pertaining to their proposed joint service. Accordingly, approval of Agreement No. 10266–2 shall be conditioned upon the addition of a provision similar to present Article 3.4 of Agreement No. 9929–5.

The ICT/French Line joint service is unlikely to operate outside the framework of Agreement No. 9929–5 during the next four years. Nonetheless, in light of the Proponents' insistence that Agreement No. 10266–2 should not be tied to Agreement No. 9929–5, approval of the former shall be conditioned upon ICT and French Line adopting an 800 TEU per week containerized cargo limit of their own. This modification is necessary to avoid overtonnaging in the event Agreement No. 9929–5 were terminated and Hapag and the ICT/French Line service began competing without benefit of that agreement's capacity limitations.

Agreement No. 10266–2 also fails to describe adequately the proposed ICT/French Line conventional vessel service. ICT and French Line have expressed an intention to concentrate on containership operations to compete for both container and breakbulk cargo and the cross-chartering provisions of Article 2.3 of

[11] No justification was offered for the highly anticompetitive proposals which allow ICT to participate in *two* conventional vessel services in the same trade—the Hapag/ICT (Combi Line) service and the French Line/ICT service.

[12] Agreement No. 10266–2 is similarly exempt from Part 528.

Agreement No. 9929–5 do not apply to conventional vessels.[13] Because Hapag is likely to employ conventional vessels to supplement its container cargo service, and because direct vessel calls at smaller U.S. ports would meet a transportation need, the vagueness found in Agreement No. 10266–2 could be made acceptable if Article 1 were amended to limit the parties to one conventional vessel call per week as part of a voyage serving at least one U.S. port not otherwise receiving direct ICT/French Line service.

Article 2.3 of Agreement No. 9929–5 states that the Proponents may charter space to and from each other "in such quantities and on such terms as they may agree." The proportional shares of the parties are not revealed.[14] An amendment to Article 2.3 describing each party's relative share of the 800 TEU container capacity would ordinarily be necessary. However, the Commission would be able to monitor adequately the performance of the proponent lines if reporting requirements more detailed than those described in the Initial Decision were included.[15] Accordingly, approval of both Agreements shall be conditioned upon the submission of quarterly reports which reveal, for each voyage undertaken, the vessel's name, its operator (Hapag, ICT or French Line), the itinerary, the total number of TEU's carried, the number of TEU's carried by each Proponent, and the average number of TEU's per week carried in each direction (averaged quarterly).[16]

The Basis for Approval

The Presiding Officer found the Agreements to be subject to the Commission's *Svenska* doctrine[17] and further found that the proposal's anticompetitive effects would be offset by other legitimate Shipping Act considerations. Agreement No. 9929–5 authorizes price fixing and a limitation of production, both of which are *per se* violations of the Sherman Antitrust Act (15 U.S.C. 1 *et seq.*). Agreement No. 10266–2 is a joint service arrangement. Such agreements between established ocean carriers are viewed as arrangements for dividing markets and are also presumed to reduce potential, if not actual, competition between the participants. The Commission will therefore require an appropriate justification without regard to whether their particular proposal constitutes a *per se* violation of the antitrust laws.

In this instance, Proponents have demonstrated that Agreement No. 9929–5, as modified, would allow the use of more efficient containerships while avoiding the detrimental effects of overtonnaging.[18] Three carriers could participate in a modern all-water container service without duplicating the extensive capital

[13] Indeed, the principal reason for both Agreement No. 10266–2 and Part II of Agreement No. 9929–5 is the high cost of entering the container cargo market and the parties' plans to acquire efficient vessels for use in the trade.

[14] Exhibits 23 and 42 indicate that a 40%-40%-20% split between Hapag, ICT and French Line may be planned.

[15] Additional reporting requirements would be necessary in any event. These particular requirements are intended to facilitate prompt Commission action in the event an excessive inbalance should develop in the relative carryings of the three proponent lines.

[16] As long as Agreement No. 9929–5 is in effect, no separate report need be filed by the parties to Agreement No. 10266–2.

[17] *Federal Maritime Commission v. Svenska Amerika Linien*, 390 U.S. 238, 243-246 (1968).

[18] Based upon the relatively small (approximately 4.0%) annual growth rate predicted for all U.S. Gulf/Europe cargo and the fact that much of this cargo is not susceptible to containerization, there is a real possibility excess container capacity could develop in the trade. Exhibit 46. Without Agreement No. 9929–5, at least 950 and perhaps as many as 3,000 TEU's would be required in order for Hapag and ICT to provide the more efficient service necessary to assure their continuance as effective competitors in the trade.

investment required to operate such a service. Experience has proven that an overcommitment of capital relative to cargo availability is likely to cause irresponsible rate competition, rebating, service disruptions, carrier failures and other conditions associated with serious instability. Hapag could provide high levels of container service on its own, but without Agreement No. 9929-5 there would either be a dramatic increase in tonnage or a marked decrease in ICT's participation in the container market. French Line might find itself unable to enter that market with even an infrequent containership service.

As modified, the practical effects of Agreement No. 10266-2 on the Proponents' competitors should not be significant, especially with regard to containerized cargo. The ICT/French Line service would add no more than 800 TEU's per week to the 5,000 plus TEU's presently available to shippers each week.[19] Moreover, as long as ICT and French Line participate in Agreement No. 9929-5, they will carry considerably less than 800 TEU's per week (probably 60% of that amount). The ICT/French Line service will therefore attract less than ten percent of the moderately growing container cargo market and would certainly enjoy no unfair advantage over Sea-Land and the other frequent all-water container operators now serving U.S. Gulf and South Atlantic ports.

In short, the Agreements, as modified, would serve a serious transportation need by continuing a reliable, shipper accepted LASH service and make an improved container service available to the shipping public. They would also provide a public benefit by furnishing the improved container service in a manner which adds to the number of competitors and increases the level of competition in the trade.[20] Lastly, they would accomplish a valid regulatory purpose by assuring that this improved container service and increased competition occur *without* causing overtonnaging or otherwise creating unstable or harmful conditions in the trade.[21]

THEREFORE, IT IS ORDERED, That Part I of Agreement No. 9929-5 is disapproved pursuant to section 15 of the Shipping Act, 1916, effective June 29, 1979, unless the Commission actually receives at its offices in Washington, D.C., on or before June 28, 1979, a modified version of that agreement designated "FMC Agreement No. 9929-6," signed by both Hapag-Lloyd Aktiengesellshaft and Intercontinental Transport, B.V., which is limited to the Hapag/ICT joint LASH service and contains the following amendments:

---

[19] Sea-Land offers 1,400 TEU's per week as a direct, all-water service. U.S. Lines (1,000 TEU's), Seatrain (1,800 TEU's) and the American Export Division of Farrell Lines, Inc (1,000 TEU's) call weekly at South Atlantic ports and serve Gulf Coast ports by a minilandbridge service. BaltAtlantic (350 TEU's) has a weekly all-water service from North and South Atlantic ports. Lykes Bros. Steamship Co., Inc. (230 TEU's averaged weekly); BaltGulf (443 TEU's averaged weekly); Atlantic Cargo Services (216 TEU's averaged weekly); Waterman Steamship (143 TEU's averaged weekly); Norwegian American Line; Polish Ocean Line, Unigulf Line, and Harrison Line offer less frequent container service in the trade. Exhibits 41 and 42 and tariffs on file with the Commission

[20] The existing Combi Line service has been the largest overall carrier of liner cargo in the trade. The proposed Agreements would disperse this concentration of market power. The Combi Line LASH service will compete on a relatively equal basis with Lykes Bros., the improved Hapag and ICT/French Line container services will not secure an unfair advantage over existing container operators, and Hapag and ICT/French Line will compete for both container and breakbulk cargo.

[21] Pages 34 to 47 of the Initial Decision are inconsistent with this analysis and are not adopted by the Commission. The economic needs of ocean carriers, although relevant Shipping Act considerations, are not "transportation needs" within the meaning of the *Svenska* doctrine. Further, the "regulatory purpose" criterion is intended to curtail specific adverse conditions which the Shipping Act was designed to eliminate (*e.g.*, cutthroat competition, rebating, undue market power, carrier failure, and activities detrimental to the foreign commerce of the United States). Increased carrier efficiency and competition generally fall within the "public benefit" criterion. The Commission specifically notes that French Line's proposed contribution to the joint LASH service is not a basis for approval in light of the deletion of French Line from that service.

(1) Delete "Compagnie Generale Maritime" in all instances where it presently appears;

(2) Delete all references to service between United States ports and ports in Mexico which presently appear;

(3) Delete the fourth "Whereas" clause;

(4) Delete the last fourteen words in Article 1.2;

(5) Appropriately renumber Articles 3.1 through 3.5;

(6) Delete those portions of present Articles 3.1 through 3.5 which apply to the Proponents' proposed cross-charter arrangement for container cargo; and;

IT IS FURTHER ORDERED, That upon full and timely compliance with the conditions set forth in the above ordering clause, Agreement No. 9929–6 shall be approved; and

IT IS FURTHER ORDERED, That Part II of Agreement No. 9929–5 is disapproved pursuant to section 15 of the Shipping Act, 1916, effective June 29, 1979, unless the Commission actually receives at its offices in Washington, D.C., on or before June 28, 1979, a modified version of that Agreement to be designated "FMC Agreement No. ______," signed by Hapag-Lloyd Aktiengesellshaft, Intercontinental Transport, B.V., and Compagnie Generale Maritime which contains the following amendments:

(1) Delete all references to service between United States ports and ports in Mexico which presently appear;

(2) Delete the second and third "Whereas" clauses;

(3) Appropriately renumber Articles 2.1 through 3.5;

(4) Delete the last thirteen lines of present Article 3.4 or modify Appendix A to comply fully with the self-policing requirements of 46 C.F.R. Part 528;

(5) Delete the proviso clause of present Article 3.4 and the two sentences immediately following that clause;

(6) Add a new final Article which reads as follows:

The parties shall submit quarterly operating reports to the Federal Maritime Commission concerning their activities in the subject trade. These reports shall include the dates, ports of call and vessels employed for each voyage undertaken by any of the parties in each direction; the total number of loaded containers (expressed in TEU's) carried on each voyage between European and (a) U.S. Gulf ports and (b) U.S. South Atlantic ports; the number of TEU's carried by each party on each voyage between European and (a) U.S. Gulf ports and (b) U.S. South Atlantic ports; the number of refrigerated containers carried on each voyage; and the average number of TEU's carried in each direction per week between European and (a) U.S. Gulf ports and (b) U.S. South Atlantic ports (averaged quarterly). The first such report shall be filed on or before November 15, 1979, and shall cover the period July 1 through September 30, 1979.

and;

IT IS FURTHER ORDERED, That upon full and timely compliance with the conditions set forth in the above ordering clause, the renumbered version of Part II of Agreement No. 9929–5 shall be approved; and

IT IS FURTHER ORDERED, That Agreement No. 10266–2 is disapproved pursuant to section 15 of the Shipping Act, 1916, effective June 29, 1979, unless the Commission actually receives at its offices in Washington, D.C., on or before June 28, 1979, a modified version of that Agreement to be designated "FMC Agreement No. 10266–3," signed by both Intercontinental Transport, B.V., and

Compagnie Generale Maritime, which contains the following amendments:

(1) Change the title from "Joint Marketing Agreement" to "Joint Service Agreement;"

(2) Delete all references to service between United States ports and ports in Mexico;

(3) Modify Article 1 by adding the following proviso clause:

Provided, That the parties shall carry no more than 800 twenty foot equivalent container units (TEU's) of containerized cargo; nor shall the parties furnish more than one conventional vessel call per week between any two ports covered by this agreement and then only as part of a voyage which calls at at least one U.S. port not otherwise receiving direct service from the parties.

(4) Add a new Article 8 which contains the conference participation provisions found in present Article 3.4 of Agreement No. 9929-5. It is unnecessary, however, for the Proponents to include the last sentence of Article 3.4 if they do not wish to do so.

(5) Add a new Article 9 which contains the following provisions for reporting the Proponents' operating results to the Commission:

Reporting Requirements: In the event the parties cease to participate in FMC Agreement No. ______ (or some similar agreement limiting their container carryings to a greater extent than is provided in Article 1 hereof), the parties shall file quarterly reports with the Federal Maritime Commission concerning their container cargo activities in the subject trade. These reports shall include the dates, ports of call and vessels employed for each voyage undertaken by the Joint Service in each direction; the total number of loaded containers (expressed in TEU's) carried on that voyage; and the average number of TEU's carried in each direction per week (averaged quarterly);

and;

IT IS FURTHER ORDERED, That upon full and timely compliance with the conditions set forth in the above ordering clause, Agreement No. 10226-3 shall be approved.

SEPARATE OPINION OF CHAIRMAN DASCHBACH AND COMMISSIONER DAY

We concur with the opinion of the majority "that the result reached by the Presiding Officer is essentially correct." Unlike the majority, we do agree with all of the steps taken in the Initial Decision to reach that result. Consequently, we believe that the only further modifications necessary to the Agreements are the more detailed reporting requirements imposed by the Commission's Order and the requirement that the Agreements be amended to comply with the self-policing requirements of 46 C.F.R. Part 528.

The minute dissection of the two filed Agreements, which imposes a new name; creates three agreements where there were two, necessitating refiling with attendant expense and delay; and arbitrarily imposes a single vessel call remedy for perceived vagueness in Agreement No. 10266 exceeds the proper role of the Commission. It is not for the Commission to redesign the details of commercial arrangements to suit its preference. Agreements Nos. 9929-5 and 10266-2 as conditionally approved by the Presiding Officer met with *Svenska* burden of outweighing their anticompetitive impacts. That is sufficient to warrant Commission approval. Painstaking inquiry into and alterations of every detail of these agreements is an exercise in abusive and excessive regulation.

Other weaknesses in the majority's opinion include the logically unfounded attempt to interpose for consistency's sake a separate proceeding, Docket No. 77-4, *Agreements No. 9902-5 and No. 9902-8*. Those Agreements were considered in light of the circumstances existing in the U.S. Pacific Coast/Europe trade. The instant proceeding involves a totally different trade. Thus Agreements Nos. 9929 and 10266 should, and can, be approved independently.

Additionally, a significant fact relied upon by the majority cannot be found in the record. The allegation that the proponents have "now decided" not to employ the 1500 TEU vessels, whose use was a central issue litigated before the Presiding Officer, is not contained in Exhibit 13 as the majority's opinion misleadingly indicates.

Further, the imposition in Agreement No. 10266 of a tonnage limitation on the two weaker carriers, ICT and French Line, in the event Agreement No. 9929 is terminated, is illogical. As the majority itself points out, without Agreement No. 9929 there would probably be a marked decrease in ICT's participation in the market while French Line would probably not be able to enter it at all. What is the efficacy of imposing a limitation on two weak entities at a time when their stronger competitor has no such similar limitation?

Another weakness of the majority opinion is the arbitrary imposition of a single vessel call per week on the ICT/French Line conventional service. Whether this is a rational resolution of the perceived vagueness of Agreement No. 10266 is unknown because this issue was never addressed by the parties during this proceeding.

Finally, our primary objection to the majority's opinion is based in its sweeping dismissal of the reasoning of the Initial Decision which is inappropriately buried in footnote 21. The majority's statement that the Initial Decision is inconsistent with their analysis is incorrect. "Transportation needs" is broad enough to include both the benefits to shippers outlined by the majority *and* the economic needs of ocean carriers described by the Presiding Officer. As pointed out in the majority order, carrier needs *are* relevant Shipping Act considerations. Why then does the majority disregard these concerns and the thoughtful reasoning of the Presiding Officer on that subject? A thorough consideration of these Agreements mandates inclusion of that reasoning, and its exclusion requires us to depart from the majority.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 77–7

AGREEMENTS NOS. 9929–2, ET AL.
(MODIFICATION OF COMBI LINE JOINT SERVICE AGREEMENT), AND
AGREEMENTS NOS. 10266, ET AL. (JOINT MARKETING AGREEMENT
BETWEEN INTERCONTINENTAL TRANSPORT (ICT) B. V. AND
COMPAGNIE GENERALE MARITIME)

Partially Adopted on June 5, 1979

Agreements Nos. 9929–5 and 10266–2, if modified by its proponents as clarified and directed herein, are approved.

The criteria of section 15 of the Shipping Act, 1916, has been met, as well as those of *Svenska* which is applicable.

Edward Schmeltzer and *George Weiner* for proponents Hapag-Lloyd A.G., Intercontinental Transport (ICT) B.V., and Compagnie Generale Maritime.
Paul J. McElligott and *John A. Douglas* for protestant Sea-Land Service, Inc.
Neal M. Mayer and *Paul D. Coleman* for protestant Seatrain International, S.A.
Russell T. Weil and *Elizabeth Ritvo* for protestant United States, Lines, Inc.
J. Robert Ewers, Joseph B. Slunt, John Cunningham and *Alan Jacobson* as Hearing Counsel.

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

Docket No. 77–7 was instituted by the Commission's April 8, 1977, Order of Investigation and Hearing, to determine whether to approve, pursuant to section 15 of the Shipping Act, 1916 (the Act), 46 U.S.C. 814, Amendments 2, 3 and 4 to Agreement No. 9929 and Agreement Nos. 10266 and 10266-1. Named as proponents were Hapag-Lloyd A.G., Intercontinental Transport B.V. (ICT) and Compagnie Generale Maritime (CGM). Named protestants were United States Lines, Inc. (USL), Sea-Land Service, Inc. (Sea-Land), and Seatrain International, S.A. (Seatrain). The Bureau of Hearing Counsel was also named a party.

This proceeding originated with the filing on October 1, 1976, of Amendment 2 to Agreement No. 9929 and Agreement No. 10266. Agreement No. 9929 was originally approved by the Commission in 1971 and authorized the operation by Hapag-Lloyd and the predecessor-company[2] of ICT of a joint liner service with lighter-aboard-ship (LASH) vessels, conventional vessels and other specialized vessels,[3] between the U.S. Gulf and South Atlantic and European ports. Agree-

[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] This was Holland-America Line.

[3] Ex. 1 at Article 1.2.

ment No. 9929–2[4] revised the basic agreement by: (1) adding CGM as a party thereto; (2) separating the ongoing joint LASH service from a "coordinated container service," by which the Combi Line joint container service would be terminated and the three parties would cross-charter to each other container space available on their respective vessels operated in this trade. Agreement No. 10266 was an agreement between ICT and CGM for the joint marketing of their non-LASH services in this trade.

Notice of Agreement Nos. 9929-2 and 10266 was published in the *Federal Register* on October 14, 1976. USL, Sea-Land and Seatrain filed comments and requested that a hearing be held prior to approval of these agreements. Proponents' response to these comments included the submission of Amendments 3 and 4 to Agreement No. 9929 and Amendment 1 to Agreement No. 10266. Agreement No. 9929-3 extended the effective term of the non-LASH portion of the Agreement for two years beyond its then-scheduled termination date of April 8, 1977.[5] Agreement No. 9929-4 (as well as Amendment 1 to Agreement No. 10266) specified a five-year term of approval of the Agreement and was included in response to matters raised by the commenting parties.

Notice of Agreements Nos. 9929-3, 9929-4 and 10266-1 was published in the *Federal Register* of February 2, 1977, and comments and requests for hearings were again submitted by USL, Sea-Land and Seatrain. In its April 8, 1977, Order of Investigation, the Commission noted its consideration of "the submissions of both the protestants and the proponents . . . [and] determined that issues have been presented which can only be resolved in a formal proceeding." Order of Investigation, p. 5. The Commission there enumerated 11 issues to be considered in Docket No. 77–7.

Hearings were held for the presentation of proponents' case-in-chief in Washington, D.C., on June 20-28, 1977. Prior to the conclusion of cross-examination of proponents' witnesses and before presentation of testimony by Hearing Counsel and protestants it became necessary to resolve certain discovery issues. These issues related primarily to the application of FMC discovery procedures to data and documents located abroad and the contention of proponents that the laws of the home countries of proponents limited proponents' ability to comply with discovery procedures. Ultimately the discovery requested was submitted.[6]

In the interval following the end of evidentiary hearings in June of 1977, events transpired which led to the submission of substantial revisions to the proposal embodied in the agreements subject to the April 8, 1977, Order of Investigation. These revisions, first filed with the Commission for approval on January 12, 1978, were denominated Agreement No. 9929–5 and Agreement No. 10266–2 and were designed to eliminate or narrow contested issues which had arisen in this proceeding. The principal substantive revisions were: (a) Article 2.2 of Agreement No. 9929–2, which called for proponents' employment in this trade of up to six, 1,500-TEU containerships, was revised to provide for

[4] Agreement No. 9929–1, approved April 7, 1974, simply extended for three years Commission approval of the non-LASH portion of the basic agreement. The LASH service portion of the original Agreement No. 9929 was approved for a 15-year term.

[5] As the Commission noted in its Order of Investigation (at page 3), Agreement No. 9929–3 "is an interim measure designed to prevent Combi's non-LASH authority from expiring while the Commission is considering the other amendments and new Agreements covered by this Order, and in the event the Commission disapproves the other amendments and Agreements."

[6] See letter of August 30, 1978, from Hearing Counsel to the Presiding Judge.

operation by proponents of a weekly container service, limited to lifting an average of 800 TEU's of containerized cargo per sailing [see Ex. 39 at Article 2.2]; (b) Articles 1.8 and 2.7 of Agreement No. 9929-2, calling for separate conference and rate agreement participation by the ongoing Combi Line LASH service and the three individual proponents, were revised to allow for individual membership by the proponents, with total voting rights equivalent to those afforded single conference members [see Ex. 39 at Article 3.4]; and (c) in various provisions, the geographic scope of the service to be provided was more clearly defined.

The Commission on February 3, 1978, issued a "Modification of Order of Investigation and Hearing" in Docket No. 77-7, directing that these newly-filed agreements be made the subject of Docket No. 77-7 and requesting that "[t]he Presiding Administrative Law Judge . . . fashion such procedures as are necessary to incorporate this new development into the fabric of the proceeding . . . ." Pursuant to this order, I convened a status conference on February 27, 1978, to consider such procedures, at which time further proceedings were deferred pending additional consideration by all parties of the newly-filed agreements, as well as additional terms discussed at that conference. Further status conferences, convened on March 15 and April 25, 1978, to discuss additional terms of these agreements, resulted in proponents' submission on April 27, 1978, of an "Agreement No. 9929-5 (Clarified)."

This agreement was considered during a further status conference convened May 24, 1978, at which protestants indicated that, should certain clarifications be made, protestants would no longer oppose approval of the agreements. These clarifications were discussed and read into the record of the May 24 conference and are reflected in proponents' filing on June 12, 1978, of agreements denominated by the Commission staff as "Agreement No. 9929-5 (2d Revised)" and "Agreement No. 10266-2 (Revised)."[7] It should here be made clear that it is only the versions of the agreements reflected in these latest submissions (hereinafter referred to as the "subject Agreements" collectively or "Agreement No. 9929-5" and "Agreement No. 10266-2" individually) for which proponents now seek approval.

At the May 24, 1978, status conference, procedures were developed for the submission by proponents of additional testimony in connection with the subject Agreements. Pursuant thereto, proponents on July 31, 1978, submitted such direct testimony. Cross-examination of witnesses by Hearing Counsel was carried out through written questions and answers. Jay A. Copan, appearing on behalf of Hearing Counsel, subsequently submitted economic testimony pursuant to a similar procedure. Protestants stated that they did not oppose approval of the subject Agreements and therefore did not submit written direct testimony or present witnesses for cross-examination.

At the final status conference convened on November 9, 1978, there was admitted into the record some 49 exhibits. Including the testimony and cross-examination of witnesses, this comprises the record for decision in this proceeding.

[7] Restatements of both Agreement No. 9929 and Agreement No. 10266, as they would read upon inclusion of the terms for which approval is now sought, are Exs. 39 and 40, respectively.

FINDINGS OF FACT[8]

1. Proponents (or their predecessor-companies, see Ex. 50) have a long history of service in the Europe/U.S. Gulf and/or South Atlantic liner trade. Hapag-Lloyd has served the trade since 1865, ICT since 1912 and CGM since 1909.

2. In January of 1971, Hapag-Lloyd and the predecessor-company of ICT submitted to the FMC for section 15 approval Agreement No. 9929, an agreement calling for: (a) operation of a joint service under the name Combi Line, "between United States South Atlantic ports (from Cape Hatteras southward), United States Gulf of Mexico ports, and ports and places on the United States inland waterway system tributary to such United States South Atlantic and Gulf of Mexico ports, on the one hand, and United Kingdom/Eire ports and European Continental ports, excluding the Mediterranean, and ports and places on the United Kingdom and continental European waterway systems tributary to such United Kingdom and European ports, on the other hand, including transshipment services To/From any other port"; (b) utilizing conventional vessels, LASH vessels and "other specialized vessels" to offer up to approximately three sailings per week from both the U.S. Gulf and U.S. South Atlantic port ranges.

3. Agreement No. 9929 was approved by Commission order of April 8, 1971. The portion of the agreement pertaining to LASH service was approved until December 31, 1986. All other services were approved until April 8, 1974. Amendment 1 to Agreement No. 9929, extending approval of the non-LASH services specified in the agreement for an additional three-year period, was approved by the Commission on April 7, 1974.

4. Pursuant to Agreement No. 9929 and No. 9929-1, Combi Line has operated: (a) two LASH vessels, together offering a service frequency of 18 days; (b) container vessels, beginning in January of 1973 with two, 400-TEU vessels on a 17-day frequency, increased to three such vessels (on a 12-day frequency) in May of 1973, reduced in 1974 again to two vessels, and modified in August of 1976 to four, 420-TEU vessels offering weekly service between Houston and New Orleans (with alternate fortnightly calls at Mobile and Miami) and Rotterdam, Bremen, Greenock and (fortnightly) Gothenburg; and (c) a varying number of conventional vessels, calling principally outbound, from U.S. Gulf and South Atlantic ports to various European destinations.

5. The four vessels currently employed in the Combi Line container service, known as "Omni"-class ships, were constructed in 1970—71 as conventional breakbulk vessels equipped with on-board cargo booms and gear. These ships can operate at 22 knots and in their original configuration had an under-deck bale cubic capacity of 800,000 feet (exclusive of gear), which capacity could be increased by carrying containers, lumber and other suitable cargo on deck.

6. In their original configuration, the Omni vessels could accommodate only about 300 TEU's, but, for stability reasons, this container capacity could be achieved only when a sufficient weight of breakbulk cargo was loaded below

[8] It should be noted that, pursuant to various rulings by the Presiding Judge, certain data submitted by the parties during this proceeding were to be maintained on a confidential basis pursuant to Rule 167 of the Commission's Rules of Practice and Procedure.

*Confidential data.

deck. With this need to combine both breakbulk and container cargo, it was not possible to use these vessels in such a way as to reach optimum capacity levels; therefore, prior to employment in the Combi Line container service, these vessels were modified (by removal of certain cargo loading gear and installation of cell guides and permanent ballast) to increase their container capacity to 420 TEU's. Therefore, the effective cargo carrying capacity of the Omni ships as now configured is limited to approximately 420,000 cubic feet, as contrasted to their design capacity (as conventional ships) of 800,000 cubic feet plus additional on-deck capacity.

7. Since the last quarter of 1976 through the second quarter of 1978, utilization of the Combi Line containerships has averaged 91.7 percent eastbound and 92 percent westbound.

8. Notwithstanding these utilization levels, the Combi Line container service in 1976 incurred losses totalling approximately * , * million for the first half of 1977, and * for the second half of 1977 (second half of 1977 results also affected by longshoremen strike).

9. It is intended that the coordinated container service specified in the subject Agreement will employ these Omni vessels subsequent to modifications (adding of a new midsection and clearing remaining self-support gear) which will bring the capacity of these vessels to about 950 TEU's. Notwithstanding these modifications, the Omni vessels will have the same operating speed, require no additional crewing and will have approximately the same fuel consumption characteristics. It is also intended that the four modified Omni vessels will be supplemented by one or more compatible vessels.

10. Article 3.2 of Agreement No. 9929 as originally approved and now in effect specifies generally that all marketing agents represent the Combi Line joint service (not the individual parties thereof) and further specifies the geographic scope of any marketing representation undertaken by either of the partners, i.e., that ICT is to act as general agent for the joint service in Belgium, Holland, Luxembourg and Switzerland, that Hapag-Lloyd will act as general agent for the joint service in Germany and Austria, and that in all other countries the joint service will appoint common representatives.

11. Hapag-Lloyd and ICT (the latter as a participant in another service, in which CGM also participates) are direct container service competitors in the U.S. East Coast/Europe trade. However, by the terms of Article 3.2 of Agreement No. 9929, any of Hapag-Lloyd's U.S. East Coast/Europe shippers located in Switzerland or the Benelux countries and also desiring service to/from the Gulf and South Atlantic must be referred to ICT representatives of the Combi Line service, which representatives also market the competing U.S. East Coast/Europe service. The converse situation applies to ICT in areas where Hapag-Lloyd represents Combi Line.

12. Hapag-Lloyd and ICT each offer services to various areas of the world and each has therefore established organizations to market these services. However, under Article 3.2 of Agreement No. 9929 as now in effect, any marketing by the parties thereto of container service to/from the U.S. Gulf and South Atlantic must be done on behalf of the Combi Line joint service, not on a basis identified with either of the respective carrier-parties to Agreement No. 9929.

13. The Combi Line LASH service is chiefly utilized to transport commodities that typically have not moved via the containerships operated by Combi Line.

14. The Combi Line LASH service is the only LASH service to any trade offered by the proponents and almost exclusively carries, in barge-load lots, bulk or neo-bulk commodities which do not lend themselves to movement in containers because of their physical dimensions or relatively low value.

15. In 1970, CGM became a party to FMC Agreement No. 9891, with Armement Deppe; Ozean/Stinnes was added as a party in 1972. Agreement No. 9891 was a scheduling and sailing arrangement in the eastbound trade from U.S. Gulf ports to North Europe, pursuant to which the parties operated the "Uni-Gulf" conventional vessel service. CGM offered approximately ten eastbound sailings annually, utilizing one-to-two conventional vessels, as part of the Uni-Gulf service. Prior to the filing of Agreement No. 9929-2, CGM gave notice of its withdrawal from Agreement No. 9891 (approved by FMC Order of December 10, 1976), and has from that time offered only sporadic conventional-vessel calls in this trade.

16. The withdrawal of CGM from the UniGulf service was based upon the desire of CGM to offer container service in this trade, which was not possible within the framework of Agreement No. 9891. CGM's intention to offer a container service in the context of a rationalized operation proceeded from consideration of factors related to: (a) the level of capital investment involved in constructing the number of modern containerships needed to offer a competitive frequency of service; (b) the difficulty of chartering a fleet of necessarily compatible vessels to offer such a service on a viable basis; and (c) the level of capacity in the trade upon introduction of such a fleet into service.

17. By the terms of Article 1.5 of Agreement No. 9929–5, CGM's participation in the Combi Line LASH service will be limited to its proportional contribution of capital equipment to such service, and the only anticipated new capital expenditure in connection with the LASH service is the possibility of a LASH feeder operation.

18. A LASH feeder service is only in the conceptual stages, but as envisioned would operate only in European waters to move cargo to/from the two European ports (Rotterdam and Bremen/Bremerhaven) now called by the Combi Line LASH service. It is unlikely that inauguration of a feeder service would alter the European port calls of the LASH vessels. At most only one port call could be eliminated, saving one day of the present 34-day roundtrip time for the LASH vessels, allowing for a maximum of one-third of one additional sailing per LASH vessel annually.

19. Agreement No. 9929–5 terminates the Combi Line joint container service and prescribes that each party is to solicit its own cargo. Absent Agreement No. 10266, ICT and CGM thus would each individually have to market the container space available to them per Article 2.3 of Agreement No. 9929–5, which should total approximately 320 TEU's and 160 TEU's weekly, for ICT and CGM respectively, for U.S. Gulf and South Atlantic/Europe cargo (with a further limitation on South Atlantic cargo).

20. Hapag-Lloyd has established and developed a marketing system for its various services throughout Europe, and, in the relevant trade, is the only carrier

of the largest volume European trading partner of the U.S. CGM has never marketed a container service in the relevant trade. The ICT marketing organization was originated under its present name in 1975.

21. In operating a container service, it is necessary to maintain a shoreside support organization and to offer a mix of 40- and 20-foot containers (further diversified as to dry vans, open-top, reefer and tank containers and flat-racks), spread over the number of port pairs resulting from the itinerary of the service. The service proposed in Agreement No. 9929-5 involves approximately 25 port pairs.

22. Agreement No. 9929-5 in Article 2.2 provides that proponents will lift not more than 800 TEU's weekly in both directions in the overall U.S. Gulf and South Atlantic/Europe trade, with an additional limitation of 100 TEU's eastbound and 225 TEU's westbound weekly to/from the South Atlantic.

23. The dominant direction of historic traffic movements in this trade is eastbound from U.S. Gulf and South Atlantic ports to Europe. The capacity to be offered by proponents eastbound from South Atlantic ports (i.e., an average of 100 TEU's weekly) amounts to only approximately 3.4 percent of export liner traffic moving in that trade in 1976 and will represent an increase of approximately four percent in present U.S. South Atlantic/Europe export container capacity.

24. The container capacity to be employed by proponents in the eastbound trade from U.S. Gulf ports to Europe will on average total 700 TEU's weekly, as compared to the present 420 TEU's per week, and would increase container capacity in the U.S. Gulf/Europe trade by 280 TEU's per week (14,560 TEU's annually), an increase of 12 percent in trade container capacity and an increase of four percent in overall trade capacity.

25. At the time the Combi Line joint service was formed in 1971, 11 carriers (in addition to Hapag-Lloyd, ICT and CGM) were offering common carrier service in the U.S. Gulf and South Atlantic/Europe trade. Of these carriers, all (except one line operating a Seabee service) operated breakbulk ships. At the present time, eight carriers (in addition to Combi Line) offer regular container service in the U.S. Gulf and South Atlantic/Europe trade, either by direct calls or by combining direct service with minilandbridge operations. Five of these carriers offer container service on a weekly frequency.

26. The Maritime Administration publication, *Containerized Cargo Statistics*, shows for the years 1970 through 1974 growth in containerized export cargo movements on Trade Route 21 (comprising the U.S. Gulf/Europe trade) as follows:

Trade Route 21, Export Container Traffic, 1970-1974

Year	Tonnage (Thousands of Long Tons)	Yearly Percentage Increase	Annual Percentage Compounded Growth Rate From 1970
1974	542.8	12	87
1973	482.8	194	121
1972	164.2	89	92

1971*	87.1	95	95
1970	44.7	—	—

*Longshore strike.

27. Export liner capacity, at design capacity, in the U.S. Gulf/Europe trade currently is approximately 2,567,679 long tons, of which 914,713 long tons consist of container capacity. The additional container capacity to be employed per Agreement No. 9929–5 would be approximately 14,560 TEU's annually, or design capacity at 112,986 long tons, resulting in overall trade capacity for 1979 (the first year in which this capacity would be fully deployed) of approximately 2,680,665 long tons, of which 1,027,699 long tons would be container capacity.

28. If Agreement No. 9929–5 is approved, the proponents' combined share of the total container capacity in the South Atlantic/North Europe trade will be slightly less than five percent, as compared to the present one percent share of the Combi Line joint container service, and proponents' combined share of the total overall capacity in that trade will be 11 percent, as compared to the present ten percent share of the Combi Line joint container and LASH services.

29. If Agreement No. 9929–5 is approved, the proponents' combined share of the total container capacity in the Gulf/North Europe trade will be 27 percent, as compared to the present 19 percent share of the Combi Line joint container service, and proponents' combined share of the total overall capacity in that trade will be 23 percent, as compared to the present 20 percent share of the Combi Line joint container/LASH/conventional services.

30. Between 1970 and 1976, the liner cargo share of total dry cargo exports from the U.S. Gulf Coast to Europe declined from 11.66 percent to 7.91 percent.

31. Between 1970 and 1976, eastbound liner shipments from the U.S. Gulf Coast to Europe increased at an average annual compounded rate of 3.84 percent; eastbound shipments of non-liner cargo grew at an average annual compounded rate of 11.53 percent.

32. The U.S. Maritime Administration recently published a study entitled "A Long-Term Forecast of U.S. Waterborne Foreign Trade, 1976—2000" (hereinafter referred to as "MarAd Forecast"), which developed predictions of growth on each U.S. trade route, based on actual 1975 traffic statistics. Ex. 44 at 12. For Trade Route 21, the MarAd Forecast predicts for the period 1975-2000 an overall annual growth rate for export and import traffic of 3.8 percent yearly.

33. The predicted growth rates in the MarAd Forecast are based upon aggregate data for liner, non-liner and tanker services, but analysis, by reference to projections for specific commodity movements in the MarAd Forecast, of the 25 leading export liner commodities on Trade Route 21 in 1976 (which comprised 84 percent of export liner traffic in that year) shows that the volume of those commodities is predicted to increase at an annual rate of 4.1 percent for the period 1975-1985.

34. Anticipated growth in the Southeastern United States is expected to far outpace the remainder of the nation. This is in terms of both personal income growth and population growth. These factors, when combined with expected growth in industrial production and gross national product, appear to indicate a continuing upsurge in the Gulf and South Atlantic markets.

35. In addition to service between U.S. Gulf and South Atlantic and European

ports, in Agreement No. 9929–5 proponents seek approval to operate a wayport service between Mexican ports and U.S. Gulf and South Atlantic ports. Proponents will operate in the trade between Europe and Mexico, in which trade westbound movements predominate, as well as in the trade between Europe and the U.S. Gulf and South Atlantic, where eastbound movements are heaviest. This would result in an equipment imbalance requiring re-positioning of empty equipment absent its use in a service between Mexico and U.S. Gulf and South Atlantic ports. There is now no regular liner service northbound or southbound between Mexican and U.S. Gulf and South Atlantic ports, although certain carriers call on an inducement basis. Less than 15 percent (by value) of all export traffic and 23 percent of import traffic moving between Mexico and the U.S. is transported by water services; the balance moves predominantly by rail and truck.

36. Mexican ports currently lack the infrastructure and proper organization for the efficient large scale transportation of containers. Minimum requirements for the operation of a full container service at Mexican ports would include the adaptation of the ports to container service, the establishment of a customs inspection system, the restructuring of cargo handling tariffs at the ports, and the adaptation of regulations and tariffs for the containers' inland transportation in Mexico. At the present time, Veracruz is the only port in Mexico that has definite plans to develop container handling facilities, with a container crane expected to be available by the end of 1979.

37. Proponents intend to include container service calls at Mexican ports, and to some extent the configuration of the container service (in terms of itineraries and number of vessels for their overall services) depends on development of container facilities and infrastructure in Mexico, which has lagged behind earlier-anticipated schedules.

38. In providing its present services, Combi Line in some European locations is assisted by or works with several Hapag-Lloyd and ICT subsidiaries or affiliates which are engaged in various maritime-related businesses, including cargo booking, stevedoring, trucking, insurance, container maintenance and tug and barge operations.

39. Hapag-Lloyd and ICT's predecessor company served the Scandinavia/Baltic range as part of their U.S. Gulf and South Atlantic/Europe services before forming Combi Line. Combi Line has served the Scandinavia/Baltic range since its inception in 1971, originally by transshipment only (except for direct calls on inducement), but, since 1977, by direct fortnightly containership calls at Gothenburg.

40. Article 1.3 of Agreement No. 9929 as originally approved and now in effect authorized the parties to supply conventional vessel tonnage to the "joint service as their owned or chartered vessels are available," with the view to offering up to three sailings per week from both the U.S. Gulf and South Atlantic ranges. Article 1.5 of the current Agreement No. 9929 authorizes the parties to offer "[s]upplementary space on conventional vessels of the parties . . . to the extent deemed necessary by the parties and required by the trade." These two provisions were combined in Article 1.2 of Agreement No. 9929–5, providing

that the parties "will use supplementary space on their owned and chartered conventional vessels as needed."

41. The conventional-vessel service of proponents has provided (and will continue to provide) a regular direct service for shippers of out-size, heavy-lift and other unusual cargoes between outports not receiving adequate or direct service by other lines.

42. Article 3.4 of Agreement No. 9929–5 provides that each of the proponents may maintain separate conference and rate agreement membership, but that the votes exercised by proponents in such agreements shall not be greater than that which may be accorded to a single member of such agreements.

43. Article 4.3 of Agreement No. 9929 as originally approved and now in effect requires that: (a) any individual party terminating the Agreement do so on two-year's written notice; (b) such notice could in any event be given for approximately three years subsequent to the date of the filing of the Agreement with the FMC; (c) a party terminating the Agreement individually could not operate its LASH vessel in the trade covered by the Agreement for a period of five years commencing from the date of notice of termination; and (d) during such five-year period the non-terminating party had the right of first refusal in the event the terminating party wished to sell its LASH vessel. Article 3.2 of Agreement No. 9929–5 provides only that a party, terminating the Agreement unilaterally, provide two-years' written notice to the remaining parties.

44. In the event Agreement Nos. 9929–5 or 10266 were terminated other than by mutual assent, the remaining party(ies) would have to undertake extensive preparations (in terms of obtaining suitable vessels, necessary equipment, port and marketing arrangements) prior to actual termination in order to be able to continue operations without disruption of service.

45. A requirement that Agreement No. 10266 remain effective only so long as Agreement No. 9929–5 was effective would also require that, prior to a mutual termination of Agreement No. 9929–5, the parties to Agreement No. 10266 would either each have to undertake development of new marketing organizations or seek approval of a further amendment to Agreement No. 10266 allowing for its operation beyond termination of Agreement No. 9929–5.

46. Where a marketing representative is jointly appointed by two or more steamship lines, the representative is responsible for soliciting cargo on behalf of the jointly-appointing lines. In so doing, it is not feasible for the representative to allocate to one or the other of the appointing lines individually particular cargoes solicited on their joint behalf. Conversely, since any cargo booked on the vessels of the appointing lines is booked on their joint behalf, it is not possible to allocate expenses in connection with the movement of particular cargoes to one or the other of the appointing lines.

47. If offered individually by the three proponents, the type of service contemplated by Agreement No. 9929–5 would require three fleets of five vessels of 1,000 TEU's each. The four Omni vessels to be employed in the coordinated container service specified by the subject Agreement are owned by one of the proponents who, absent the Agreement, would likely employ these vessels (with one or two additional compatible ships) in a service similar to that contemplated by the Agreement. The remaining proponents each have long histories of service

to this trade and would, absent the Agreement, undertake to maintain their presence with some combination of additional vessels and/or revised itineraries of other vessels which would enable them to serve this trade.

48. Many shippers and port interests rely on the LASH, conventional and container service offered by Combi Line and support approval of the services to be offered by proponents per the subject Agreements because: (a) they have had favorable experience with the reliability of the Combi Line container service, including the availability of specialized equipment; (b) the Combi Line LASH and conventional services have facilitated the movement of outsized cargoes between outports in this range; (c) the direct services offered by proponents have proved a preferable alternative to minilandbridge services in terms of reliability and minimizing overhead; (d) the presence of the services offered by proponents will avoid shortages of container capacity such as those experienced in this trade in 1974 and will add to the number of competing liner services available in this trade; and (e) in the case of the Port of New Orleans, approval of the Agreement will increase utilization of the expensive container facilities constructed by the Port and augment service between New Orleans and Western Europe, which accounts for the largest share of all cargo moving through the Port.

DISCUSSION

Section 15 provides, in pertinent part:

> 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, 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, modifications, or cancellations.

As the terms of the subject Agreements now stand, they are not discriminatory vis-a-vis proponents and competing carriers. Five of the issues noted by the Commission in its Order of Investigation pertain to the impact of the then-subject Agreements upon other carriers. These are: (a) overtonnaging; (b) the creation of excess market power; (c) unfair advantage for the proponents in conference affairs; (d) the "open-ended" authority to charter supplementary conventional vessels; and (e) definition of the operational relationship between the LASH and container services. The terms of the Agreements as revised and the evidence of record establishes that approval would not have a "discriminatory or unfair" impact upon carriers in the trade.

> (a) "[W]hether approval . . . will enable the parties to offer a viable container service without overtonnaging the trade, as the proponents claim, or whether the trade is already overtonnaged and will be made more so by approval of the Agreements, as the protestants claim . . . ."

This issue was directed to the provision of Agreement No. 9929-2 whereby proponents would have placed in the trade up to six, 1,500 TEU vessels, operating on a weekly frequency. As set out in Agreement No. 9929-5, however, proponents will lift in the U.S. trades not more than 800 TEU's weekly on an overall trade basis, with further specified limitations for South Atlantic container traffic.

It is anticipated that the operation now proposed will enable proponents to offer a "viable container service" and, with the limitations on capacity incorporated into Agreement No. 9929-5, protestants have withdrawn their previous opposition to approval on the grounds of overtonnaging. Proponents' witness Rugan and Hearing Counsel's witness Ellsworth analyzing current levels of capacity and traffic in the U.S. Gulf/Europe trade concluded that there does not presently exist in this trade the severe disequilibrium between capacity and cargo which is associated with overtonnaging, and that the capacity which would be employed under Agreement No. 9929-5 will not bring about such a disequilibrium.

No party to this proceeding opposes approval of the subject Agreements on the basis of potential overtonnaging, and the record establishes that the container capacity proposed in Agreement No. 9929-5 will not, by reason of creating an overtonnaged situation or otherwise, have a discriminatory effect upon other carriers. Hearing Counsel's economic witness, Mr. Copan, also testified that approval of the subject Agreements will not create an overtonnaged situation in this trade.

Upon approval of the subject Agreements, "Combi Line" will only be the ongoing joint LASH service offered by the proponents. The two subject Agreements will act to separate the present joint Combi Line container service into two independent entities, the container service marketed by Hapag-Lloyd and that marketed by ICT and CGM. This is not simply an elevation of form over substance. Witnesses for the lines explained that a principal basis for the subject Agreements was to allow independent competition between these two marketing organizations in the container service market, and the terms of Agreement No. 9929-5 clearly preclude the pooling of expenses and revenues among the parties to the container service portion of the Agreeent. Thus, reference to prospective market shares upon approval of the subject Agreements must take into account that approval will act to diffuse present market shares.

Approval of the Agreements will result in a change of less than one percent in the market shares of all other carriers, but will mean that ICT/CGM and Hapag-Lloyd, respectively, will be the fourth and fifth largest carriers in the trade, in comparison to the present position of the Combi Line *joint* service as the largest operator, overall, in this trade.

(b) "[W]hether approval of the Agreements will strengthen the competitiveness of the LASH service and will make the parties more competitive among themselves with respect to the container service, as the proponents claim, or whether approval will give the parties excess market power and will create severe and dangerous competitive pressures on the other lines in the trade, as the protestants claim . . . ."

Within the framework of the terms of the subject Agreements as now revised, protestants no longer claim that approval will afford proponents "excess market power" and that approval "will create severe and dangerous competitive pressures."

Proponents' affirmative claim that the subject Agreements will result in increased competitiveness of their respective services is supported by the record. The LASH service will, in terms of capacity and frequency, remain unchanged from present levels. CGM would be added as a party to the ongoing Combi Line *joint LASH service, but only to the extent of its capital contribution to that* service. Agreement No. 9929–5 includes the possible employment of a LASH feeder service, to which CGM would contribute, but such a feeder service would only implement the movement of LASH cargoes to/from the two European ports currently served by the Combi Line LASH service. Even if one of these calls were eliminated by the feeder service, the resulting "increase" in LASH capacity would be one-third of one additional sailing annually for each of the two LASH vessels. Thus, the "competitiveness" of the LASH service, in terms of capacity and frequency of service, would in effect remain at the *status quo,* although a feeder service could facilitate for shippers and consignees the movement of LASH cargoes. In short, a better LASH service could be provided without adverse impact on carriers competing with Combi Line.

As to increased competition in the market for container services, witnesses for the proponents explained that the basis for establishing separate marketing organizations as between Hapag-Lloyd and ICT and CGM was, in contrast to the system presently in effect, to permit the parties to increase their respective identities in the market place and to allow each organization to market container service in all geographic areas within the scope of the subject Agreements. Agreement No. 9929–5 will lead to the creation of two container services (instead of the single Combi Line joint container service at present) marketed on an independently competitive basis. Moreover, Agreement No. 9929–5 does not, like the Agreement presently in effect, call for the pooling of revenues and expenses among the parties. This Agreement allows only for the cross-chartering of container slots on the vessels of the respective proponents. Thus, the subject Agreements have as their purpose the separation of proponents' container services and placing the two marketing organizations on a competitive footing both as between themselves and among other carriers in the trade. Finally, considering that the impact of these two marketing organizations will be spread over the limited amount of capacity specified in Agreement No. 9929–5, approval of the subject Agreements will serve to diffuse substantially the present market share of Combi Line as the largest carrier in the trade, thus precluding the creation of "severe and dangerous competitive pressures on other lines in the trade."

(c) "[W]hether a restriction should be placed on the open-ended provision in Section 1 (the LASH section) of Agreement No. 9929–2, which permits the parties to charter supplementary space on conventional vessels as such space is needed . . . ."

As explained in the direct testimony of witness Thiede the question of "open-ended" chartering authority proceeded from a combining of two provisions of the original Agreement No. 9929 into one provision of the Agreement first made the subject of Docket No. 77–7. That is, Article 1.3 of the original Agreement authorized the parties to supply conventional vessels to the "joint service as their owned or chartered vessels are available" and contemplated the parties offering up to three sailings per week from both the U.S. Gulf and South Atlantic ranges. Article 1.5 of the original Agreement further provided that the parties were to offer "[s]upplementary space on the conventional vessels of the parties . . . to the extent deemed necessary by the parties and required by the trade." In drafting Agreement No. 9929–2, however, the pertinent portions of original Articles 1.3

and 1.5 were combined in a new Article 1.2, which provided that the parties would "charter supplementary space on conventional vessels as needed."

While this wording could have been read to encompass "open-ended" authority for chartering conventional vessel space, even on ships of outside carriers, it was the intent of the parties only to allow for continuation of the Combi Line conventional vessel service authorized by the terms of the original Agreement No. 9929. To clarify this intent, proponents in Agreement No. 9929–5 revised the pertinent wording of Article 1.2 to provide that the parties "will use supplementary space on their owned and chartered conventional vessels as needed."

Thus, Agreement No. 9929–5 makes clear that the proponents do not seek new authority with respect to conventional vessel service, and seek only to continue to provide a regular, direct breakbulk service for shippers of out-size, heavy-lift and other unusual cargoes between outports not receiving adequate or direct service by other lines. While Article 1.2 remains "open-ended," in terms of vessel number and capacity, it has not been suggested at any point in this proceeding that the conventional vessel service offered under terms essentially identical to Article 1.2 has had any negative effects upon other carriers in the trade. Thus, any restrictions upon conventional vessel service are unwarranted in view of the already-limited nature of this service.

(d) "[W]hether the separate voting provisions contained in Agreements Nos. 9929–2 and 10266 may result in unjust or unfair advantage to the parties in conference affairs . . . ."

The "separate voting" provisions of Agreements Nos. 9929–2 and 10266 have been eliminated from Agreements Nos. 9929–5 and 10266–2. Article 3.4 of Agreement No. 9929–5, to which no party objects, provides that each of the proponents may maintain separate conference/rate agreement memberships, but that their combined voting power in such agreements shall not exceed that afforded to single members, an arrangement which cannot afford proponents "unjust or unfair" leverage in conference matters.

(e) "[W]hether the Agreement No. 9929–2 should be modified to more precisely define the operational relationship between the joint LASH service and the coordinated container service . . . ."

Mr. Thiede testified that the lack of an "operational relationship" between the Combi Line LASH and Combi Line container services was one of the reasons for separating the present Combi Line operation into an ongoing joint LASH service and two container services marketed independently by Hapag-Lloyd and, under Agreement No. 10266, by ICT and CGM. As further explained by witness Thiede, in those instances where containers would be carried aboard the LASH or conventional vessels operated by proponents in this trade, such containers would be included in the capacity limitations set out in Agreement No. 9929–5. No party has suggested a further clarification of this "operational relationship" and none would appear warranted in view of the inclusive scope of the capacity limitations now incorporated into the subject Agreements.

The subject Agreements are not "unjustly discriminatory or unfair as between . . . shippers, exporters, importers . . . or between exporters from the United States and their foreign competitors"

None of the issues noted in the Commission's original Order of Investigation made any reference to a possible discriminatory impact upon shippers as a result of approval of the subject Agreements, and no such claim was raised at any point in this proceeding. Several U.S. shippers did, however, appear in this proceeding to testify on behalf of proponents, regarding the services provided by Combi Line and in support of the service proposed to be offered.

There has been no suggestion in this proceeding that the subject Agreements are discriminatory or unfair to importing or exporting shippers. There is testimony regarding the benefits to the shipping public resulting from approval of the subject Agreements.

The subject Agreements are not "unjustly discriminatory or unfair as between . . . ports

None of the issues raised in the Order of Investigation touched upon discrimination vis-a-vis U.S. Gulf and South Atlantic ports, nor has there been any claim in this proceeding that approval of the subject Agreements would have any discriminatory or unfair impact upon ports. Mr. Reed, Executive Port Director and General Manager of the Board of Commissioners of the Port of New Orleans, testified in support of the service to be offered by proponents. There is no evidence that the subject Agreements will have a discriminatory impact upon relevant ports.

The subject Agreements would not "operate to the detriment of the commerce of the United States," nor would they "be contrary to the public interest"

Apart from such matters as overtonnaging and the creation of excess market power, none of the 11 issues specified in the Order of Investigation dealt in direct terms with "detriment [to] . . . the commerce of the United States" resulting from approval of the subject Agreements. In considering the "public interest" criterion of section 15, the antitrust principles incorporated therein by the *Svenska* decision, as well as the evidence of "serious transportation needs" and "important public benefits" as hereinafter more fully discussed, the record supports the conclusion that the subject Agreements are not contrary to the public interest. Three of the issues specified by the Commission are related to the "public interest" criterion and are discussed in this context:

(a) "[W]hether Agreements Nos. 9929-2 and 10266 establish unnecessary restraints on individual termination (the Agreements require each party to give two years' notice prior to cancellation, and no notice can be given prior to December 31, 1979, in the case of Agreement No. 10266) . . . ."

Agreements Nos. 9929-5 and 10266-2 continue the provision requiring two-years' written notice of an individual termination, but eliminate the further restriction against giving such notice within a specified time period (longer than two years) from the date of the filing of the Agreements. The remaining termination provisions of the subject Agreements are a normal commercial practice (in fact carried over from the originally-approved Agreement No. 9929), necessary to avoid the severe disruption of the services of one or more of the parties in the event of an unexpected unilateral termination of the Agreements. Such a disruption would not be in the public interest in the maintenance of regular, stable liner services in this trade. The subject Agreements do allow for termination at any time by mutual assent of the parties, and Agreement No. 9929-5 further eliminates the restriction in the originally-approved Agreement against a party (terminating unilaterally) operating its LASH vessel in this trade for a period of five years, as well as the right of first refusal by the non-terminating party in the event the other party sought to sell its LASH vessel. Thus, the subject Agreements are less restrictive as regards termination than either the original Agreement No. 9929 or the Agreements first made the subject of this proceeding, retaining only a "restraint" constituting a reasonable commercial necessity.

(b) "[W]hether Agreement No. 10266 should be amended to make it clear that it shall exist only so long as the parties' relationship under Agreement No. 9929-2 is maintained . . . ."

As explained by witness Drabbe, the container service portion of Agreement No. 9929-5 (as well as No. 9929-2) was from the outset constructed by the parties to be only a rationalization plan allowing the three proponents to cross-charter space on their respective vessels employed in this trade. Agreement No. 10266 was constructed separately only as between ICT and CGM, and was entered into by those parties in view of their market positions independent of participation by those lines in Agreement No. 9929-5.

While the Commission did not in framing this issue specify the basis for its concern about the separate existence of the Agreements, proponents argue that a requirement that Agreement No. 10266 exist only so long as Agreement No. 9929 is also maintained would be contrary to the public interest. That is, except in cases where there was less than unanimous consent to terminate (invoking the two-year notice provision discussed above), they claim such a requirement could inhibit the parties' operation independent of Agreement No. 9929-5. As stated by witness Drabbe:

> For example, if the three parties mutually desire to cancel Agreement No. 9929-5, it could be the result of a decision to act independently of the cross-chartering provisions of that Agreement and have the two respective marketing organizations compete with each other independent of any agreement on vessel use. If, however, ICT and CGM were at the same time faced with the prospect of disbanding their arrangements under Agreement No. 10266 (requiring extensive preparation for new marketing representation or a new approval procedure before the FMC), this would at least require postponing a decision to operate independently of Hapag-Lloyd under Agreement No. 9929-5. Therefore, making the existence of Agreement No. 10266 dependent on the existence of Agreement No. 9929-5 could inhibit or prevent ICT and/or CGM from joining in a mutual decision with Hapag-Lloyd to act independently of Agreement No. 9929-5.

Thus it would appear, to the extent it can be said that antitrust principles, inherent in the public interest standard of section 15, are "infringed" by the rationalization plan of Agreement No. 9929-5, a requirement that Agreement No. 10266 be entirely co-existent with No. 9929-5 could act to forestall the parties' operation independent of that latter Agreement. Further, given the established principle that the Commission can at any time review operations under previously-approved agreements as part of its "responsibility of continuing surveillance over Section 15 agreements,"[9] there is no need to impose the restriction referred to in the Order of Investigation.

[9] *Mediterranean Pools Investigation*, 9 F.M.C. 264, 292 (1966).

(c) "[W]hether approval of the Agreements will result in rationalized use of vessels and container space, thus achieving substantial savings in fuel consumption, as the proponents claim, or whether this benefit is purely speculative since the parties are unlikely to institute individual container services in the event of disapproval of these Agreements, as the protestants claim . . . ."

Each of the proponents has a long history of liner service to the relevant trade. Hapag-Lloyd has offered service since 1865, ICT since 1912 and CGM since 1909. Proponents have chosen to maintain their commitment to direct, all-water liner service in this trade by the rationalization plan set out in Agreement No. 9929-5, but each of the proponents has indicated that, absent approval, they would individually seek by alternative means to maintain their services to this trade. The four, 950-TEU vessels to serve as the nucleus of proponents' rationalized service are owned by one of the proponents and the remaining proponents have considered possible alternative services, albeit at levels of frequency and regularity which are inferior to that proposed under Agreement No. 9929-5.

Absent approval, therefore, it is likely that considerably more capacity would be placed on berth (although not all in service patterns that are optimal for regular direct service to this trade) than the 800 TEU's[10] per week to be offered by the rationalized service. Thus, approval will result in the rationalized use of vessels and container space, not only achieving a substantial savings in fuel consumption but also avoiding the prospect of excess trade capacity. Such results would be in furtherance of the public interest and operate to the benefit of the commerce of the United States.

The subject Agreements would not "be in violation of the [the] Act"

While not framed in terms of actual or potential violations of other provisions of the Shipping Act, three issues set out in the Order of Investigation bear on matters related to interpretations of various provisions of the Act and/or have been considered issues of law for the purposes of this proceeding. These issues are:

(a) "[W]hether the addition of the words 'Scandinavia and Baltic' to the scope of Agreement No. 9929-2, and hence to Agreement No. 10266, constitutes an enlargement of the existing geographic scope of the basic Agreements, as the protestants claim, or whether the purpose of the addition is only clarification since Combi has served those areas since it commenced operations, as the proponents claim . . . ."

As originally approved by the Commission in 1971, the scope of the service authorized by Agreement No. 9929 was defined as between U.S. Gulf and South Atlantic ports "and United Kingdom/Eire ports and European Continental ports, excluding the Mediterranean . . . ." Thus, the European scope of the service was originally defined in the all-inclusive terms of "European Continental ports," with any exclusions (i.e., the Mediterranean) set out in specific terms. Pursuant to this authority, Combi Line from its inception continued service to the Scandinavian and Baltic ranges, which service had previously been offered by its

[10] The modified Omni vessels which will serve as the nucleus of the rationalized service will be of 950-TEU capacity, and, if employed in this trade individually by one of the proponents, would not be limited to the 800-TEU level specified in the Agreement (as well as the further limitation for South Atlantic cargo). Thus, even assuming that the remaining proponents would not individually offer service if the Agreement is disapproved, these ships alone could place on berth more weekly capacity than that called for in the subject Agreement.

constituent members. Combi Line service to this range was originally on a transshipment basis (except for direct calls on inducement), but since 1977 Combi Line has offered direct service with regular fortnightly calls of its containerships at Gothenburg. However, since this provision of the original Agreement No. 9929 also specified certain ranges (i.e., the United Kingdom and Eire) included within the scope, on drafting the revisions which became Agreement No. 9929-2 it was decided to clarify this provision by including reference to Scandinavia and the Baltic.

Reason supports the conclusion that "Scandinavia and Baltic" ports are included within the term "European Continental" ports. Inspection of a map shows that Scandinavia is part of Europe and that the Baltic is a European sea. The dictionary defines Scandinavia as a "region in N. Europe, including Norway, Sweden & Denmark and, sometimes, Iceland & the Faeroe Islands." and the Baltic Sea as a "sea in N. Europe, south & east of the Scandinavia Peninsula and west of the U.S.S.R., joining the North Sea."[11] Protestants no longer argue that such calls constitute an "enlargement" of the scope of service. There has been no evidence presented in this proceeding which could warrant precluding proponents from serving this integral part of the European range.

(b) "[W]hether approval of the Agreements should be conditioned upon the parties meeting all tariff filing requirements with respect to the foreign-to-foreign coordinated container service between ports in Mexico and ports in Continental Europe . . . ."

This issue apparently proceeded from certain language of Agreement No. 9929-2, which could have been construed as a request by proponents for section 15 approval of service between Mexico and Europe, and from proponents' memorandum of justification submitted with the filing of Agreement No. 9929-2, which referred to proponents' expectation that substantial portions of the 1,500-TEU vessels then planned for employment in this trade would be devoted to Mexico/Europe cargo. Protestants, in their comments and during the hearings, questioned the extent to which the carriage of such foreign-to-foreign cargo would affect the level of capacity employed in the U.S. trade.

The pertinent language of Agreement No. 9929-2, however, now has been clarified to reflect the parties' original intent to include only wayport service between Mexican ports and the U.S. Gulf and South Atlantic. Proponents will file appropriate tariffs covering the U.S./Mexico service. Further, the earlier perceived possibility of shifting "excess" capacity in the Mexico/Europe trade to the U.S. Gulf and South Atlantic trade has been obviated by the reduced capacity of the vessels now to be employed and by the inclusion in Agreement No. 9929-5 of the 800-TEU limitation on liftings from U.S. ports, which limitation would include containers loaded or discharged at U.S. ports regardless of their origin or destination outside the U.S. Gulf or South Atlantic range.

(c) "[W]hether approval of the Agreements should be conditioned upon deletion or limitation of authority in Agreement No. 9929-2 for the parties to provide LASH service on a transshipment basis to or from ports outside the geographic scope of the Agreement."

This issue has been resolved by the deletion in Agreement No. 9929-5 of authority to provide LASH transshipment service "to/from any other port" outside the scope of the Agreement.

[11] *Webster's New World Dictionary of the American Language, Second College Edition*, at pp. 1270, 108, respectively.

For all the foregoing reasons it is concluded that the subject Agreements will contravene none of the criteria for disapproval set out in section 15 and that the current terms of the Agreements as well as the evidence of record resolve favorably the 11 issues set out in the Commission's original Order of Investigation.

Agreements Nos. 9929–5 and 10266–2 are subject to the Svenska standards

Proponents argue that approval of the subject Agreements is not governed by the standards approved by the Supreme Court in *FMC v. Svenska Amerika Linien,* 390 U.S. 238, 243-246 (1968), which require that in order to be approved, an agreement must be shown to be required by a serious transportation need, necessary to secure important public benefits or necessary to achieve a valid regulatory purpose of the Shipping Act. Proponents' position is without merit. Both Agreement No. 9929–5 and Agreement No. 10266–2 represent commercial arrangements which are significantly anticompetitive and thus contrary to the antitrust laws. Shipping Act immunity for these arrangements should be granted, therefore, only upon a showing that immunity is justified under the *Svenska* standards.

With respect to Agreement No. 9929–5, this Agreement represents an arrangement whereby three shipping lines are agreeing to limit "production" in a particular market, that is, cargo capacity in the U.S. South Atlantic and Gulf/North Europe trade. The proponents' preferred phrase is "rationalization of vessels and container space." By either label, such a practice represents an effective division among the three proponents of cargo moving in that trade. Such a horizontal market division represents a *per se* violation of section 1 of the Sherman Act. *Addyston Pipe and Steel Co. v. United States,* 175 U.S. 211, 244-245 (1899); *Citizen Publishing Co. v. United States,* 394 U.S. 131, 135-136 (1969). Agreement No. 9929–5 also contains authority for the three proponents to fix prices in certain circumstances. Price-fixing is another *per se* violation of section 1 of the Sherman Act *United States v. Trenton Potteries Co.,* 273 U.S. 392 (1927). Proponents try to limit the application of the *Svenska* standards to ratemaking by conferences. But price-fixing is illegal *per se* whether undertaken by three parties, as here, or by thirty-three. The test for *per se* illegality is not whether proponents can control rates throughout the trade, but whether their agreement interferes with "the freedom of traders and thereby restrain[s] their ability to sell in accordance with their own judgment." *Kiefer-Steward Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211, 213 (1951). Nor does the fact that Agreement No. 9929–5 represents an extension of ratemaking authority previously approved by the Commission remove the Agreement from the *Svenska* standards. Each extension of ratemaking authority must be shown to meet the same *Svenska* standards of approval, as the Commission's Order in Canadian-American Working Arrangement, 16 SRR 733 (FMC, 1976), makes clear.

With respect to Agreement No. 10266–2, Article 4 of that Agreement states that ICT and CGM will "share in and contribute to any and all revenues and expenses incurred by the parties collectively." Such a division of revenues is another way of dividing a market, and is again a *per se* violation of section 1 of the Sherman Act. See *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969). Even if Agreement Nos. 9929–5 and 10266–2 did not contain provisions *per se* unlawful, the facts of this case could support a finding that the Agreements are sufficiently restrictive of competition to be required to meet the *Svenska* standards.[12]

It is clear that the three proponents would, absent these Agreements, maintain their long presence in this trade, individually if necessary. Individual service would, of course, be more competitive than the combined services proposed in the Agreements. Hence, the Agreements substantially reduce the level of competition both among the proponents and in the U.S. South Atlantic and Gulf/Europe trade in general. Hapag-Lloyd, ICT, and CGM are all long-established or descendants of long-established shipping companies which operate world-wide. They all have substantial resources which can be deployed to assist their cargo-carrying ventures; these include a multitude of subsidiary and affiliate companies, some of which already assist the European end of the Combi Line service. Any combination between such enterprises must be scrutinized carefully before given antitrust immunity; they must meet the standards of *Svenska* before they are approved under section 15.

Svenska Criteria

The *Svenska* test is framed in the disjunctive, i.e., proof of either serious transportation need, *or* important public benefits *or* furtherance of a valid regulatory purpose. As more fully set forth hereafter it is concluded that the uncontraverted evidence of record demonstrates that the Agreements should be approved under all three parts of the *Svenska* formulation.

1. "Serious transportation needs."

(a) The need to employ more efficient container vessels.

The four containerships which have been employed in the Combi Line container service were originally constructed as conventional breakbulk vessels, equipped with on-board cargo handling gear, and had an underdeck bale cubic capacity of 800,000 cubic feet (exclusive of gear), plus additional on-deck carrying capacity. To optimize their cargo carrying capacity as containerships, these ships underwent certain modifications, but their maximum capacity as presently configured is only 420 TEU's. Thus, Combi Line has been operating ships designed with an 800,000-plus bale cubic capacity but with an inherent limitation on effective capacity of roughly half that amount.

This inherent inefficiency is underscored by the fact that, despite utilization factors averaging better than 90 percent in both directions from the fourth quarter of 1976 through the second quarter of 1978, the Combi Line container service incurred substantial losses. Thus, there exists a serious transportation need to place this service on a viable footing, which proponents propose to do by further modification of these vessels to bring their capacity to approximately 950 TEU's

[12] ". . . the fact that a given practice is considered under a rule of reason, rather than as a *per se* violation, does not mean that the dangers to competition in any particular circumstance are necessarily lower; clearly, certain practices which are not *per se* violations may, depending upon the facts of the particular case, restrict competition more severely than would *per se* restraints." *United States Lines, Inc. v. FMC*, 584 F. 2d 519, 15 SRR 411, 423, n. 31 (D.C. Cir., July 28, 1978).

(while maintaining the same operating speed and fuel and manning requirements, with the number of vessels sufficient to offer the weekly service (at least to/from U.S. Gulf ports) which is a competitive necessity in this trade.)[13]

(b) The need for CGM's participation in the rationalized container for LASH services.

CGM, like the other two proponents, has a long history of liner service in this trade, having served the trade since 1909. In 1970 CGM became a party to FMC Agreement No. 9091 with Armement Deppe and Ozean Stinnes by which these parties operated the "UniGulf" service, an eastbound conventional vessel service from U.S. Gulf ports to Europe. CGM saw the rapid development of containerization in this trade and wished to modernize its service, but also saw a serious transportation need to undertake this modernization in connection with a rationalized service.[14] As explained by witness Mirobent:

> It was, however, necessary for us to consider several factors in connection with starting such a service. Given: (a) the substantial investment involved in building a fleet of modern containerships of a sufficient number to offer the weekly service necessary to be comparable to those already offered by the established container operators; (b) the difficulties usually involved in chartering a fleet of ships with the necessary compatibility to offer such a service; and (c) the fact that placing an entire new such fleet into this trade could have led to a situation of excess capacity, CGM wished to participate in some sort of rationalized service in order to offer a containerized operation to this trade.

CGM also would participate in the ongoing LASH service, but only to the extent of any future capital contributions thereto, and the only new capital expenditure presently envisioned is the possibility of instituting a LASH feeder service to operate in European waters. No such specialized system is presently offered in this trade, and, in view of the already substantial capital investment by Hapag-Lloyd and ICT in the LASH service, CGM's participation in and contribution to this service will serve serious transportation needs by facilitating the development of such a feeder system should it prove technically feasible.[15]

(c) The need to separate the present Combi Line joint container service.

Termination of the joint Combi Line container service also is prompted by serious transportation needs related to coverage of and identity in the relevant market. That is, Article 3.2 of Agreement No. 9929 as presently in force requires that any marketing of this service be undertaken by jointly-appointed representatives for the Combi Line service, not the individual constituent lines. Article 3.2 further specifies in geographic terms that ICT is to act as general agent for the joint service in Belgium, Holland, Luxembourg and Switzerland, that Hapag-

[13] See Ex. 41 at 15-16, where, in response to an issue framed in the Commission's Order of Investigation, witness Thiede explained:

> A "viable container service" in this trade must meet two basic requirements. First, it must be of a weekly frequency in order to remain competitive with the various weekly all-water and minibridge services. Second, such a service must utilize suitably efficient vessels in order to place the service on an economic footing. Under the proposed Agreement No. 9929-5, the parties and both marketing organizations will be able to offer weekly capacity at least in the U.S. Gulf portion of the trade, and, as described above, the modifications to the Omni vessels will avoid the inefficiencies inherent in their use as full containerships in their present configuration. Therefore, this Agreement should enable the parties to offer a "viable container service."

[14] Witness Mirobent pointed out that CGM's "partners in the UniGulf service did not wish to undertake in the near future the conversion from breakbulk to container service in this trade" [Ex. 43 at 5], and, as noted by witness Thiede, Hapag-Lloyd and ICT viewed CGM's participation favorably because, *inter alia*, "it had been obvious for some time that Combi Line container service needed to be improved. This meant the commitment of new tonnage to the trade [and] [a] third partner to share the risks in any such improvement plan made sense from a rationalization viewpoint." Ex. 41 at 11-12.

[15] Development of such a system is still in the discussion stage, but CGM's participation at this point is, as explained by witness Thiede, necessary to avoid revising preliminary planning for such an undertaking.

Lloyd act as general agent for the joint service in Germany and Austria, and that in all other countries the joint service is to appoint common representatives.

This arrangement has led to two marketing difficulties. First, Hapag-Lloyd and ICT (the latter in a service in which CGM is also a participant) are direct competitors in the North Atlantic trade and have established marketing outlets for those services. However, for U.S. Gulf and South Atlantic cargo of North Atlantic shippers of the respective lines, the geographic divisions of Article 3.2 require in certain areas that the one line refer its shippers to the other, competing line for movement via Combi. Second, the requirement of Article 3.2 that *any* marketing (whether by the constitutent lines or appointed agents) be undertaken on behalf of the Combi Line joint service has precluded the lines from identifying themselves in the market with service to the U.S. Gulf and South Atlantic.

Separation of the present joint container services into two independently-marketed services will thus meet the need to correct the marketing "overlap" which developed under the present Agreement and will allow the respective lines to develop their identities in the market.

(d) The need to rationalize the container fleet of the proponents.

Continued rationalization of the vessels and container capacity to be employed in these services will further meet serious transportation needs in connection with what had been the principal disputed issue in this proceeding, the possibility of overtonnaging. The capacity limitations incorporated into Agreement No. 9929-5 have obviated protestants' continiued opposition to approval on the grounds of excess capacity, and witnesses for both proponents and Hearing Counsel concur in the conclusion that the trade will not be overtonnaged as a result of the capacity to be employed. While it is not possible to develop a precise level of capacity proponents would employ in the trade individually absent approval, each of the proponents would undertake to retain their longstanding presence in the trade (but, in some instances, with services less desirable for the trade in terms of frequency and regularity), and the capacity of the ships, owned by one of the proponents, would, if operated independently, alone be greater than the capacity limitations set out in Agreement No. 9929-5. Thus, approval of the Agreement will serve the serious transportation need of avoiding the possibility of the destabilizing conditions which can occur in an overtonnaged trade.[16]

(e) The need for ICT and CGM to rationalize their marketing activities.

The rationalization of marketing activities called for in Agreement No. 10266-2 also is necessitated by serious transportation needs. As explained by witnesses for ICT and CGM, those lines are, vis-a-vis Hapag-Lloyd and other established operators, newcomers insofar as marketing in this trade is concerned. CGM has never offered a container service in this trade, and ICT did not form its marketing organization until 1975. Absent Agreement No. 10266, each of the lines would be left to market the capacity respectively allocated to them by the terms of the limitations set out in Agreement No. 9929-5. Within those limitations, however, ICT and CGM would be left in an untenable position upon entering this market. As explained by witness Drabbe:

[16] The Commission's thorough report in the *Mediterranean Pools Investigation*, 9 F.M.C. 264, 291 (1966), remains a leading study of the results in an overtonnaged trade "where malpractices flourish, rate instability exists and competition is wasteful and destructive . . . ."

. . . *assuming at best that, as an internal matter among the three parties, ICT were to be allocated* 40 percent of the slots available on the ships operated under Agreement No. 9929-5 and CGM 20 percent, these two lines would have respectively a total of 320 and 160 TEU's weekly for U.S. Gulf and South Atlantic cargo. With further limitations for its South Atlantic cargo, this would leave a very small amount of capacity available for the South Atlantic part of the trade. Taking first ICT's position without Agreement No. 10266, because of the mix of 40-foot and 20-foot containers, our 320 TEU's would mean on average only a total of approximately 200 boxes. However, considering that these ships will probably serve five ports on each side of the trade, producing 25 port pairs, this would give ICT itself an average of only eight boxes per port pair. One also must bear in mind the need to have some diversification in equipment, such as 20- and 40-foot dry vans, open-top and reefer containers, tank containers, flat racks, etc. Thus, were ICT alone marketing the capacity available, the overall capacity limitations in Agreement No. 9929-5 would be such that finding a competent agent who could be expected to develop the market with such small amounts of capacity available, as well as the difficulty of making necessary equipment available against such limited capacity, would be commercially undesirable and perhaps impossible, particularly in the South Atlantic where even further limitations apply. For CGM, with only 160 TEU's weekly, the same considerations would apply but with greater force.

Additionally, to implement a joint marketing venture such as Agreement No. 10266, there is a serious transportation need for the constituent lines to pool revenues and expenses. That is, in order that the services of both parties be marketed by all outlets to be employed, proponents claim it is necessary that these marketing organizations be jointly appointed to represent both ICT and CGM. In the course of such representation, it is impossible for the marketing organizations to allocate to one or the other of the principals cargoes (of varying ocean freight rates) solicited on their joint behalf. The converse applies with respect to expenses incurred in connection with the transportation of such cargoes, and it is therefore necessary that Agreement No. 10266 include a provision for the sharing of revenues and expenses.

Approval of the subject Agreements will thus meet serious transportation needs by: (1) allowing proponents to improve the fleet of inherently inefficient ships presently operated in the Combi Line service, thus placing proponents' container service to this trade on a more viable footing; (2) permitting CGM to offer a regular, direct container service in this trade, without the prospect of excess capacity, as well as to contribute to implementation of a LASH feeder service; (3) eliminating the restrictions in the present Agreement No. 9929 both with respect to geographic limitations on the respective proponents' participation in marketing container service and the limitation to marketing only on a joint service basis; (4) rationalizing the amount of tonnage to be placed on berth, thereby avoiding the prospect of overtonnaging the trade; (5) separating the present joint Combi Line container service into two independently marketed services, and, under Agreement No. 10266, placing the services jointly marketed by ICT and CGM on a reasonably competitive footing vis-a-vis Hapag-Lloyd and other operators in this trade.

2. "Important Public Benefits."

(a) Providing additional container capacity to the trade.

Since the Combi Line service was first formed in 1971, the liner trade in question has experienced a rapid movement toward containerization. Moreover, as reflected by current utilization data of container operators in this trade, shipper demand for container space has continued at very high levels. Thus, improvement of the container service heretofore operated per Agreement No. 9929 will serve an important public benefit by making available additional container capacity needed by shippers in this trade.

(b) Continuing to provide conventional service.

Similarly, continuation of the conventional vessel service offered under Agreement No. 9929 will ensure regular, direct breakbulk service for shippers of out-size, heavy-lift and other unusual cargoes between outports not receiving adequate or regular, direct service by other lines. This service has proved to be a valuable one to shippers in this trade, and its continued operation will thus serve to maintain the important public benefits derived from this service.

(c) Increasing carrier participation in the trade without excess capacity.

CGM's participation in Agreement No. 9929–5 will permit this line's entry into the market for container service in this trade, but, through the rationalized service contemplated by that Agreement, will avoid the prospect of overtonnaging as a result of its entry. In connection with approval of another rationalization agreement, the Commission has made clear the important public benefits inherent in maximizing carrier-participation without excess capacity [*Agreements Nos. 9178–3 & 9731–5*, 16 SRR 1553, 1567 (FMC 1976)]:

These agreements permit Respondents to offer the level of service which they consider competitively necessary, a determination not unreasonable on this record, with substantially less capacity than would be required for each Respondent to individually offer that level of service. The agreements, therefore, tend to ameliorate the overtonnaging problem in the transpacific trades and tend to keep a high number of common carriers in those trades. Both of those results are beneficial to the public, and outweigh the anticompetitive effects of these agreements, demonstrated on this record, sufficiently to justify the continued implementation of these agreements . . . .

Additionally, CGM's participation in the LASH service will not add to the capacity offered by that service, but will serve an important public benefit by assisting in the development of a LASH feeder service that would facilitate the movement of LASH cargoes in this trade.

(d) Increasing the level of competition in the container service market.

Through the "Co-ordinated Container Service" portion of Agreement No. 9929–5 and the formation of Agreement No. 10266, there will be substituted for the present joint Combi Line container services two independent, competitively marketed container services, a development serving important public benefits by giving shippers a wider choice of transportation alternatives than at present. The rationalization of container space per Agreement No. 9929–5 does not allow for the pooling of revenues and expenses among the three proponents, as contrasted to the present Agreement, and is thus an arrangement more competitive vis-a-vis these lines and other operators in this trade. Approval of the subject Agreements will therefore have a favorable impact upon competition in this trade and will thus serve the important public benefits inherent in increasing the level of competition in the relevant market, while avoiding the prospect of instability in the trade which could result from overtonnaging.

3. "Furtherance of a Valid Regulatory Purpose of the Shipping Act.

There is no precise definition of the term "valid regulatory purpose" in the Shipping Act or its legislative history, or in the legislative history of the 1961 amendments to the Act, or in Commission or court cases related to the Shipping Act. It is fair to say, however, that the objectives, set forth in the recommenda-

tions in the Alexander Report[17] *and in reports of the Commission, concerning the* proper function of section 15 provide appropriate parameters to the "valid regulatory purposes" here to be considered. These include: (a) regular and frequent service to shippers; (b) trade stability; (c) prevention of overtonnaging; (d) participation by a sufficient number of carriers to provide competition in a trade; (e) maintenance of specialized services to meet the needs of the trade; and (f) economy in the cost of service.

(a) Regularity and frequency of service.

The Alexander Report characterizes regularity and frequency of service as an advantage that is said to result from agreements and conferences.[18] Agreement No. 9929-5 will allow national-flag lines of France, Germany, and the Netherlands to provide regulary weekly service in the trade between the U.S. Gulf and Europe, a level of service seen as optimum in this trade.[19]

(b) Trade stability.

The Alexander Report emphasized that, unless trades were stabilized, competitors would be driven out by rate wars, and the carriers which remained in the trade ultimately would have to increase rates to recoup rate war losses.[20] Agreement No. 9929-5 will help to stabilize the trades between U.S. Gulf and South Atlantic ports and ports in Europe by preventing overtonnaging. If each of the three parties to Agreement No. 9929-5 were to supply the tonnage necessary to provide its own weekly sailings, a large amount of additional capacity would have to enter the trade.[21] The Agreement permits its three member lines each to offer weekly sailings with a single fleet of vessels.

(c) Prevent overtonnaging.

Measures to remedy or foreclose the development of overtonnaged liner trades is another valid regulatory purpose of the Act, as the Commission has recognized in its decisions dealing both with matters such as tradewide pools[22] and rationalized service agreements.[23] As shown above, Agreement No. 9929-5 is designed to allow proponents to provide weekly container service without overtonnaging the trade.

(d) Maximizing carrier participation in the trade.

One of the purposes of the Shipping Act is to encourage participation by a sufficient number of carriers to maximize competition in a trade. This was confirmed in *Agreements Nos. 9718-3 and 9731-5*, 16 SRR 1553, 1567 (FMC 1976), where the Commission held that the agreements there in question

[17] The Committee's recommendations were designed to secure the advantages seen "as resulting from agreements and conferences if honestly and fairly conducted, such as greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination." *House Comm. on the Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, 63d Cong., 2d Sess. (Vol. 4) 416 (1914) (hereinafter cited as *Alexander Report*). While the Alexander Report primarily relates the advantages it discusses to tradewide agreements, they are no less advantageous when derived from other kinds of section 15 agreements.

[18] See *id.*

[19] See Ex. 41 at 15-16; Ex. 43 at 4; Ex. 46 at 27.

[20] See *Alexander Report* at 416.

[21] See Ex. 45 at 2-4, 8-9, 11-12; Ex. 46 at 27-28.

[22] See, e.g., *Mediterranean Pools Investigation*, 9 F.M.C. 264 (1966).

[23] See, e.g., *Agreements Nos. 9718-3 and 9731-5*, 16 SRR 1553 (1976).

"tend[ed] to ameliorate the overtonnaging problem in the [relevant] trades and tend[ed] to keep a high number of common carriers in those trades." Both results were found by the Commission to be "beneficial to the public, and [to] outweigh the anticompetitive effects of these agreements, demonstrated on this record, sufficiently to justify the continued implementation of these agreements . . ."

By permitting the three proponents (including CGM, a new entrant in the container market) to rationalize their container operations so as to maintain a weekly frequency of service, and by separating the present joint container service framework to allow for two competitively-marked outlets for each service, the subject Agreements are in furtherance of this regulatory purpose.

(e) Maintenance of specialized services.

Encouraging services that are tailored to meet the needs of shippers is another valid regulatory purpose of the Act, as the Commission has long recognized, particularly in connection with the development of innovative transportation systems.[24] Agreement No. 9929–5 will allow its member lines to offer additional container service which is needed by the trade,[25] maintain the conventional services which are now utilized by shippers, and improve the LASH service by a possible feeder operation.[26] The conventional services, particularly, are tailored to meet the needs of shippers on routes that are not served by the container carriers and to carry cargoes that are not carried as efficiently by containerships or LASH vessels.[27]

(f) Economy in the cost of service.

Economy in the cost of service is an advantage set forth in the Alexander Report[28] and "the Commission has often recognized that the financial soundness of carriers serving the commerce of the United States is a necessary consideration [under the Act] because carriers are the 'instrumentalities' of that commerce."[29] It is plain from the record that a financially sound service cannot be provided with the existing container vessels operated by Combi Line.[30] Approval of Agreement No. 9929–5 will enable the proponents to utilize efficiently the same kind of

[24] See, e.g., *Disposition of Container Marine Lines*, 11 F.M.C. 476 (1968), where, in dealing with the propriety of an early intermodal through tariff, the Commission noted (11 F.M.C. at 482-83):

> . . . [the] Commission need be ever mindful of its responsibilities as a body to which Congress has 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.
>
> The determination of the issues in this proceeding will have far-reaching importance. Traditional methods of transporting cargo are rapidly being replaced by the growth of new techniques and transportation systems. The Federal Maritime Commission has not been unmindful of these developments and has sought to facilitate, wherever possible, the implementation of improved shipping systems. In the Order of Investigation in this proceeding the Commission stated that it "does not wish to discourage the inauguration of any transportation services which might be of great benefit to shippers." It is in accordance with that injunction that the Commission must arrive at its decision herein.

[25] Witnesses Thiede and Rugan testified as to the present demand for additional container capacity in the U.S. Gulf/Europe trade. See Ex. 41 at 8 and n. 2; Ex. 44 at 6-10.

[26] Witness Thiede also discussed the potential benefits of the LASH feeder service. See Ex. 41 at 18-19.

[27] See Ex. 13 at 36-39, 40-41.

[28] See *Alexander Report*, *supra*, at 416.

[29] Docket No. 76–14, *Agreement No. 10116–1–Extension of Pooling Agreement*, slip opinion at 54 (Initial Decision, served November 21, 1978). Judge Kline in his opinion here cites *Regulations Governing Level of Military Rates*, 13 SRR 411, 412 (1972); *Seas Shipping Co. v. American South African Line, Inc.*, 1 U.S.S.B.B. 568, 583 (1936); *Secretary of Agriculture v. N. Atlantic Continental Freight Conference*, 4 F.M.C. 706, 739 (1955); *Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade*, 11 F.M.C. 168, 174 (1967).

[30] See Ex. 41 at 4-9, wherein witness Thiede explains the inherent operating inefficiencies of the Combi Line container vessels in their present configuration.

vessels with substantially the same vessel operating costs and fuel consumption but modified to transport more than twice their present container capacity on each sailing.[31] The capacity increase which will co-exist with Agreement No. 9929–5 will enable proponents' container vessels to operate on a more cost-efficient basis and place proponents' respective container services on a more viable financial footing.

Moreover, as already noted, the container vessels the proponents intend to operate in the trade will be modified to carry more than double their present capacity, but with approximately the same fuel consumption, thus reducing fuel consumption per container mile with these ships as well as conserving the fuel which would be used if proponents could not operate with the benefit of this vessel rationalization plan.[32]

It is, therefore, concluded that Agreement No. 9929–5 will be in furtherance of valid regulatory purposes of the Shipping Act.

The "Antritrust Implications" of the Subject Agreements Call For Their Approval Under Section 15

The Court of Appeals in *United States Lines, Inc. v. FMC,* 584 F.2d 519, 15 SRR 411 (D.C. Cir. 1978), held that the principles underlying section 15 required Commission consideration of the "antitrust implications" of all agreements submitted for approval, not only those constituting *per se* violations and considered under what the Court characterized as "the strict antitrust standard" of the *Svenska* decision. 15 SRR at 421. As the Court there stated (quoting from *Volkswagenwerk A.G. v. FMC,* 390 U.S. 261 (1968)), section 15 requires that the Commission "scrutinize [any] . . . agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute." 15 SRR at 421-22. Thus, while the Court made clear that "the strict antitrust standard" of *Svenska* was not applicable to all agreements, the Commission was nonetheless instructed to view the "antitrust implications' of every agreement either by the *Svenska* formulation (where applicable) or in terms of the balancing approach referred to in the *Volkswagenwerk* decision.

It is concluded that for reasons of serious transportation needs, important public benefits, and valid regulatory purposes served by or resulting from the subject Agreements the record demonstrates that approval is warranted by "the strict antitrust standard" of *Svenska,* as well as the less rigorous criterion of "antitrust implications." That is, any anticompetitive implications of the subject Agreements are overbalanced by the positive contributions to the trade and furtherance of regulatory objectives of the Act that would flow from approval.

---

[31] See *id.* at 9, where witness Thiede explains that proponents "intend to use these Omni ships, with substantial modifications, as the basis for the replacement fleet. These ships are to be further modified by adding a new midsection and clearing remaining self-support gear, which will give each Omni vessel a capacity of approximately 950 TEU's. These ships will, even with these modifications, be able to maintain the same operating speed as at present, will require no additional crewing, and will have roughly the same fuel consumption characteristics. As a result, we will be able to more than double the container carrying capacity of the Omni ships and eliminate to a great extent the 'wasted' capacity in their current configuration, but with almost no increase in vessel operating costs."

[32] The conservation of fuel is another valid regulatory purpose, as recognized in such statutes as the Energy Policy and Conservation Act of 1975, 42 U.S.C. §§6201-6422, which in section 382(b) thereof requires the Commission to consider the impact of any final agency action "on energy efficiency and energy conservation." 42 U.S.C. §6362(b).

To recapitulate, the rationalization efforts incorporated into the subject Agreements are fully consistent with the regulatory purposes of the Act by allowing an improvement of service to the trade (as well as allowing a new entrant into the market) while obviating the prospect of excess trade capacity. The "antitrust implications" of the Agreements are the minimum necessary to achieve these purposes, and the Agreements in fact establish an operational and marketing framework more competitive than under the present Agreement No. 9929, but circumscribed in such a way as to ensure that proponents' rationalization efforts will not result in an undue concentration of market power.

Protestants' Position

Protestants United States Lines, Inc., Sea-Land Service, Inc., and Seatrain International, S.A., do not oppose approval of Agreements Nos. 9929–5 and 10266–2 as these agreements have been amended and revised and are now before the Commission for its consideration. None of the protestants filed reply briefs but such non-action is not to be construed as necessarily agreeing with all the arguments set forth in proponents' opening brief.

Hearing Counsel's Position

Hearing Counsel believe that with the exception of two provisions in Agreement No. 9929–5, proponents have adequately justified the Agreements and so the Agreements should be approved.

The first exception of Hearing Counsel deals with the provisions of Agreement No. 9929–5 which include CGM in the Combi Line LASH service and authorize a container service between Mexican ports and U.S. Gulf and South Atlantic ports. Hearing Counsel argues that these provisions are insufficiently concrete to warrant Commission approval.

Article 1.5 of Agreement No. 9929–5 provides that CGM will participate in the Combi Line LASH service to the extent of the proportion that it contributes capital equipment to the trade. However, the only capital expenditure the parties are considering for the LASH service is the implementation of a LASH feeder operation, and this concept is still in the exploratory stages. Therefore, proponents cannot state if CGM actually will be participating in the LASH service to any extent.

A second aspect of Agreement No. 9929–5 which Hearing Counsel contends lacks the requisite amount of definiteness for Commission approval is Article 2.1 in which proponents seek the authority to implement a container service between United States ports and ports in Mexico. At the present time, no Mexican ports have container facilities and only one port has definite plans to develop them in the future. The elements of proponents' container service necessarily depend upon the construction of such facilities which at this point is uncertain.

The Commission has recently stated 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." *Agreement No. 10066–Cooperative Working Arrangement*, FMC Docket No. 74-5, November

17, 1978, slip opinion at *29*. In *Agreement No. 10066* the Commission refused to approve a coordination of services provision in the Agreement because "beyond some unspecified plan for coordination of sailings, no action was contemplated under the provision." The Commission cited a conclusion of the Presiding Officer that "[i]ndeed, in the United States West Coast to Colombia trade [no coordination of services] is presently feasible given the itineraries of the parties." As in Docket No. 74-5, the justification offered to support the two aspects of Agreement No. 9929-5 mentioned above reveals that there are only ambiguous plans for the development of the services proposed and fails to demonstrate to an "interested party," in this case the Commission, that action is definitely contemplated or presently feasible.

Hearing Counsel believes that the amount of information noticeably absent from Agreement No. 9929-5 is significant. Proponents have attempted to provide details as to how CGM's participation in a LASH feeder service would operate and what economic effect it would have if implemented "so as to permit any party to ascertain how the agreement works." Proponents explain that the LASH feeder service, "as envisioned would operate only in European waters to move cargo to/from the two European ports (Rotterdam and Bremen/Bremerhaven) now called by the Combi Line LASH service. It is unlikely that inauguration of a feeder service would alter the European ports calls of the LASH vessels. At most only one port call could be eliminated . . ." Hearing Counsel argue that this information cannot cover for the lack of the most fundamental operative facts, which are whether CGM will actually participate in the LASH service, whether a feeder service will be implemented and when, and what the proportionate share of CGM's contribution will be if the system is implemented. The LASH feeder system is only in the exploratory stages. Factors still remaining to be considered are the availability of suitable equipment, the ability to develop a suitable and financially sound operation, and the desirability of instituting such an operation. Hearing Counsel says proponents have explained what they expect to happen if a feeder service is implemented, but have not explained what they actually intend to do.

Hearing Counsel says that there are also gaps of information concerning the operation of a container service to Mexico. Proponents cannot explain even what they expect to happen. They state that Combi Line seeks to operate a wayport service between Mexican ports and U.S. Gulf and South Atlantic ports in order to resolve an equipment imbalance resulting from a predominantly westbound movement of goods from Europe to Mexico and a predominantly eastbound movement from U.S. Gulf and South Atlantic to Europe. However, proponents do not definitely know when Mexican container facilities will be available. Veracruz is the only port in Mexico that even has plans to develop container facilities and it is not expected that it will have even a container crane available until the end of 1979. There is no indication of what other ports will develop facilities or of any possible time-table for their doing so. Even if a container crane does become available in Mexico, there is presently no infrastructure or proper organization for the efficient large scale transportation of containers. Minimum requirements for the establishment of an infrastructure are significant: the adoption of the ports to a container service; the establishment of a customs inspection system; the restructuring of cargo handling tariffs at the ports, and the adaptation of regulations and tariffs for the containers' inland transportation in Mexico. These tasks are not quickly or easily accomplished. Clearly Combi Line could initiate a container service to Mexico before the complete development of such an organization, but proponents admit that to some extent the configuration of the container service (in terms of itineraries and number of vessels for their overall services) depends upon the development of container facilities as well as infrastructure in Mexico. It is Hearing Counsel's position that to grant authority to provide a container service before answers are provided to these fundamental questions concerning the existence of container facilities would be premature.

Hearing Counsel believe that the facts which remain to be supplied in Agreement No. 9929-5 are not simply "working details" which the Commission has stated may be determined by the parties after an agreement is approved. In *Agreement No. 9835–Japanese Lines' Pacific Northwest Containerships Service Agreement,* 14 F.M.C. 203 (1971), the Commission found that an agreement was final and approvable even though schedules, advertising, space charters, mutual accounting procedures and container interchanges remained to be filled-in, because there was an agreement. There is no definitive agreement on the CGM/LASH and Mexican matters between the parties to Agreement No. 9929-5. Proponents are asking the Commission to approve hypothetical propositions. The participation of a major carrier has not been determined in the LASH service, and the institution of a Mexican service is not even possible at this point and therefore cannot be determined. Hearing Counsel say these absences constitute more than "interstitial sort of adjustments."

Proponents set forth several arguments in opposition to Hearing Counsel's position. They argue that because the capacity of the LASH service would remain unchanged, the competitiveness of the service would also remain unchanged, and consequently a feeder service could be implemented which would benefit shippers without adversely affecting Combi Line's competitors. As for the Mexican container operation, proponents state that "such a service would provide the important public benefits derived from inaugurating such a service and afford an alternative to the overland systems which presently accommodate most such movements."

In considering an agreement, the Commission must determine what the benefits to the public interest and the agreement's anticompetitive effects actually are. The issue here is whether the agreement is so indefinite as to preclude the Commission from making these determinations. As stated in *In the Matter of Agreement 9448–Joint Agreement Between Five Conferences in the 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.

*It is Hearing Counsel's position that CGM's participation and the implementa-*tion of a feeder service is speculative and the benefits that may accrue are speculative as well. Hearing Counsel claim that the Mexican container operation is so vague that it is impossible to even determine what the nature of the benefits is, let alone speculate on their actually coming into effect. In essence, Hearing Counsel argue, proponents are seeking a blank check from the Commission. They wish to institute a Mexican container service, but do not wish to be bound as to whether, when, or how such services are to be developed. Proponents appear to be asking for the authority to discuss the implementation of services and in that sense have really only proposed before the Commission an agreement to agree. They state that "[p]lanning a joint service among lines must include considera-tion of numerous factors concerning costs, construction and compatibility of vessels and equipment, which process should most efficiently include from the outset participation by all the lines to be involved."

The Commission however is not authorized to approve "agreements to agree."[33] In *Matson Navigation Co. v. FMC and United States*, 405 F. 2d 796 (9th Cir. 1968), the Court of Appeals found that as a matter of jurisdiction, the Commission could not grant final approval of a merger when the agreement between the parties was to merely agree to a merger. The Court stated that "[t]he Commission thus cast its official approval and the mantle of antitrust immunity over whatever arrangements the lines might come up with. Matson contends that this is not consistent with the intent of §15. We agree . . . The Commission here has done no more than consent that the three companies involved proceed to work out an arrangement. This is not a sufficient discharge of the Commission's responsibilities." Thus, the Commission cannot grant final approval to those aspects of Agreement No. 9929-5 to which the parties themselves have not made or cannot make a final commitment. As for proponents' argument that it is more efficient to include all of the involved parties from the outset, the Court stated "[t]he uncertainty of ultimate governmental approval and the risk that elaborate and expensive preparations will go for naught are facts of life in the field of corporate reorganization. We find no strength in the argument that the shipping industry should be made an exception."

It is Hearing Counsel's further position that because Agreement No. 9929-5 allows the proponents to operate in a somewhat unusual manner, i.e., TEU limitations rather than ship-size limitations, approval of that Agreement should be conditioned upon a requirement that the proponents file reports for each quarter of each calendar year, indicating (1) the number of TEU's carried in the trade eastbound from U.S. South Atlantic ports, and (2) the number of TEU's carried in the trade eastbound from U.S. Gulf ports. They say this requirement will enable the Commission to monitor the proponents' operations under the limitations of the Agreement.

Proponents do not oppose approval of Agreement No. 9929-5 subject to the conditions requested by Hearing Counsel with respect to CGM's participation in the LASH service and the joint Mexico/USA service. Proponents similarly do not

[33] Nor is it necessary for the Commission to approve a discussion agreement concerning the implementation of services. The Commission must authorize discussion agreements where the discussions themselves may violate section 15, but this is not the case here. *Agreement 9448, supra*, at 305; *In Re: Far East Discussion Agreement, No. 9981-5*, 17 SRR 857 (FMC, 1977)

oppose the reporting requirement requested by Hearing Counsel. Proponents' position in this regard is without prejudice to their filing of any subsequent amendments to the Agreements with respect to these matters.

CONCLUSION

For all of the reasons hereinabove set forth Agreements Nos. 9929–5 and 10266–2[34] are approved upon condition that Agreement No. 9929–5 be modified as follows:

(1) Article 1.1 shall be modified to read as follows: "*Scope of the Joint Service*. Hapag Lloyd and ICT shall . . . ."

(2) Article 2.1 shall be modified to delete the final phrase reading, "and between United States ports and ports in Mexico."

(3) Article 2.2(a) shall be modified to delete the final phrase reading, "and between United States ports and ports in Mexico."

(4) Consistent modifications shall also be made to the Agreement's second, third and fourth "Whereas" clauses and to the second "Whereas" clause in Agreement No. 10266–2.

Further, as a condition of approval proponents shall file reports for each quarter of each calendar year, indicating (1) the number of TEU's carried in the trade eastbound from U.S. South Atlantic ports, and (2) the number of TEU's carried in the trade eastbound from U.S. Gulf ports.

(S) STANLEY M. LEVY
Administrative Law Judge

WASHINGTON, D.C.
January 29, 1979

[34] Exhibits 39 and 40.

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–47

MISCELLANEOUS AMENDMENTS TO RULES OF PRACTICE AND PROCEDURE

ORDER OF RECONSIDERATION

June 7, 1979

On February 14, 1979, the Commission published in the *Federal Register* a Final Rule revising section 502.67 of its Rules of Practice and Procedure to comply with the requirements of P.L. 95–475, 92 Stat. 1494 (1978), which amends the Intercoastal Shipping Act, 1933 (46 U.S.C. 843, *et seq*.).[1] The Final Rule established procedural guidelines for participants in proceedings instituted under section 3 of the Intercoastal Shipping Act.

Sea-Land Service, Inc., has petitioned the Commission to reconsider this Final Rule. The Military Sealift Command (MSC) has filed a Reply opposing the petition.

Sea-Land asks the Commission to reconsider that part of Rule 502.67 which requires carriers to file their direct case and underlying workpapers concurrently with any general rate increase or decrease, and serve copies of this material on designated interested parties and make them available to any person executing a certification which restricts the use of the information to the preparation of potential protests to the rate changes (46 C.F.R. 502.67(a) (2)).

Sea-Land opposes making its workpapers available to anyone other than the Commission prior to the filing of a protest or order of investigation on the grounds that such a requirement would be overly burdensome, and would impose an unequal burden on the U.S.-flag carriers because its foreign competitors would have access to their current financial and operating data. Sea-Land also challenges the requirement of filing the carrier's direct case with the tariff changes on the ground that it violates the Administrative Procedure Act and P.L. 95–475 because the carrier is in essence being subjected to the requirements of a hearing without prior notice of the specific issues which will be addressed at that hearing.

MSC takes the position that the certification requirement of any person seeking to view the workpapers (46 C.F.R. 502.67(a) (2)) will preclude disclosure to

[1] P.L. 95–475 establishes time limitations on hearings conducted pursuant to section 3 of the Intercoastal Shipping Act. If a hearing is ordered the Commission has 180 days from the effective date of the tariff matter under investigation to complete all proceedings and issue a final decision. 46 U.S.C. 845(b).

foreign competitors, and that in any event the need of ratepayers to have access to this data outweighs the need of the carrier to be protected from any potential disclosure. Additionally, MSC contends it is imperative that the carrier file its direct case with the tariff changes to give protestants and the Commission's Bureau of Hearing Counsel opportunity to analyze and interpret the data and prepare their positions.

The Commission has considered Sea-Land's contentions in this matter and finds them to be without merit. The question of an undue burden was discussed in the Supplemental Information accompanying the Final Rule and will not be repeated here. Furthermore, the Commission has determined that the information required by these rules is necessary to substantive regulation under the Intercoastal Shipping Act, 1933, as amended, that it is meant to apply only to records of operations in the domestic offshore trades and, that with minor exceptions, no unequal burden or prejudicial loss of confidentiality would arise. Therefore, no legal infirmity can be discerned in this regard. *Alcoa Steamship Co., Inc. v. Federal Maritime Commission*, 348 F.2d 756, 761 (D.C. Cir. 1965).

Requiring the filing of financial data and justification for general rate changes concurrently with the filing of the tariff changes is merely an extension of long standing Commission practice and is supported by the legislative history of P.L. 95-475. S. REPT. 95-1240, 95th CONG., 2d SESS. 12, reprinted in [1978] U.S. CODE CONG. & A.D. NEWS 3331, 3342. It does not constitute the initiation of a "hearing" under the Commission's Rules;[2] rather, it is a procedural requirement that is unavoidable if the Commission is to make a rational and timely decision as to whether a hearing is necessary and the specific issues to be resolved thereby, as is required by P.L. 95-475. The protest/reply procedures before an investigation is ordered and the prehearing conference procedures after an investigation is ordered give the carrier ample opportunity to know the claims of an opposing party and to meet them. Such procedures fulfill the requirements of due process. *Morgan v. United States*, 304 U.S. 1 (1937).

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration of Sea-Land Service, Inc., is denied.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[2] This argument is undermined by Sea-Land's own suggestion, contained in its Petition for Reconsideration, that the carrier's direct case be filed 45 days after the tariff changes and 15 days before the serving of the Commission's Investigation and Suspension Order and the *Federal Register* notice thereof.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79–19

SEA-LAND SERVICE, INC.

v.

EURO-PACIFIC JOINT SERVICE,
HAPAG-LLOYD AKTIENGESELLSCHAFT,
COMPAGNIE GENERALE MARITIME,
AND INTERCONTINENTAL TRANSPORT (ICT) B.V.

NOTICE

June 7, 1979

Notice is given that no appeal has been filed to the April 26, 1979, order of discontinuance in this proceeding and the time within which the commission could determine to review that order has expired. No such determination has been made and, accordingly, the order of discontinuance has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79–19

SEA-LAND SERVICE, INC.

v.

EURO-PACIFIC JOINT SERVICE,
HAPAG-LLOYD AKTIENGESELLSCHAFT,
COMPAGNIE GENERALE MARITIME,
AND INTERCONTINENTAL TRANSPORT (ICT) B.V.

PERMISSION TO WITHDRAW COMPLAINT GRANTED: PROCEEDING DISCONTINUED

Finalized on June 7, 1979

Complainant Sea-Land Service, Inc., by letter dated April 10, 1979, states that it has determined to withdraw its complaint. Sea-Land asserts that it does not wish to pursue the matters raised in its complaint because, in its opinion, the Commission's recent decision in Docket No. 77–4[1] confirms Sea-Land's interpretation of the restrictions imposed on respondents under Agreement 9902, as amended and in effect at the time of the filing of the complaint. Therefore, Sea-Land believes it to be a wasteful exercise to seek to obtain the interpretation which it already believes has been confirmed by the Commission or to be the means to obtain compliance with Commission orders and approvals. The letter, which I am treating as a motion for leave to withdraw the complaint, has received no reply from respondents, whose counsel advised me orally that respondents would not be filing a reply.

There is no authority of which I am aware which holds that a complainant can be compelled to litigate against its wishes under circumstances such as presently exist, especially when a responsive pleading to the complaint has not even been filed. Permission to withdraw is therefore granted and the proceeding is discontinued. In issuing this ruling, I make no comment on the validity of Sea-Land's statements regarding the meaning of the Commission's decision in Docket No. 77–4. The important point is that Sea-Land believes that the Commission has agreed with its interpretation of the limitations imposed on the parties to the subject agreement presently in effect[2] and further believes that it is not incumbent

[1] *Agreements No. 9902–3, et al. (Modification of Euro-Pacific Joint Service Agreement)*, Docket No. 77–4, March 29, 1979.

[2] The agreement presently in effect which is mentioned in Sea-Land's complaint is Agreement No. 9902–5, which, according to the Commission's decision in Docket No. 77–4 (pp.16,17), is due to expire on May 31, 1979.

upon a private complainant to bear the expense of pursuing issues relating to compliance with Commission orders and approvals, which issues formed the gravamen of the complaint.

(S) NORMAN D. KLINE
Administrative Law Judge

June 7, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-31

FAST INTERNATIONAL FORWARDING CORP.—
INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND
POSSIBLE VIOLATIONS OF SECTION 44, SHIPPING ACT, 1916

NOTICE

June 11, 1979

Notice is given that no exceptions were filed to the May 8, 1979, initial decision in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the initial decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78–31

FAST INTERNATIONAL FORWARDING CORPORATION—INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND POSSIBLE VIOLATIONS OF SECTION 44, SHIPPING ACT, 1916

Finalized on June 11, 1979

Applicant-respondent (Fast International Forwarding Corporation) (1) found to have violated section 44(a) of the Act by engaging in unlicensed forwarding activities on 173 occasions after having been warned against unlicensed forwarding, including 45 occasions subsequent to a second warning; (2) found to have received moneys from shippers for ocean freight and to have failed to pay this ocean freight to the ocean carriers; and (3) applicant-respondent (Fast International Forwarding) and its president, Ms. Elia A. Lopez, both found not to possess the requisite fitness under section 44(b) of the Act to be licensed as an independent ocean freight forwarder. Freight-forwarder license application denied.

Thomas P. Carlos and *Jack L. Weitzman* for respondent-applicant.

John Robert Ewers, Joseph B. Slunt, and *Polly Haight Frawley* as Hearing Counsel.

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

Fast International Forwarding Corporation (Fast or applicant-respondent) filed an application for a license as an independent ocean freight forwarder. The Commission instituted this proceeding by its Order of Investigation and Hearing served August 29, 1978, in which it stated that its prior investigation had disclosed that Fast, on nineteen or more occasions, appeared to violate section 44(a) of the Shipping Act, 1916 (the Act), by engaging in unlicensed forwarding activities during the period September 1977, through April 1978, although warnings had been received by Fast on August 26, 1977, and subsequent thereto about unlicensed forwarding activities.

On May 26, 1978, pursuant to section 510.8 of the Commission's General Order 4 (46 CFR 510.8), the Commission advised Fast of the Commission's intent to deny Fast's freight forwarder application, and on June 26, 1978, Fast requested the opportunity at a hearing to show that denial of the application was unwarranted.

Hearing was held in Miami, Florida, where Fast is located, for its convenience and so that it could present any character or other witnesses in its behalf at the least expense. Fast presented no witnesses, but was represented by counsel.

Two matters are to be determined in this proceeding. First, Fast as a respondent is charged with violations of section 44(a) of the Act for allegedly engaging

[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.

in unlicensed forwarding activities subsequent to August 26, 1977. Second is the matter whether Fast, as an applicant for a freight-forwarder license, can be found to possess the requisite fitness within the meaning of section 44(b) of the Act to be licensed as an independent ocean freight forwarder.

Hearing Counsel presented extensive evidence at the hearing showing that Fast violated the Act and that Fast is unfit to be licensed as a forwarder.

Hearing Counsel filed their "Reply Brief" as directed on April 9, 1979. Fast's "Brief" was due on March 23, 1979, but was submitted late to the Office of the Secretary of the Commission on April 2, 1979, but without proper copies. Being thus advised by the Secretary by letter dated April 4, 1979, Fast later made proper filing of its brief with necessary copies on April 16, 1979. By letter to the Administrative Law Judge dated March 27, 1979, but with envelope postmarked April 6, 1979, Fast's counsel asked permission to serve its brief late. Hereby it is ruled that Fast's late-filed brief is accepted into the record as such, but not as to the accuracy of all statements therein.

For example, in the brief counsel for Fast state that "Respondent has frankly admitted its fault," and "No member of the shipping public has been injured as a result of Respondent's alleged illegal forwarding activities." Also, ". . . Respondent made no misrepresentations to the Federal Maritime Commission." However, neither Ms. Lopez nor any other officer or employee of Fast appeared at the hearing, nor did anyone frankly admit Fast's fault. No exhibit or paper was presented in evidence by Fast admitting its fault. The shipping public has been injured by Fast, insofar as certain ocean freight monies entrusted to Fast have not been paid by Fast to the ocean carriers which transported the shippers' cargoes. American Financial and Trade Corp., a shipper, issued Fast a check on August 3, 1978, covering, among other charges, $6,074.70 for ocean freight. Fast did not attempt to pay the carrier for this shipment until two months later, at which time Fast's check was returned not paid because of insufficient funds. As of February 6, 1979, Fast still owed the ocean carrier, Farovi Shipping Corporation. Hearing was held on February 9, 1979, and Fast introduced no evidence that this ocean freight had been paid. The shipper, American Financial and Trade Corp., may be held responsible for payment of the ocean freight charges by the ocean carrier if Fast fails to pay.

In another instance, Fast issued a check on July 24, 1978, to Transytur Lines in the amount of $858.16 for ocean freight for two shipments, one from Andreco Trade International to a consignee in Maracaibo, Venezuela, with $288.08 of ocean freight charges, and the other shipment from the Wilson Tire & Supply Co. of Ga., Inc., to a consignee in La Guaira, Venezuela, with $570.88 of ocean freight charges, in both instances with the freight charges prepaid by the shippers to Fast, and with Fast issuing its check to Transytur, but with said check being returned not paid because of insufficient funds. The president of Transytur Lines stated that as of February 6, 1979, Fast owed Transytur $856.16 for ocean freight for the two shipments.

The three shippers above and the two ocean carriers above are part of the shipping public and have been injured, contrary to the mistaken statement of counsel for Fast.

Ms. Lopez made two misrepresentations to the Commission's Gulf District staff when she stated on February 10, 1978, that Fast had performed freight forwarding services for only twelve (12) shipments and that Fast had turned over smaller shipments to Almar International Corp., a licensed independent ocean freight forwarder. In fact, Ms. Lopez or Fast did not turn over any shipments to Almar, and Fast performed forwarding services on many more than 12 export shipments prior to her conversation with the Gulf District staff.

Ms. Lopez and Fast had been warned not to perform freight forwarding service by letter dated August 22, 1977, from Mr. Charles L. Clow, Office of Freight Forwarders, Federal Maritime Commission. On February 10, 1978, when Ms. Lopez visited the Gulf District Office of the Federal Maritime Commission in an interview with District Director Harry T. Statham and Investigator Jules Z. Johnson, Ms. Lopez was advised that Mr. Statham believed that Fast was in violation of section 44(a) of the Act and that Fast should cease all unlicensed forwarding activity. On that date Ms. Lopez stated to Mr. Statham and Mr. Johnson that Fast would cease unlicensed freight forwarding activity.

In late 1977, Ms. Lopez requested and received permission[2] from the president of Almar International Corporation to use the freight forwarding license number of Almar on bills of lading for four or five shipments for which fast would peform the freight forwarding services. The president of Almar determined that Ms. Lopez was using the license number of Almar to perform freight forwarding services in excess of four or five shipments after Almar was contacted by Coordinated Caribbean Transport, Inc., for payment of ocean freight charges owed by Fast that were attributed to having been owed by Almar, which orally and by registered letter then advised Ms. Lopez to cease and desist from using the freight forwarding license number of Almar.

In a similar situation, in August 1977, Ms. Lopez requested and received permission from the owner of Malvar Forwarding Service, a licensed ocean freight forwarder, to use its license number. Ms. Lopez was requested by Malvar to cease using its license number because ocean freight monies owed by Fast were being attributed to having been owned by Malvar.

In another situation, not exactly the reverse of the above, Ms. Lopez loaned the license number which she did not have, but which Ms. Lopez said had been assigned to her by the Federal Maritime Commission to Vincent Kessler, president of Land Sea Air Cargo Expediters, Inc., pursuant to an arrangement under which Ms. Lopez would keep one-half of certain compensation from ocean carriers, and turn the remaining half and other monies for advance charges over to Mr. Kessler. A check issued by Fast on August 16, 1978, to Land Sea Expediters in the amount of $884.12 was returned not paid because of insufficient funds, and Land Sea had not received payment by October 13, 1978. Mr. Kessler discontinued the agreement with Ms. Lopez.

Hearing Counsel listed on brief seventy-three (73) proposed findings of fact, detailing some of the above facts and many others. All of these proposed findings of fact are accepted and should be referred to if more details are deemed necessary. However, it is believed that the prior recitation of facts and the facts below are sufficient basis for the ultimate findings and conclusions herein.

[2] Use of one forwarder's license number by another person is contrary to the law.

The Gulf District Office of the Commission began an Investigation of Fast as a result of a complaint which it received on October 7, 1977, from Prudential Lines in Miami that Fast had been late in paying ocean freight charges to Prudential and that some checks issued by Fast to Prudential had been returned not paid because of insufficient funds.

Certain letters of reference submitted by Fast (Exhibit 14) in support of its application all predate August 26, 1977, and are entitled to little weight in view of the countervailing evidence of record. No one appeared at the hearing as a character witness or otherwise in support of Fast or Ms. Lopez.

Fast has violated section 44(a) of the Act. Nineteen instances are documented in Exhibit No. 5, one hundred fifty-two instances are listed in Exhibit No. 8, and two instances occurred in January 1979, as listed in Exhibit Nos. 17 and 18. The total is 173 instances of violation by Fast. Forty-five violations by Fast occurred after a second warning on February 10, 1978, as listed in Exhibit Nos. 5, 8, 17 and 18.

Fast and Ms. Lopez are not fit to be licensed as an independent ocean freight forwarder. Ms. Lopez is the only officer of Fast attempting to qualify for a license. Fast and Ms. Lopez have shown a flagrant and persistent disregard of the provisions of the Shipping Act, they have not conducted their business affairs with integrity and responsibility, and have failed to cooperate with the Federal Maritime Commission.

Ms. Lopez has expressed no regret at past violations and has demonstrated no extenuating circumstances to justify her past conduct. Ms. Lopez has disregarded warnings against illegal forwarding activities. All of the 173 shipments documented in the record for which Fast performed the freight forwarding services occurred after August 26, 1977, when she was first warned by Mr. Clow. She continued her illegal forwarding services after a second warning. How many chances should she get? The answer is no more. Fast and Ms. Lopez are unfit for a license because of financial irresponsibility (bad checks, unpaid ocean freight charges) and because of flagrant disregard of the law.

On brief, counsel for Fast do not argue the facts, but argue the law. Counsel interpret past forwarder application cases as showing a liberal attitude for the granting of licenses, but counsel fail to realize that the conduct of Fast and Ms. Lopez is of far more serious nature than that of the applicants in the cited cases.

Counsel for Fast insist that Ms. Lopez' conduct is of a "lesser degree of moral turpitude." Counsel for Fast, as seen, are incorrect in stating that Fast has not injured the shipping public.

Counsel for Fast make the final argument that:

> In concluding this discussion, the fact that Respondent has attempted to become a part of the system through the submission of its application rather than attempting to function outside of the system, as have many other persons and entities, should have a strong bearing on the outcome of the consideration of Respondent's application. Also, the Court should take note of the fact that there are many ways by which the law and the regulations can be circumvented by persons desiring to do so and that such may very well be encouraged by the denial of a license application in situations similar to the situation of Respondent.

To the contrary, granting of Fast's application would encourage other misrepresentations to the Commission's staff and other non-payments to ocean carriers of ocean freight charges when moneys for the payment of same have been *entrusted by shippers to forwarders acting as shippers'* agents. One of the prime duties of an agent entrusted with his principal's monies is to keep those monies in a special account, or in escrow or trust, for the principal. Fast did not so act when Fast took the shippers' prepaid freight charges and failed to pay such charges to the ocean carriers.

It is concluded and found that applicant-respondent, Fast International Forwarding Corporation, and its president, secretary and 100-percent owner, Ms. Elia A. Lopez, by engaging in unlicensed ocean freight forwarding activities, have violated section 44(a) of the Shipping Act on 173 occasions subsequent to August 26, 1977, when Fast and Ms. Lopez first were warned not to engage in such unlawful conduct, and that included among those unlawful activities, Fast and Ms. Lopez have harmed the shipping public by receiving monies from shippers for ocean freight and have failed to pay this ocean freight to the ocean carriers. It is further concluded and found that Fast and Ms. Lopez do not possess the requisite fitness under section 44(b) of the Shipping Act to be licensed as an independent ocean freight forwarder. The application herein for an ocean freight forwarder license hereby is denied.

(S) CHARLES E. MORGAN
Administrative Law Judge

WASHINGTON, D.C.
May 7, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–2

ORGANIC CHEMICALS (GLIDDEN-DURKEE) DIVISION
OF SCM CORP.

v.

ATLANTTRAFIK EXPRESS SERVICE

NOTICE

June 11, 1979

Notice is given that no exceptions were filed to the May 4, 1979 initial decision in this proceeding, and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, the initial decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78–2

ORGANIC CHEMICALS (GLIDDEN-DURKEE) DIVISION OF SCM CORPORATION

v.

ATLANTTRAFIK EXPRESS SERVICE

Finalized on June 11, 1979

Complainant has carried its heavy burden of proof and established the proper measurement of the shipments in issue.
Respondent found in violation of section 18 (b) (3).
Reparation awarded.

Merlin H. Staring for complainant, Organic Chemicals (Glidden-Durkee), Division of SCM Corporation.
Neal M. Mayer and *Paul D. Coleman* for respondent, Atlanttrafik Express Service.

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

The Organic Chemicals Division of SCM Corporation charges Atlanttrafik Express Service with violations of section 18(b) (3) of the Shipping Act, 1916, (46 U.S.C. 817) and seeks reparation of $5,693.33. A brief discussion of the procedural background of this case is necessary to an understanding of its somewhat unusual posture.

This case was originally consolidated with Docket No. 78–3—Organic Chemicals (Glidden Durkee) Division of SCM Corp. v. Farrell Lines, Inc. In No. 78–3 Organic charged Farrell with violations of section 18(b) (3) on essentially the same facts and circumstances as make up the gravamen of the complaint here. At a prehearing conference a discovery schedule was set up and a tentative hearing date was set, and the parties then filed extensive requests, including interrogatories, requests for production of documents and for admissions. Objections to some of the discovery requests and refusals to make the requested admissions followed and it became apparent that counsel on both sides were becoming concerned about the cost of litigating the cases when that cost was compared to the amount of the recovery by the complainant should it prevail and the amount saved by respondents should they prevail. When counsel for complainant filed a

[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).

list of seventeen witnesses which he intended to call at the hearing this concern expressed itself at an informal conference held in my office.

As a result of the informal conference Organic and Farrell filed a joint motion for settlement and dismissal of the complaint in No. 78–3. The motion recognized that Commission policy was against settlement of cases arising under section 18(b) (3) but nevertheless sought a change in that policy. In denying the motion I stated that had it not been for Commission precedent I would have granted it and gave the parties leave for immediate appeal to the Commission. The Commission after establishing certain criteria for settlements of cases arising under section 18(b) (3) granted the motion, and the case was ultimately dismissed.[2]

At about the same time that Organic and Farrell filed their motion, counsel for Atlanttrafik filed a "Notice of Discontinuance of Active Participation." The reasons given for this discontinuance were that:

> . . . whether or not Atlanttrafik wins the case the expenses of defending against the claim for $5,693.33 is not warranted since the cost will far exceed any possible savings from prevailing in the matter. This is especially true where no settlement appears possible under the case law and section 18(b) (3).

In declining further participation, Atlanttrafik refused to concede that it had violated section 18(b) (3) but agreed that it would abide by any decision of the Commission on the merits based upon whatever evidence complainant submitted, saying:

> Despite Atlanttrafik's decision to cease active participation in the proceeding, Atlanttrafik wants it clearly understood it does not concede that it has violated Section 18(b) (3) so as to require Atlanttrafik to pay SCM as requested in the complaint. Rather, Atlanttrafik believes that although it is at risk because it is foregoing a full and complete defense, the Administrative Law judge and the Commission must still weigh whatever evidence SCM puts into the record and determine if complainant has produced sufficient evidence to prove a violation of the Act. (See, *E. I. DuPont De Nemours and Company v. Seatrain International S.A.*, Docket No. 78–7, FMC Order dated August 22, 1978.) Atlanntrafik will, of course abide by the decision of the Commission on the merits of the claim.

At this point counsel for complainant elected to flesh-out the record with affidavits of the witnesses he had intended to call and by "Argument of Complainant" or brief. The affidavits are given exhibit numbers and admitted into evidence by an appendix to this decision.

Facts

Organic is in the business of producing, manufacturing and marketing industrial chemicals. Atlanttrafik is a common carrier by water subject to the requirements of section 18(b) (3) of the Shipping Act. The crux of the complaint is that Atlanttrafik assessed ocean freight on shipments of Organic "which [were] higher than the proper charge, since the ocean freight was assessed on an incorrectly high cubic measurement of the containers actually composing the shipments involved." The "containers" were 55 gallon steel drums either 18 gauge or 18/20 gauge. The "incorrect cubic measurement" was the result of a mistake by an employee of complainant.

[2] See Docket No. 78–3, *Organic Chemicals v. Farrell Lines, Inc.*, Order of January 25, 2979, and Order of March 14, 1979.

In 1973 this employee compiled a table "Shipping Weights, Cubic Measurements and Flashpoints". At the end of the table appear "Drum Statistics". It is in these statistics that the source of incorrectly high cubic measurement is found. The cubic measurement for the 18 gauge drum is reached through the formula "24″ × 24″ × 34-5/8″" equals 11.54 cubic feet. The cubic for the 18/20 gauge drum is arrived at by the formula 24″ × 24″ × 35″ equals 11.66 cubic feet.

All of the steel drums used by Organic were purchased from one or another of three makers: (1) Florida Steel Drum Company, Inc., (2) Inland Steel Container Division of Inland Steel, or (3) Rheem Manufacturing Company. The drums were procured by Organic under contracts or purchase orders which specified that the drums were to be 55-gallon Tight-Head Universal Drums conforming to U.S. Department of Transportation Specification 17E (49 CFR 178.116).[3] DOT 17E requires among other things that the drum's diameter "over rolling hoops" be 23-15/32 inches with a tolerance of +0 −1/16 of an inch. The height is to be 34-3/4 inches. The "Tweed's Accurate" cubic measurement is stated to be 10.715 cubic feet.

Atlanttrafik is a member of the U.S. Atlantic & Gulf/Australia New Zealand Conference, and Rule 2(d) of the Conference's Freight Tariff No. 3 (FMC 12) provides:

RULE 2 APPLICATION OF RATES

(d) Rates will be assessed on the accurate shipper's gross weight and overall measurement of the individual pieces or packages calculated when the cargo is delivered to the carrier and measurements shall be computed in accordance with "Tweed's Accurate Cubic Tables". Measurements shall be calculated in accordance with the following with respect to fractions:

All fractions under ½ inch are to be dropped.

All fractions exceeding ½ inch are to be included as full inches.

Where there is a fraction of ½ inch on one dimension of a package, same is to be included as a full inch.

Where there are fractions of ½ inch on two dimensions of a package, one is to be included as a full inch and the other dropped.

Where there are fractions of ½ inch on three dimensions, two are to be included as full inches and the other dropped.

When giving and taking fractions of ½ where same occur on two dimensions, the one on the smaller dimension is to be included.

When giving and taking fractions of ½ inch, where same occur on three dimensions, the one on the largest and smallest dimensions are to be included and the other dropped.

Rule 2(d) is the center of the controversy. Under Rule 2(d) Organic was entitled to drop the 15/32 of an inch in diameter when measuring the cube. By doing so it would come up with "Tweed's Accurate" cube of 10.715. Instead, its employee took the 23-15/32" to the next full inch (24") and arrived at a cube of 11.54 or 11.66. As Atlanttrafik has noted the case turns on 1/32 of an inch and "no carrier measures drums with such fineness."[4] Up to this point there is little room for controversy if the drums used by Organic adhered to the prescribed standards.

[3] The standards of DOT 17E are specifically adopted by the industry by "American National Standard Specifications for 55 Gallon Tight-Head Universal Drums" (ANSI, MH2, 1974). (See Appendix D to the complaint).

[4] This is somewhat inconsistent with the rule of the Conference's tariff which states that freight charges be assessed on "the actual measurement calculated when cargo is delivered to the carrier.

However, one of the three makers of the drums used by Organic specifically concedes that the drums made by it are subject to a plus or minus 1/16" manufacturing tolerance. Inland Steel's specifications contain "Note 1" which states, "All dimensions are given in inches. Dimensions are within normal manufacturing tolerances of ±1/16" . . . ." The record does not disclose how many of the drums carried by Atlanttrafik were from Inland. The respondent's proposition made in an earlier motion to dismiss the case is that all or an unidentifiable portion of the drums carried by Atlanttrafik could have been made by Inland. Since the alleged mismeasurement is stated to be only 1/32" at the diameter some or all of those drums could have been properly rated. Since the drums are no longer around to be measured, it is Atlanttrafik's position that it is impossible to determine the number improperly rated and therefor the amount of reparation. Against this proposition the evidence of record supplied by the complainant establishes the following.

All of Organics shipments for which reparation is claimed were in 55-gallon steel drums manufactured either of 18 gauge steel throughout or of 20 gauge steel bodies with 18 gauge steel drum heads and bottoms. As noted all of the drums used by Organic came from only three sources: (1) Florida Steel Drum Company, (2) Inland Steel Container Division of Inland Steel Company, or (3) Rheem Manufacturing Company; and all of the drums were procured under purchase orders or contracts which specified that the drums comply with DOT 17E.

The drums supplied to Organic by Florida Steel were made under its policy and objective of adherence to the specification and dimensional tolerances of the American National Standard Specifications (ANSI) or DOT 17E.[5] The drums were made with tools and under processes designed and set up to insure that the drums have a diameter of less than 23.5", and have been produced under quality control procedures designed to insure compliance with the specifications. A master gauge of sufficient precision is used by Florida Steel to insure that the overall diameter of the drums does not exceed the specifications. While it is possible due to variations in materials and equipment that some drums made by Florida Steel might have dimensions or distortions which exceed the specification by a "minute" amount, the number of drums doing so would be exceedingly small and minimal. In 23 years of supplying 55-gallon steel drums, the President of Florida Steel has never known an instance in which Florida's production-run drums were returned or rejected because of their diameter exceeding specification, nor has it ever come to his attention that any carrier has ever refused to honor or accept the declared American National Standard shipping cube of a drum made by Florida.

The drums supplied Organic by Inland were produced with tools and processes designed to insure that the overall diameter of the drums was less than 23.5 inches. Inland has quality control procedures which include the systematic use of gauges of sufficient precision to insure that the overall diameter is less than 23.5 inches. Again while it is possible that variations in materials or equipment could result in drums which exceed the maximum, the number of drums doing so would be extremely small and minimal.

[5] ANSI is an industry association which establishes standards for the industry. The standards of ANSI are the same as those of DOT 17E.

Rheem also makes its drums with tools and processes that are designed to insure that the overall diameter is less than 23.5 inches and they have been produced under quality control procedures which includes the use of a precision gauge at the beginning of each production run which insures the adherence to specifications. With Rheem, as with Florida and Inland, the Resident Plant Manager cannot recall a single instance in which a drum was returned or rejected because it exceeded the specified overall diameter.

Mr. Jack H. Cross, Pricing Analyst for Organic, in company and with the assistance of Mr. Max F. McLead, Organic's Superintendent of Shipping, measured the overall diameter of some 25 drums both 18 gauge and 18/20 gauge which were then on hand at Organic's facilities. In Cross's affidavit he states:

> . . . the measurements thus taken were made with the use of a six-foot folding ruler and, even allowing for the possible imprecision of measurements made by that means, I discovered that none of the drums thus measured appeared to equal or to exceed 23½ inches in diameter over the rolling hoops or to exceed 35 inches in height.

Mr. Vincent F. Gentile, a machinist for over 30 years, and at the time of his affidavit was employed by The Adherence Group, Inc. (TAG).[6] Mr. Gentile's job was "the measurement of shipments of goods" in ocean commerce. In the course of his employment Mr. Gentile was told to inspect and measure a containerized shipment of 69 drums of Citral 70 which had been tendered to Sea-Land Service by Glidden-Durkee Export Division of Cleveland. Mr. Gentile made "actual physical measurements of the outside diameter and height of several steel drums which were accessible to [him] at the rear of the opened container." The measurements were made with a graduated steel rule. An inspection report dated April 20, 1977, was then submitted by Mr. Gentile, who goes on to say:

> . . . in that inspection report of April 20, 1977 I recorded the outside diameter of the drums so sampled as 22¾"; that I measured the diameter of the drums on that occasion across the drum head, and not over the rolling hoops; and that the measurement which I thus took was consistent with the size of a standard 55-gallon tight-head steel drum (DOT-17E) manufactured in compliance with ANSI Specification MH2.1-1974, within the limit of accuracy of the measurement means then available to me.

On January 17, 1978, Mr. Gentile measured another containerized shipment of 80 steel drums of Citral-70 which had been tendered to United States Lines by SCM International, Ltd. About this shipment Mr. Gentile states:

> That, in making the inspection and measurement . . . I made actual physical measurements of the outside diameter and the height of each of several of the steel drums which were accessible to me at the rear of the opened container; that I made the measurement of the height with a graduated steel rule; that I made the diametric measurements with an L.S. Starrett 36" firm-joint outside machinist caliper, Mode #26 applied over the rolling hoops at the maximum diameter of the drum then transferred to a graduated steel rule for quantification . . . .

Mr. Gentile found that the drums measured complied with DOT-17E. The outside diameter over the rolling hoops was 23⅜".

This seems a good point at which to try to clear up what could be an inadvertent error on the part of Inland Steel.

As noted above one (if not the only) cause of the dispute here is Note 1 of Inland's specification sheet or "flyer" on its 55-gallon drums. As printed on the

[6] An organization then used to "spot check" shipments for irregularities.

sheet Note 1 can be read as allowing a tolerance of plus or minus 1/16 of an inch in the diameter of the drum. Thus an error of plus 1/16 of an inch would under the conference Rule 2d require the diameter measurement of 23 17/32'' to be carried to the next higher inch or to 24''. This is precisely the result of the Organic employee's mistake. However, elsewhere in Inland's specifications it is stated that the drums meet ANSI requirements and that the drums in issue here meet the specifications of DOT-17E.

The ANSI and DOT-17E standard however do not permit a *plus* or minus 1/16'' tolerance. The diametric specification is written as:

> Diameter over rolling hoop 23.15/32 + 0 −1/16

Thus, there is no plus tolerance only a minus tolerance of 1/16 of an inch. This was deliberate. Mr. Vincent G. Grey a former employee of ANSI who was in charge of supervision of the "Standards Committee" affirms that "a maximum dimension or plus-zero tolerance on drum diameter measured over the rolling hoops . . . was to ensure that production-run drums would fit into mechanical handling equipment and facilities frequently employed by drum users, carriers, and consumers. . . ." Mr. H. M. Shappill, Technical Director of Steel Shipping Container Institute and Secretary of ANSI confirms the zero-plus tolerance.

There is an obvious inconsistency in Inland's specification sheet—Inland cannot comply with ANSI's standards and DOT-17E and still allow a plus tolerance in a drum's diameter. Mr. Larry A. Istel, Vice President of Operations for Inland specifically states:

> That Inland Steel's production tools and processes have been designed and are setup to manufacture such 55 gallon containers with an overall diameter of less than 23.5'' and with an overall height of less than 35.5 inches; and that the quality-control procedures at Inland Steel's New Orleans plant include the systematic use of gauges of sufficient precision to check the overall diameter and height of the drums being produced to insure that those dimensions do not exceed the dimensions stated . . . .

Mr. Istel makes no mention of the specification sheet or flyer. In weighing the affidavit of Mr. Istel against Inland's specification sheet, I give the affidavit considerably more weight than the specification sheet.

The standard cube of 10.715 for the 55 gallon drum is commonly known and accepted by carriers and shippers and the common practice among shippers and carriers is to declare and accept the shipping cube of the drums as expressed to the nearest tenth of a cubic foot, or 10.7 cubic feet. This is demonstrated by the corrective actions taken by several carriers on a number of Organic's shipments which were known or believed to still be in the carrier's custody after the error in the "Drum Statistics" had been discovered. Organic notified 12 different carriers that an erroneous declaration of cubic measurement was made on 17 separate shipments. Adjustment was requested on the basis of a cube of 10.7 cubic feet. In each instance the adjustment was made. Respondent itself made the adjustment of four shipments.

Since correcting its error, Organic has placed with respondent 39 separate shipments in the 55 gallon drums in question and in each case Atlanttrafik has accepted the shipments at the declared cubic measurement of 10.7 cubic feet per drum and freight was assessed on that basis.

Discussion and Conclusion

Underlying respondent's position in this case is the proposition, (1) that after the cargo has left the custody of the carrier the actual measurement of the cargo cannot be established; (2) if the claim for reparation is based on mismeasurement, the actual measurement controls; and (3) since the actual measurement controls there can be no reparation. In short a claim for reparation based on an error in measurement cannot be supported by indirect evidence.[7]

Of course where the issue is the correct measurement of a shipment, the actual physical measurement of the cargo is the best evidence. However, this is rather rarely the case in the steamship industry. What then does the shipper do when, as Organic did, he finds what he believes to be an erroneous measurement of his shipment? Particularly, what does he do when the erroneous measurement is admittedly his own fault, and the carrier has relied on the shipper's own albeit erroneous statement of the measurement?

A shipper is not bound by an unintentional or inadvertent mistake in describing his shipment. *Western Publishing Company v. Hapag Lloyd,* Informal Docket No. 283, served May 4, 1972. However, claims involving alleged error of weight, measurement or description of necessity involve a heavy burden of proof once the shipment in question has left the custody of the carrier. *Colgate Palmolive Company v. United Fruit,* Informal Docket No. 115, served October 6, 1970. In *Kraft Foods v. Moore McCormack Lines Inc.,* 19 FMC 407, 16 SRR 1575 (1976),[8] Kraft declared the cargo as measuring 145.01 cubic feet but Mormac assessed freight charges on a measurement of 284 cubic feet claiming that it had actually measured the cargo when Kraft delivered it. The Commission found for Kraft concluding that it had carried its admittedly heavy burden of proof. The way in which Kraft sustained its burden is particularly relevant here.

The respondent supported its claim of actual measurement by some handwritten notations on the back of the dock receipt for Kraft's shipment. The notations merely listed "the measurements of some undescribed lots of 30, 30, 30, 30 and 25 packages." The total measurement was said to be 283.50 cubic feet. To counter this Kraft offered a copy of its sales invoice showing what the shipment consisted of, and copies of its price list pages indicating the *standard measurement* of its products identified with numbers which coincided with the products shipped. Concerning Kraft's evidence the Commission said:

> From all this information it is demonstrated that a shipment consisting of a number of cases and types of products listed, when checked against complainant's sales brochure, would have a standard measurement of 146 cubic feet, the measurement for which complainant argues the shipment should have been rated. As indicated above this measurement is also the amount shown on the face of the dock receipt.

The Commission went on to say that while generally "it is difficult to overcome evidence regarding measurement of cargo" when it is "actually recorded by measurement at the pier," nevertheless "the measurements on the back of the dock receipt . . . have absolutely no relation to what are shown to be the standard

---

[7] Reducing the limited argument made by respondent to its simplest term may not be completely fair to respondent since it did not avail itself of the opportunity to fully explain its position.

[8] Some of the cases discussed deal with misclassification rather than mismeasurement, but the misclassification cases are cited only for general principles which apply equally to mismeasurement cases.

measurements of the cargo shipped.'' The Commission concluded that the ''actual'' measurements said to have been made at the pier could not have been for Kraft's shipment.

Significantly, in the *Kraft* case the Commission accepted Kraft's stated *standard* measurements for its products and awarded reparation on the basis of those standard measurements, and it did so with a great deal less evidence establishing those measurements than complainant has introduced here.

Organic's evidence clearly establishes the standard measurements for the drums used by it and it is entitled to have its shipments rated on the basis of those measurements absent some reason to believe that the drums do not meet the standard. The vast preponderance of the evidence here demonstrates beyond even a reasonable doubt that the drums did meet those standards and should be so rated. In failing to properly rate the shipments here in issue respondent has violated section 18(b) (3) of the Shipping Act.

Accordingly, Atlanttrafik Express Service is ordered to pay Organic Chemicals (Glidden Durkee) Division of SCM Corporation reparation in the amount of $5,693.33. Upon notice that payment has been received the proceeding will be dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

WASHINGTON, D.C.
May 3, 1979

APPENDIX

The following exhibits are admitted into evidence in this proceeding, Docket 78-2—*Organic Chemicals (Glidden-Durkee) Division of SCM Corporation v. Atlanttrafik Express Service:*

Exhibit 1, Affidavit of Richard D. Barrett and attachments.
Exhibit 2, Affidavit of Jack H. Cross and attachments.
Exhibit 3, Affidavit of Judy M. McGunagle and attachments.
Exhibit 4, Affidavit of Gaston L. Dickens.
Exhibit 5, Affidavit of Max F. McLead with attachments.
Exhibit 6, Affidavit of Bruce J. Hebel with attachments.
Exhibit 7, Affidavit of H. M. Shappill with attachments.
Exhibit 8, Affidavit of Louis J. DeHayes with attachments.
Exhibit 9, Affidavit of Vincent F. Gentile with attachments.
Exhibit 10, Affidavit of Richard Proscia with attachments.
Exhibit 11, Affidavit of Louis J. Deutsch.
Exhibit 12, Affidavit of Larry A. Istel.
Exhibit 13, Affidavit of Vincent G. Grey.
Exhibit 14, Affidavit of Benjamin F. Coke with attachments.
Exhibit 15, Affidavit of Donald C. Long with attachments.
Exhibit 16, Affidavit of Paul Samuel with attachments.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–46

AGREEMENT NOS. T–3191, ET AL.

Neal M. Mayer, Charles L. Haslup III, and *Paul D. Coleman* for Seatrain Gitmo, Inc.
Amy Loeserman Klein, Olga Boikess, William Karas and *Robert L. McGeorge* for Puerto Rico Ports Authority
Gerald A. Malia, Gary R. Edwards and *Edward A. McDermott, Jr.* for Sea-Land Service, Inc.
Edward J. Sheppard, Mario F. Escudero, Dennis N. Barnes, Louis A. Rivlin, John T. Schell, Lawrence White, Susan M. Liss and *Michael W. Beasley* for Puerto Rico Maritime Shipping Authority.
Joseph B. Slunt, Jack Ferrebee and *John Robert Ewers* for Bureau of Hearing Counsel.

REPORT AND ORDER

June 15, 1979

By the Commission: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice-Chairman;* James V. Day and Leslie L. Kanuk, *Commissioners).* *

This proceeding was initiated on August 24, 1976, by Order of Investigation and Hearing to determine the approvability under section 15 of the Shipping Act, 1916 (46 U.S.C. 814) of four agreements relating to the use of marine terminal facilities at Puerto Nuevo, San Juan, Puerto Rico between and among the Puerto Rico Ports Authority (PRPA), the Puerto Rico Maritime Shipping Authority (PRMSA) and Sea-Land Service, Inc. (Sea-Land).[1] PRMSA, PRPA and Sea-Land were named respondents and Seatrain Gitmo, Inc. (Seatrain) was named petitioner.[2]

Hearings commenced on April 5, 1977, before Administrative Law Judge William Beasley Harris (Presiding Officer). They adjourned, however, when the Commission, on that same day, issued an Amended Order of Investigation and Hearing (Amended Order).[3] The Amended Order raised the additional issues of: (1) whether twenty-three other agreements between PRPA, Sea-Land, and/or PRMSA for the lease or use of berths or land parcels at Puerto Nuevo were subject to section 15, and, if so, whether they should be approved, disapproved,

* Commissioner Bakke recused himself from consideration of the matters herein on July 9, 1976.

[1] Agreements Nos. T–3191, T–3193, T–3199, and T–3210.

Additionally, the Order raised as issues: (1) whether an unfiled agreement between Sea-Land and PRMSA (the Puerto Nuevo Contract) was subject to section 15; and (2) whether the Puerto Nuevo Contract together with the above four agreements constituted the parties' complete understanding concerning the use of marine terminal facilities at Puerto Nuevo.

[2] Seatrain had protested the above four agreements and had requested a hearing. Subsequently, by letter dated March 3, 1977, Seatrain withdrew from this proceeding.

[3] The Amended Order was presaged by the Order of Conditional Approval of Agreement No. DC–75, September 22, 1976.

or modified; (2) whether any other agreements existed between PRPA, PRMSA and/or Sea-Land; and (3) whether any agreements determined to be subject to section 15 were implemented prior to Commission approval. PRPA and PRMSA filed petitions for reconsideration of the Amended Order, which were denied by the Commission.[4]

The Presiding Officer subsequently limited the scope of this proceeding to what he determined were the five agreements presently in existence which had not received Commission approval[5] (Memorandum of Procedural Schedule, November 6, 1978). The Commission's Bureau of Hearing Counsel filed an Offer of Proof consisting of twenty-two documents which it deemed necessary to resolve the third issue raised by the Amended Order.[6] The proponents of the remaining agreements filed memoranda of justification on their behalf.[7]

BACKGROUND

The Puerto Nuevo marine terminal complex is the major container facility in San Juan. It consists of fourteen berths (600 feet long and 32 feet wide) and approximately 264 acres of land adjacent to the berths suitable for development as back-up areas. Three berths are suitable for breakbulk vessels (A, B, and D); one for roll-on/roll-off vessels (C); and the rest for container vessels. Berths E, F, G, and H are the only fully developed container facilities.[8] Five shoreside container cranes are located at Berths E through H.

Prior to 1974, when PRMSA was formed,[9] the terminal facilities at Puerto Nuevo were leased to Transamerican Trailer Transport, Inc. (TTT) and Sea-Land.[10] PRMSA subsequently acquired all the stock of TTT's Puerto Rico subsidiary and thereby assumed responsibility for its leases. PRMSA also purchased the assets of the remaining carriers in the United States/Puerto Rico trade, including many of Sea-Land's. Sea-Land had intended to move its remaining operation to the marine terminal facilities at Isla Grande across the harbor from Puerto Nuevo. Unforeseen difficulties ensued, however, and Sea-Land and PRMSA worked out a temporary arrangement for the use of the Puerto Nuevo facilities.[11]

PRPA, PRMSA and Sea-Land finally clarified their relationship at Puerto Nuevo through eight agreements which were recently approved by the Commission[12] and by the five agreements which are still pending Commission approval.

[4] *Order Denying Reconsideration*, served October 17, 1978. The Commission noted that PRMSA's request to restructure the proceeding could more appropriately be raised before the Presiding Officer pursuant to Rule 147(a) of the Commission's Rules of Practice and Procedure.

[5] Agreement Nos. T-3193, T-1582, T-3212-1, T-3393, and T-3211, as amended by T-3211-1 and T-3211-2 (the Extant Agreements).

[6] The record consists of: (a) the April 5, 1977 hearing; (b) Prehearing Exhibit A and twenty attachments received in evidence November 2, 1978; and (c) Exhibits 1-21, identified during the April 5, 1977 hearing (Order served December 18, 1978).

[7] Hearing Counsel filed a letter dated November 30, 1978, stating that it had no objection to approval of the Extant Agreements.

[8] Berths J and K have crane rails but no improved backup facilities. Berth L has only one crane rail. Berths M and 1/2N have no crane rails.

[9] PRMSA was created by the Puerto Rico Maritime Shipping Authority Act, Act No. 62, June 10, 1974.

[10] TTT had preferential use of Berth C and exclusive use of Parcel 4. Sea-Land had preferential use of Berths E, F, G, and H and exclusive use of certain backup areas. Sea-Land also had an option to lease Berths J and K.

[11] Agreement DC-75 between Sea-Land and Puerto Rico Maritime Management, Inc. (PRMMI), PRMSA's managing agent, was conditionally approved by the Commission on September 22, 1976, pending resolution of this proceeding.

[12] Agreement Nos. T-3565, T-3565-A, T-3567, T-3567-A, T-3638, T-3638-A, T-3212, and T-3627.

All other agreements between these parties have been canceled, withdrawn, superseded, or have expired.

The Presiding Officer issued an Initial Decision on February 2, 1979, in which he found that the Extant Agreements are subject to section 15 and should be approved. In addition, he found the Puerto Nuevo Contract subject to section 15 and ordered that it be immediately filed with the Commission. Exceptions to the Initial Decision were filed by Sea-Land, PRMSA, and Hearing Counsel. PRPA and Sea-Land filed replies to exceptions.

Position of the Parties

Sea-Land excepts to the findings that the Puerto Nuevo Contract:

(1) is an agreement for land and use of cranes;

(2) in a manner provides for an exclusive or preferential working arrangement; and

(3) is subject to section 15 and should be submitted for Commission approval.

Sea-Land contends that these findings are not supported by substantial evidence and that, moreover, the Puerto Nuevo Contract was terminated and, therefore, no agreement exists to submit for approval.[13]

Additionally, Sea-Land submits that there is no reason to reexamine certain agreements referred to by Hearing Counsel in its exceptions. It notes that all twenty-three agreements included by the Amended Order have been superseded, approved or withdrawn, except for those discussed in the Initial Decision. It also argues that the scope of the proceeding was committed to the Presiding Officer's discretion and there is no regulatory purpose served by disturbing his decision. Sea-Land concludes that the only possible purpose for examining those agreements is to find section 15 violations which would support the imposition of penalties. It argues, however, that having once determined an agreement is not subject, the Commission cannot retroactively reverse that determination and then find the parties in violation of section 15 for having implemented unfiled agreements.[14]

PRPA contends that the Presiding Officer properly scoped this proceeding consistent with the Commission's directive and that it should not, therefore, be expanded to include many of those agreements raised by the Amended Order.

Hearing Counsel excepts to the Presiding Officer's alleged failure to:

(1) adequately review the relationships between PRPA, PRMSA and Sea-Land concerning the use of marine terminal facilities at Puerto Nuevo; and

(2) consider whether any agreements subject to section 15 were implemented without Commission approval.

Hearing Counsel also notes that the Presiding Officer did not fully explain his reasons for finding Agreements T-1582, T-3211 (as amended) and T-3212-1 subject to section 15.

---

[13] PRMSA adopted Sea-Land's exceptions and brief.

[14] Eleven of the twenty-three agreements added by the Amended Order were never filed with the Commission. However, five of the eleven amend other agreements which were filed and found not subject.

DISCUSSION

The Extant Agreements

The Presiding Officer found the five Extant Agreements subject to the filing requirements of section 15 and concluded that they should be approved (Initial Decision, at 18 and 19). The Commission basically agrees with this finding of fact and ultimate conclusion of law. However, because some of the parties have repeatedly argued that many of these agreements are not subject to section 15 (although all were filed), the reasons for concluding that they are subject will be more fully explained.

Briefly, these agreements provide as follows:

a. T-3193: between Sea-Land and PRMSA, for the preferential interchange of container cranes at Berths E, F, G, and H;

b. T-1582: Sea-Land's lease from PRPA of Parcel 8 for use of a truck terminal (for receipt and delivery of less than truckload cargo);

c. T-3211: PRMSA's lease from PRPA of Parcels IV-F and IV-G, an area of approximately eight acres. The first amendment to this agreement, T-3211-1, merely changes the annual rental fee;

d. T-3211-2 and T-3212-1: these agreements, between PRPA and PRMSA, provide PRMSA with an option to renew, for an additional 15 years, Agreements T-3211 and T-3212 (which has been approved); and

e. T-3393: PRMSA's option to lease from PRPA a 32 acre tract of land behind Berth J.

The crane interchange agreement, T-3193, is an agreement between common carriers by water which provides for a cooperative working arrangement and is, therefore, subject to section 15 of the Act. In fact, neither Sea-Land nor PRMSA disputed this point in their briefs. The remaining four agreements, all leases of realty or options concerning such leases, are between PRPA on the one hand and either Sea-Land or PRMSA on the other. In the circumstances presented, PRPA is clearly an "other person subject to [the] Act" within the meaning of section 1 of the Act.[15] *See e.g., Agreement Nos. T-2455/T-2553*, 14 S.R.R. 1317 (1974); *Agreement No. 8905–Port of Seattle and Alaska Steamship Co.*, 7 F.M.C. 792 (1964). Moreover, because these agreements provide the lessee with the exclusive use of certain terminal facilities, in conjunction with its preferential berthing rights, they provide for an exclusive working arrangement, bringing them within the ambit of section 15.[16]

In this particular case it is of little import that these leases relate to areas which are not directly adjacent to the berths being leased by the parties on a preferential use basis. Leases granting exclusive use of backup (marshalling) areas have been found subject to section 15 if the areas are in the locale of the berth and are essential to its operation. *Agreement No. T-4*, 8 F.M.C. at 528; *See also, Agreement Nos. T-1685 and T-1685-6,* 16 S.R.R. 1677, 1696 (1977). There is no requirement that the backup area be contiguous to the berth. In fact, the

[15] Section 1 defines the term "other person subject to the Act" to include, *inter alia*, one ". . . furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." 46 U.S.C. 801.

[16] These leases could also have been found subject to section 15 because they: (1) fix or regulate transportation rates or fares, *See Agreement No. 8905*, 7 F.M.C. at 797; or (2) give special rates, accommodations, or other privileges, *See Agreement T-4*, 8 F.M.C. 521, 530 (1965).

properties which were the subject of Agreement No. T–4 were two blocks apart at one port and a half-mile apart at the other. It is therefore concluded that these four agreements concern backup areas in the locale of the berths which are essential to the respective carriers' operations at the berth.

No anticompetitive impacts of the Extant Agreements have been demonstrated. Adequate space remains at Puerto Nuevo for any carrier which desires to lease and develop terminal facilities. Moreover, since Seatrain's withdrawal, no party opposes these agreements. The memoranda of justification submitted by the proponents of these agreements set forth a sufficient rationale for their approval.[17]

These agreements are neither unjustly discriminatory or unfair as between carriers, shippers, exporters, or importers; nor operate to the detriment of the commerce of the United States; nor are contrary to the public interest; nor are otherwise in violation of the Shipping Act, and will, therefore, be approved.

The Remaining Agreements

As mentioned above, the Commission's Amended Order interjected 23 additional agreements into this proceeding. However, because the Presiding Officer "scoped and sculptured" this proceeding to include just the Extant Agreements, only four of these agreements were addressed in the Initial Decision. The Commission does not agree with this resolution of the remaining 19 agreements, but concludes nonetheless, that the ultimate result is correct.[18]

Any discussion of these additional agreements must begin with the observation that all have been terminated either by cancellation, withdrawal, or the passage of time. Therefore, the only issues applicable to them are whether they were subject to section 15 and, if so, whether they were in any manner implemented prior to Commission approval. In addition, this group of nineteen agreements can be further narrowed to the eleven agreements which were never filed with the Commission for approval.[19] The other eight were at one time or another filed with the Commission and found not subject to section 15.

The agreements before the Commission generally fall into three categories. One set relates to Berths E and F. Under the original agreement, T–1583, entered into in 1963, Sea-Land was granted preferential berthing rights at Berths E and F

---

[17] Among the various justifications offered are:

1. Sea-Land's Puerto Rico operation would be seriously disrupted without its truck terminal;

2. it would not be feasible for Sea-Land and PRMSA to acquire additional cranes. The crane sharing arrangement is a highly efficient and practical method of providing an extra crane when needed;

3. PRMSA needs space for a parking lot for containers on chassis; and

4. the long term options are requirements for obtaining federal assistance for future development.

[18] The Presiding Officer denied Hearing Counsel's request to consider each and every agreement mentioned in the Amended Order because of possible due process violations and because it would better serve a regulatory purpose to consider only the Extant Agreements (Memorandum of Procedural Schedule, November 6, 1978, at 2). He based his action on a statement in the Commission's Order Denying Reconsideration of October 17, 1978, that "PRMSA's request to restructure this proceeding can more appropriately be raised before the Presiding Officer" and on a reference to Rule 147(a) of the Commission's Rules of Practice and Procedure (Order Denying Reconsideration, at 2, 3). The Presiding Officer apparently misunderstood our directive. The reference to "restructuring" the proceeding in the Order Denying Reconsideration was made in the context of PRMSA's request to *sever* the proceeding into two distinct phases and not in response to PRPA's contention that the 23 agreements added by the Amended Order needed no further investigation. We did not contemplate nor encourage such a wholesale deletion of a major portion of the Amended Order.

[19] These agreements are designated, using the Port Authority's system, as: AP–64–65–41; AP–64–65–237;AP–65–66–28; A7–AP–62–63–169; A1–AP–68–69–57; AP–67–68–48; March 7, 1968 amendment to AP–67–68–48 and AP–67–68–49; June 2, 1969 amendment to AP–67–68–48; A–2–AP–67–68–48; and November 16,1972 letter amendment to AP–67–68–48.

and exclusive use of adjacent parcels of land. This agreement was filed with the Commission and, by letter dated October 20, 1964 (Exhibit 17), found not subject to section 15. Two subsequent agreements, AP-64-65-41 and AP-64--65-237, allowing Sea-Land to make certain improvements at the Berths, were not filed. Agreement T-1583-1,by which Sea-Land leased an additional parcel and received permission to install more improvements, was also filed with the Commission and found not subject. Again, two subsequent agreements amending T-1583 were entered into but not filed (AP-65-66-28 and A7-AP-62--63-169). Finally, an agreement canceling all the above agreements (T-3271) was filed and found not subject.

The second group relates to Berths G and H. The original agreement granting Sea-Land preferential use of these berths (T-2253) was found not subject on October 2, 1969. Another agreement relating to the same area, T-2254, was also found not subject. A third agreement, A1-AP-68-69-57, amended T-2253 by leasing Sea-Land about 3 acres behind pier G but was not filed.

The third group is comprised of six agreements between PRPA and TTT (AP-67-68-48, A-2-AP-67-68-48, A-3-AP-67-68-48, and three letters concerning AP-67-68-48). The basic agreement (AP-67-68-48) grants TTT preferential use of Berth C and exclusive use of adjacent areas. The others make minor modifications. None was filed with the Commission.

The primary purpose of including the twenty-three agreements by way of the Amended Order was so that the Commission would have before it all the agreements which constituted the parties' complete relationship at Puerto Nuevo, not just the four agreements which had originally been filed for approval. As the initial Order of Investigation indicated, the Commission wished to review the parties' complete understanding concerning this port area. For it was only by conducting this review that the Commission could properly exercise its obligations under the Shipping Act in determining whether to approve the four agreements.

During the course of this proceeding the relationship among PRPA, PRMSA and Sea-Land has been appreciably altered. As a result, the five agreements approved herein coupled with the eight agreements recently approved by the Commission satisfactorily explain the current and complete relationship at Puerto Nuevo. Because the primary purpose in raising these additional agreements has been achieved, and because of the unique circumstances of the case,[20] no further inquiry into this matter is warranted.[21]

The Puerto Nuevo Contract

In his Memorandum of Procedural Schedule the Presiding Officer "scoped" this proceeding around those agreements appearing in Prehearing Exhibit A. The

[20] The parties to the eleven unfiled agreements were probably relying upon earlier Commission determinations that their predecessor agreements or similar agreements were not subject to section 15. Moreover, most of these agreements are but minor modifications to agreements which were filed and found not subject—none supersedes its predecessor to the extent that a completely new arrangement results.

[21] Today's decision should in no way be construed as approval or acceptance of the parties' failure to file *all* terminal agreements which are potentially subject to the requirements of section 15. If doubt exists, an agreement should still be filed with the Commission for review. *See* 46 C.F.R. 530.5(a); *Arrangements Relating to the Use of Isla Grande Marine Terminal, San Juan, Puerto Rico*, 17 S.R.R. (1978).

[22] It was, however, included in this proceeding by the original Order of Investigation and Hearing served August 24, 1976 and was never expressly deleted by either the Commission or the Presiding Officer.

Puerto Nuevo Contract was not among them.[22] Nevertheless the Presiding Officer included the Puerto Nuevo Contract in his Initial Decision and found that it was an agreement ". . . for land and use of cranes" and "in a manner provide [d] for an exclusive or preferential working arrangement." He further concluded that this agreement should be filed with the Commission for approval.

The Puerto Nuevo Contract was entered on November 14, 1975, between Sea-Land and PRMSA (Exhibit 14). By its terms, Sea-Land agreed to sell to PRMSA certain leasehold improvements it had made at Berth F (Article I).[23] PRMSA agreed to reimburse Sea-Land for temporary improvements Sea-Land would have to make at Berth E for a minimum period of two years (Article 2). In addition, PRMSA obtained a six month option within which it could cause Sea-Land to transfer to it a lease on a container crane (Article 3).[24]

Although Sea-Land correctly states that the Initial Decision did not properly characterize the terms of this agreement, the Commission cannot conclude on the record that the Puerto Nuevo contract is beyond our jurisdiction. On its face the Puerto Nuevo Contract does not clearly fit into that category of agreements which courts have determined not be covered by section 15. *See Seatrain Lines v. Federal Maritime Commission*, 460 F.2d 932 (D.C. Cir. 1972), *aff'd* 411 U.S. 726 (1973). Additional information would be necessary to develop the actual relationship established.[25] There is no need to develop this information, however, for it appears that the Puerto Nuevo Contract was terminatd by mutual agreement on January 25, 1978 (Attachment II to Exceptions of Sea-Land)[26] and under no circumstances is required to be filed with this Commission.

There remains the issue of whether this contract, if subject to section 15, was implemented in any manner prior to approval by the Commission. For reasons similar to those mentioned above in the context of the eleven unfiled agreements the Commission declines to further explore this issue.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding is adopted to the extent indicated above, and Agreement Nos. T-3193, T-1582, T-3211, T-3211-1, T-3211-2, T-3212-1 and T-3393 are approved;

IT IS FURTHER ORDERED, That the Exceptions of Sea-Land Service, Inc., Puerto Rico Maritime Shipping Authority, and Bureau of Hearing Counsel are denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

[23] This article became effective upon the effective date of Agreement T-3210. That agreement never became effective, however, because it was superseded by Agreements No. T-3567 and T-3567-A.

[24] The six month period began to run on the date of "Deferred Closing" apparently mentioned in a "Memorandum of Understanding" between PRMSA and Sea-Land executed on December 20, 1975. No copy of this memorandum was made part of the record and, therefore, the date of deferred closing cannot be ascertained.

[25] Sea-Land has alleged that the temporary entry complex contemplated by Article 2 has been constructed and paid for and that PRMSA relinquished its option under Article 3 (Exceptions at 9). If true, these facts could have some bearing, albeit not determinative, on whether or not the Commission has jurisdiction over the contract. They are, however, merely allegations of counsel and are not part of the record in this proceeding, and could not, therefore, be utilized by us in reaching our decision.

[26] We are treating this attachment as a late-filed exhibit and admitting it into the record of this proceeding. No party commented adversely on its inclusion in Sea-Land's brief.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 602

APPLICATION OF TRANS FREIGHT LINES, INC. FOR THE BENEFIT OF INTERNATIONAL TRANSPORTATION CORPORATION

ORDER PERMITTING WAIVER OF CHARGES

June 21, 1979

In its order of Conditional Denial of Application issued in this proceeding, the Commission determined that the record contained conflicting statements as to the prior existence and nature of an agreement between Trans Freight Lines, Inc. (Applicant), and International Transportation Corporation on the rate to be applied to the shipment of two containers of construction materials from New York to Rotterdam, The Netherlands. The Commission determined to deny the application unless applicant provided conclusive evidence of the existence of such agreement and of the level of the negotiated rate.

Applicant has now submitted evidence in the form of a booking order for the two containers and an affidavit from an official of the freight forwarder, which evidence establishes that: (a) the parties had agreed on a rate of $40.00 w/m per 20' container, minimum 900 c.f., and $42.50 per 40' container, minimum 1600 c.f.; (b) that the rate was intended to be filed upon confirmation of the booking; and (c) that due to clerical error, it was not so filed.

The application complies with all requirements of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3) and, accordingly, Applicant is authorized to waive collection of $6,201.25 from the charges previously assessed.

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

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 602 that effective August 29, 1978 for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period August 29,1978 and September 6, 1978, the rate on supplies and materials for construction of the Ramses-Hilton Hotel in Cairo is $40.00 w/m, minimum 900 cft. per 20' container and $42.50 w/m, minimum 1600 cft. per 40' container, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That waiver of the charges shall be effectuated within thirty (30) days of service of this notice and Applicant shall within five (5) days thereafter notify the Commission of the date and manner of effectuating the waiver and submit a copy of the published tariff notice.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–51

AGREEMENT NO. 10349—A CARGO REVENUE POOLING AND SAILING AGREEMENT—ARGENTINA/UNITED STATES ATLANTIC TRADE

DOCKET NO. 78–52

AGREEMENT NO. 10346—A CARGO REVENUE POOLING AND SAILING AGREEMENT—ARGENTINA/UNITED STATES GULF COAST TRADE

Agreement Nos. 10346 and 10349, cargo revenue pooling and sailing agreements in the northbound Argentina/United States trades, found subject to section 15 of the Shipping Act, 1916, and approved pursuant to that section, subject to certain modifications.

Joseph A. Klausner for Reefer Express Lines Pty.

Elmer C. Maddy, George Dalton and *John Greenwood* for A/S Ivarans Rederi.

David A. Brauner and *Nathan Bayer* for Empresa Lineas Maritimas Argentinias S.A.

Edward S. Bagley and *Frederick Wendt*, for Delta Steamship Lines.

Neal M. Mayer and *Gladys Gallagher* for Companhia de Navegacao Lloyd Brasileiro and Companhia Maritima Nacional.

Odell Kominers, William Fort, John W. Angus, III and *Jonathan Blank* for Moore-McCormack Lines, Inc.

John H. Dougherty for Companhia de Navegacao, Maritima.

Robert L. McGeorge for Holland Pan American Lines.

David C. Jordan and *Stanley O. Sher* for Transportacion Maritima Mexicana S.A.

Thomas K. Roche for Northern Pan-American Lines.

Edward M. Shea for Sea-Land Service, Inc.

Renato C. Giallorenzi for Cia de Navegacao Maritima Netumar.

Stuart Benson and *Judy Bellow* for the Department of State.

Paul A. Mapes and *Janice Reece* for the Department of Justice.

John Robert Ewers, C. Douglass Miller, Bruce Love and *William Weiswasser*, Hearing Counsel.

REPORT AND ORDER

June 22, 1979

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

* Commissioner Bakke joined in the Commission decision but also has filed a separate concurring opinion.

BACKGROUND OF PROCEEDINGS

These related but unconsolidated proceedings were instituted to determine the approvability of certain cargo revenue pooling agreements which were filed with the Commission pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C.A. 814).

Agreement No. 10349 (the Atlantic Agreement), the subject of Docket No. 78-51, is an agreement between Empresa Lineas Maritimas Argentinas, S.A. (ELMA), Moore-McCormack Lines, Incorporated (Mormac) and Sea-Land Service, Inc. (Sea-Land),[1] as national-flag lines and Companhia Navegacao Lloyd Brasileiro (Lloyd), Cia de Navegacao Maritima Netumar[2] (Netumar), A/S Ivarans Rederi (Ivarans), Van Nievelt Goudriaan and Company (Hopal), and Montemar S.A. Commercial y Maritimas (Montemar), as third-flag lines,[3] in the northbound trade from Argentine ports within the LaPlata/Rosario range, both inclusive, to ports on the United States East Coast. The Atlantic Agreement provides that 80% of the cargo revenue shall be divided equally among the national-flag lines—40% to the Argentine-flag line(s) and 40% to the United States-flag line(s). The remaining 20% of the pool is to be allocated among the third-flag lines on a percentage basis.[4] By its terms the Atlantic Agreement expires December 31, 1980.

Agreement No. 10346 (the Gulf Agreement), the subject of Docket No. 78-52, is an agreement between ELMA, A. Bottacchi S.A. de Navegacion C.F.I.I. (Bottacchi), and Delta Steamship Lines (Delta), as the national-flag lines, and Northern Pan-American Lines (Nopal), Lloyd, Companhia Maritima Nacional (Nacional), Montemar and Navimex S.A. de C.V. (Navimex), as third-flag lines, in the northbound trade from Argentine ports within the LaPlata/Rosario range, both inclusive, to ports on the United States Gulf Coast. The Gulf Agreement, like the companion Atlantic Agreement,[5] provides that 80% of the cargo revenue shall be divided equally among the national-flag lines—40% to the Argentine-flag line(s) and 40% to the United States-flag line(s). The remaining 20% of the pool is to be allocated to the third-flag lines on a percentage basis.[6] The Gulf Agreement also expires on December 31, 1980.

The Gulf and Atlantic Agreements were noticed in the *Federal Register* on July 31, and August 22, 1978, respectively. The United States Department of

[1] Sea-Land, though a signatory to the Atlantic Agreement, has assigned all of its rights, responsibilities, and obligations under the Atlantic Agreement to Mormac.

[2] On June 15, 1979, the Commission was advised that Netumar had, on May 21, 1979, decided not to participate in the Atlantic Agreement and that Lloyd would assume its rights and duties under the Agreement.

[3] As used herein the term "third-flag line" refers to other than an Argentine or United States liner operator.

[4]

THIRD-FLAG LINES	1978	1979	1980
Brazilian (Lloyd and Netumar)	6.0%	6.6%	7.2%
Ivarans	12.5%	11.8%	11.1%
Hopal	1.0%	1.0%	1.0%
Montemar	0.5%	0.6%	0.7%

[5] Hereinafter, the Atlantic and Gulf Agreements are collectively referred to as "the Agreements".

[6]

THIRD-FLAG LINES	1978	1979	1980
Brazilian (Lloyd and Netumar)	6.85%	7.40%	7.90%
Montemar	1.05%	1.05%	1.05%
Nopal	11.10%	10.55%	10.05%
Navimex	1.00%	1.00%	1.00%

Justice (Justice), Transportacion Maritima Mexicana S.A. (TMM) and Reefer Express Lines Pty. (REL) protested the Gulf Agreement and requested a hearing. The Department of State (State), A/S Ivarans Rederi (Ivarans), Justice and REL protested the Atlantic Agreement and requested a hearing.

On November 30, 1978, the Commission instituted proceedings pursuant to section 15 to determine whether the Agreements are "unjustly discriminatory or unfair to the protesting carriers", REL, TMM and Ivarans.[7] However, because of public interest considerations found by the Commission, the Agreements were granted *pendente lite* approval. The Commission's Bureau of Hearing Counsel (Hearing Counsel) was made a party to both proceedings.[8]

On March 23, 1979, the United States Court of Appeals for the District of Columbia, in response to the petitions for review filed by Ivarans and REL, stayed the Commission's November 30, 1978 Orders of Interim Approval, but deferred the effectiveness of that stay for 60 days.[9] The Court also remanded the record to the Commission and directed it to provide for "appropriate expedited notice and hearings under section 15 of the Shipping Act, 46 U.S.C. 814 (1976)."

On April 12, 1979, the Commission, in response to the Court's orders of remand, and after consideration of briefs filed by the parties, referred the proceedings to the Presiding Officer for an expedited hearing. In its Order on Remand, the Commission directed the presiding Administrative Law Judge Thomas W. Reilly (Presiding Officer), to certify the record to it for decision on or before May 2, 1979, and ordered the simultaneous filing of proposed facts and briefs on May 9, 1979.[10]

After providing for an expedited discovery procedure, the Presiding Officer held hearings from April 26 through May 2, 1979. On May 3, 1979, the Presiding Officer certified the record to the Commission for decision.[11] The parties have filed their proposed findings and briefs,[12] and the matter is now before the Commission for decision.[13]

FACTS

Argentina, like a number of other nations, particularly in South America, has instituted programs, through a series of laws, decrees, and resolutions, designed to develop, maintain and promote a merchant marine that is capable of carrying a substantial portion of its commerce. The general purpose of these enactments is to reserve a fixed or substantial portion of Argentina's waterborne commerce to

[7] Ivarans, while a signatory to the Atlantic Agreement, was designated a protestant in the November 30, 1978 Orders of Investigation, as were TMM and REL.

[8] Justice and State later sought and were granted permission to intervene in these proceedings. Neither party called any witnesses. State did not offer any evidence for the record, and Justice presented only one exhibit which was sponsored by a witness for TMM.

[9] The stay was originally scheduled to take effect on May 21, 1979. However, by order of May 17, 1979, the Court postponed the effectiveness of its stay through June 23, 1979.

[10] These dates were later extended to May 3 and May 11, 1979, respectively.

[11] The Presiding Officer certified that "the record is a full and sufficient basis for agency decision and . . . that there exists no questions of witness demeanor or witness credibility not sufficiently reflected by the record."

[12] Although signatories to the Agreements and named as proponents in the November 30, 1978 Orders of Investigation, neither Nopal, Bottacchi, Netumar or Montemar participated in these proceedings.

[13] These proceedings have not been formally consolidated. However, because they are legally and factually related, it is appropriate to dispose of both proceedings in a single Report and Order.

Argentine-flag vessels. The principal Argentine cargo reservation law is Law 18.250, as amended. That law, as enacted in 1969, reserves the Argentine-flag carriage *all* goods imported for, or for the account of, the national or provincial governments or any corporation which is either owned or controlled by a government entity.[14] This reservation also applies to any import cargo that is financed through the state banking system or which enjoys any duty or tax benefit. In addition, Law 18.250 provides that Argentine-flag carriers shall participate substantially in the carriage of Argentine exports.[15]

In 1972 and 1973 Argentina amended Law 18.250 (Laws 19.877 and 20.447, respectively) to permit Argentine imports to be carried on vessels of the exporting nations providing there exists an intergovernment or commercial agreement which allocates no less than 50% of the freight revenues earned to Argentine-flag carriers. Law 20.447 establishes the Argentine merchant marine as an instrument of national economic policy and affirms Argentina's right to carry 50% of its export waterborne cargo in Argentine-flag vessels. This law also directs the State Secretary of Maritime Interests (SEIM) to negotiate bilateral or multilateral arrangements "to promote the organization" of Argentina's international waterborne commerce.

In December of 1976, SEIM promulgated Resolution 507 which instituted a procedure for obtaining waivers from the Argentine import reservations. When it became effective on January 19, 1977, Resolution 507 required that Argentine-flag vessels be given the right of first refusal for all Argentine imports controlled by Law 18.250. The Resolution provided that these cargoes could only be carried on non-Argentine-flag vessels if the consignee in Argentina applied for and received a waiver from the Argentine reservations laws at least 30 days in advance.

Resolution 507 created an "avalanche of concern" by United States shippers and carrier interests.[16] Generally, these parties complained of the "stifling" effects of the Resolution on the movement of goods from the United States to Argentina and the chaotic conditions created by that Resolution at loading docks, cargo terminals, and in the traffic departments of major United States shippers.

In response to these protests, Robert J. Blackwell, then Assistant Secretary of Commerce for Maritime Affairs, met with Admiral Carlos N. A. Guevara, the Argentine Secretary of State for Maritime Interests in February of 1977.[17] Admiral Guevara expressed concern that the cargo subject to the then existing northbound pooling agreements (Agreement Nos. 10038 and 10039) was not growing as fast as nonpool cargo. Accordingly, Admiral Guevara suggested that the existing pooling agreements were losing their stabilizing effects. Admiral Guevara took the position that the north and southbound United States/Argentine trades are "interlinked," and urged Mr. Blackwell to take some action which would assure Argentine-flag carriers reciprocity in the carriage of northbound cargo.

---

[14] The relevance of the import trade to the northbound trade is explained further, *infra*.

[15] In 1971 Argentina instituted a "drawback system" which provides for tax rebates to Argentine exporters. Where the cargo is shipped in Argentine ships, an additional refund is granted based upon a percentage of the freight charges.

[16] The United States Maritime Administration (Marad) received protests from the Commerce and Industry Association of New York, the National Industrial Traffic League, International General Electric, Ford Motor Company, and DuPont, among others.

[17] Mr. Blackwell and Admiral Guevara had met earlier in late 1976.

Although Mr. Blackwell was unable to negotiate a final solution to the difficulties resulting from Resolution 507 at the February 1977 meeting, Admiral Guevara did agree to exempt Mormac from the pre-waiver procedures because of its existing pooling agreement with ELMA in the northbound Atlantic trade (Agreement No. 10038).

Thereafter, Marad, in conjunction with the State Department, prepared a Memorandum of Understanding (Memorandum) addressing Argentina's concerns over maritime matters in the Argentina/United States trade. On March 21, 1978, the draft Memorandum was executed with minor modifications by Mr. Blackwell and Admiral Guevara. As executed, the Memorandum provides, in pertinent part:

> Each party recognizes the intention of the other party in carrying a substantial portion of its liner trade in vessels of its own flag in accord with appropriate legislation in each country. For purposes of this paragraph, the vessels of Argentina shall include vessels under Argentine registry or charter. This provision, established in the light of the reciprocal interest of the two countries, does not affect the right of flag vessels of the third parties to carry goods between the ports of the two Parties, as implemented in the terms of Paragraph 2 below, and in accord with the appropriate legislation in each country.
>
> * * *
>
> The establishment of mechanisms and procedures necessary to the implementation of the carriage of cargo envisioned in Paragraph 1 of this Memorandum of Understanding, such as revenue shares for the lines in the trade, number of sailings, overcarriage and undercarriage provisions, and similar matters, will be determined by commercial agreement between their respective national-flag carriers, subject to approval by the appropriate governmental agencies of each of the Parties. (Hearing Counsel Ex. 1, App. 4).

Although the Memorandum does not specifically detail the particulars of the commercial agreement between the respective national-flag lines, it does, as Mr. Blackwell testified, appear to contemplate a commercial cargo revenue pool that includes third-flag carriers.

Subsequent to the execution of the Memorandum, ELMA was directed to draft a pool agreement with the other national-flag carriers then serving the United States/Argentine trade.[18] On May 31, 1978, ELMA sent draft copies of the Agreements to the Secretary of the Inter-American Freight Conference requesting comments and the convening of a principals' meeting on the Agreements. Meetings were held in Buenos Aires on June 27 and 28, 1978 to discuss the Gulf Agreement and on June 29 and 30, 1978 on the Atlantic Agreement.[19]

All of the carrier parties to the instant proceedings were represented at the Buenos Aires meetings. The Agreements were discussed except to the extent they addressed the individual third-flag allocations, a matter which had not been included in ELMA's draft. The third-flag lines caucused separately to negotiate

[18] TMM in the instant proceedings urges the imposition of sanctions, pursuant to 46 C.F.R. 502.210, against ELMA for its failure to produce the SEIM document(s) that directed ELMA to form a pool. TMM objects to all "portions of the record referring to any Argentine Government instructions and orders" to ELMA to form a cargo revenue pool. Although the SEIM document may have been the "best evidence" of SEIM's instructions to ELMA, the record evidence presented by all of the parties on this matter, including Mr. Blackwell's testimony (see Hearing Counsel Exhibit 1, *e.g.* at pages 81 and 82), the Memorandum of Understanding, and the acquiescence of State to ELMA Exhibit 3, Attachment B (a cable sent from the Argentine Government to the Department of State and the Department of Commerce), does clearly establish that SEIM directed ELMA to formulate the pooling agreements now at issue. Because of the availability of other probative evidence relative to SEIM's instructions to ELMA and in the interest of expediting the disposition of these proceedings, TMM's request is denied.

[19] In 1974, prior to the events set in motion by Resolution 507, ELMA convened a principals' meeting in an attempt to formulate a 85%, national-flag,—15%, third-flag—pool among all the carriers in the northbound Argentina/United States trade. These meetings were recessed without reaching an accord.

their individual pool shares and conveyed the results to the open transcribed meetings attended by all the parties. Although neither ELMA nor any of the other national-flag lines had any interest in the third-flag allocations, an ELMA representative was asked to chair the third-flag caucus.

In the Gulf Agreement caucus, Montemar, Navimex, Nopal and the Brazilian carriers Lloyd and Nacional agreed on a division of the third-flag allocation. TMM did not request a specific share and was offered one percent. REL attended the third-flag caucus, but its representative had instructions to reject any and all offers.[20]

At the open meetings, when TMM asked the third-flag carriers to advise as to the manner by which the third-flag share had been divided, Mr. Arieira of Lloyd explained that the allocation was made based upon: (1) best performance during the last several years; (2) historical participation in the trade; and, (3) with respect to the Brazilian share, reciprocity and compensation to the Brazilian lines for the cargo and shares contributed by Brazil in the Brazil/United States trade.[21]

The Gulf Agreement was executed on June 28, 1978, over TMM's objections to its share. As executed, the Gulf Agreement allocates a 1% share to TMM should it decide to participate in the pool.

In the Atlantic Agreement caucus, Ivarans, which had been carrying approximately 22-23% of the total northbound cargo, offered to reduce its share of the third-flag allocation to 17.2%, with the remaining 2.8% to be divided among the other third-flag carriers. These other third-flag carriers refused to accept Ivarans' offer, and eventually agreed to the division presently set forth in the Atlantic Agreement.[22] Ivarans did not agree to this allocation, and on June 30, 1978, the Atlantic Agreement meeting was adjourned without an agreement being reached.[23] At the close of the meeting, Captain Barni of ELMA advised that SEIM would be issuing a resolution governing loading rights in Argentine ports and that another principals' meeting would be convened in the near future. He also advised that if any carrier refused to accept a share at the next meeting, that carrier's share would be forfeited to the national-flag lines until it joined in the pool.

On July 17, 1978, SEIM promulgated Resolution 619. That Resolution provides that all Argentine export cargoes shall be carried only by conference members or, where pooling agreements approved by SEIM exist, by members of the pool. The Resolution does not apply to cargo not covered by the conference agreement or to cargo moving outside the geographic scope of the pool. The Resolution allows for a waiver of the carrier requirement when no conference or pool member is in a position to lift cargo. For perishable cargo such as refrigerated commodities, a waiver may be obtained if there is no pool member in a position to lift the cargo within 48 hours of the desired date of shipment.

On July 31 and August 1, 1978, the principals met again in Buenos Aires to discuss the Atlantic Agreement. At these meetings, Ivarans' representative, Mr.

[20] See, for example, Tr. 1026 and Mormac Ex. 2, Attach. P, page 8.

[21] These criteria were also applied to the third-flag allocations in the Atlantic Agreement.

[22] See footnote 4, *supra*.

[23] REL's representative also attended the Atlantic Agreement meeting. Again, he did not have authority to bind REL to the Atlantic Agreement and was instructed to reject any and all offers.

John Schmeltzer, advised that, in view of SEIM Resolution 619, Ivarans would sign the Atlantic Agreement but only under protest. When ELMA explained that SEIM would not permit it to sign the Atlantic Agreement under protest, Ivarans agreed to sign the Atlantic Agreement reserving its legal rights.

DISCUSSION AND CONCLUSION

Section 15 of the Shipping Act, 1916, requires the filing for approval of every agreement between common carriers, or other persons 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 constitute substantial evidence that the agreement is contrary to the public interest, unless the proponents to the agreement can demonstrate 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).

Cargo revenue pooling and sailing agreements of the type now before us are *per se* violative of the antitrust laws of the United States and are *prima facie* subject to disapproval unless justified. *Agreement No. 10056–Pooling, Sailing, and Equal Access Agreement to Cargo in the Argentina/United States Pacific Coast Trades*, 20 F.M.C. 255, 17 S.R.R. 1323 (1977); *Mediterranean Pools Investigation*, 9 F.M.C. 264 (1966). Before addressing the question of justification, however, we must first determine if the Agreements in fact are "agreements" within the meaning of section 15 of the Act.

Section 15 Jurisdiction

Justice argues that the Agreements are not *bona fide* agreements because they were allegedly "coerced by Argentine Resolution 619 and the Argentine threat to create chaos in the southbound United States Argentine trade." It contends that before an agreement may be considered for approval under section 15 of the Act, there must be mutual assent among the parties and a voluntary meeting of the minds. Justice takes the position that these required conditions are lacking here because SEIM Resolution 619 restricts certain Argentine exports to pool members, and because SEIM has allegedly threatened to disapprove the southbound pools if these Agreements are disapproved. It concludes that these Agreements were *forced* on the parties and therefore do not constitute "agreements" within the meaning of section 15.[24]

Ivarans also argues that the Atlantic Agreement is not within the scope of section 15. It explains that it did not "voluntarily" sign that Agreement but did so only to protect its interests. Ivarans points out that its representative at the July 30-August 1, 1978 Buenos Aires meetings originally advised that Ivarans would sign the Atlantic Agreement but only under protest and that this protest was withdrawn only after ELMA advised that it could not execute a protested Atlantic Agreement. Ivarans notes that it did, however, reserve its legal rights.

Cited by both Ivarans and Justice as support for the position that the Agreements cannot be approved because they are the result of government compulsion and therefore not *bona fide* agreements within the meaning of section 15 is the Commission's decision in *Inter-American Freight Conference–Cargo Pooling Agreement Nos. 9682, 9683, and 9684*, 14 F.M.C. 58, 72 (1970). This reliance on the *Inter-American* decision is misplaced.

The Commission's refusal to approve the agreements at issue in *Inter-American* was not grounded on any alleged governmental involvement, but rather on the fact that the Commission lacked the requisite subject matter jurisdiction to determine the merits of the agreements, because of the withdrawal of some of the parties to those agreements.[25] *Inter-American, supra,* at 62. The language relied on by Justice and Ivarans is clearly dicta. *Ibid,* at 62, 72. In any event, the allegations of coercion raised by Justice and Ivarans are not supported by the records in these proceedings.

The Gulf Agreement was executed on June 28, 1978, the last day of the Gulf Agreement principals' meeting in Buenos Aires. The alleged threat of SEIM intervention and the promulgation of Resolution 619 on July 17, 1978, which Justice argues forced the carriers to assent to the Gulf Agreement, occurred *after* the Gulf Agreement had been executed. Nor does the evidence relating to the Gulf Agreement meetings and the execution of that Agreement otherwise indicate that the Argentine Government coerced the carriers into entering into the Gulf Agreement. On the contrary, the record evidence indicates that, with the exception of REL's representative, who had been instructed to object to any proposal, and TMM's representative who did not ask for a specific share, the negotiation and execution of the Gulf Agreement was spirited but free from any duress or coercion. The Commission therefore finds that the Gulf Agreement reflects a "voluntary meeting of the minds" of its signatories, was mutually agreed to by those signatories, and is subject to our consideration under section 15 of the Shipping Act, 1916.

The June 29-30, 1978 meetings on the Atlantic Agreement were adjourned because the third-flag carriers were unable to reach a consensus on the allocation of shares. Prior to the adjournment, Captain Barni of ELMA advised that a SEIM resolution was forthcoming. Thereafter, Resolution 619 was promulgated.

---

[24] If Justice is correct, it would also appear that the Agreements would not be subject to the United States antitrust laws. *Inter-American Refining Corp. v Texaco Maracibo*, 307 F.Supp. 1291 (1970).

[25] For a more recent discussion of this issue, see *Agreement No. 8080-11, Amendment to the Atlantic and Gulf/Indonesia Conference Agreement*, 19 F.M.C. 500, 17 S.R.R. 21 (1977) and the cases cited therein.

At the subsequent Atlantic Agreement meetings Ivarans advised that it would sign the Agreement, but only under protest. Ivarans withdrew this "protest," reserving its legal rights, when ELMA advised that SEIM would not permit ELMA to sign a protested agreement.[26]

The evidence presented with respect to the Ivarans' protest and its subsequent withdrawal is contained in the transcript of Buenos Aires meetings, and the testimony of Mr. Holter-Sorensen and Mr. Schmeltzer. There is nothing in the Agreement itself that would even suggest that Ivarans signed that Agreement under duress or coercion and not on its volition. On the contrary, the Atlantic Agreement provides on the signature page, just above Mr. Schmeltzer's signature for Ivarans, that:

> The parties hereto have caused this Agreement to be executed voluntarily, *of their own free will* . . . (Emphasis added) (Mormac Ex. 1).

Furthermore, although Ivarans has protested the Atlantic Agreement before this Commission, it has not repudiated or disassociated itself from the Atlantic Agreement in any way.[27] In fact, Ivarans, through one of its principal owners, Mr. Holter-Sorensen, testified that it advised ELMA that:

> We [Ivarans] confirm that we shall comply with the terms and provisions of pool (sic) Agreement signed Buenos Aires August 1, 1978, if and when agreement has been approved by Argentine and United States authorities in accordance with Argentine and United States law. (Ivarans Ex. 2, p. 17).

Ivarans now, however, cites the *withdrawn* "protest" as indicative, at least in part, of the alleged duress that caused it to sign the Atlantic Agreement. This position is in conflict with Mr. Holter-Sorensen's admission that Ivarans will participate in the pool if approved, and Mr. Schmeltzer's acknowledgment that Ivarans voluntarily, and of its own free will, executed the Atlantic Agreement.

Finally, while SEIM Resolution 619 does restrict certain Argentine exports to pool participants, the promulgation of that Resolution does not mandate a finding that the Atlantic Agreement was not voluntarily entered into by its signatories, including Ivarans. SEIM Resolution 619 directs that certain Argentine exports be carried on conference vessels or, if the conference members form a pool, that the cargo be carried on the vessels of those conference members who are also pool members.[28] Although Resolution 619 recognizes the conference lines' attempt to formulate a pooling Agreement, it does not *mandate* the creation of a pool. Nor does it *direct* the allocation of any specific pool shares. While the promulgation of Resolution 619 may be further evidence of the Argentine Government's sanction of pooling agreements in its export trades, its provisions cannot be construed *to require* the Agreements now in issue. The record simply will not support a finding that these Agreements were compelled by Resolution 619. Accordingly, we find that the Atlantic Agreement is subject to our consideration under section 15 of the Shipping Act, 1916.[29]

---

[26] While the record does not indicate the reasons for SEIM's refusal to permit ELMA to sign the Atlantic Agreement, SEIM was probably concerned that the Ivarans' protest would abrogate the Agreement under Argentine or United States law.

[27] See *Agreement No. 8080–11*, *supra;* and *Inter-American*, *supra*.

[28] As implemented, Resolution 619 only applies to Argentina's export trade with the United States. However, Article 6 provides that it may be "extended to cover Argentine exports to other countries."

[29] While Ivarans has objected to the approval of the Atlantic Agreement in general, its primary concern is the allocation of the third-flag shares. We believe our disposition of the third-flag share issue as discussed, *infra*, addresses Ivarans' concerns and minimizes any impact Resolution 619 may have on Ivarans.

Justification

Having resolved the jurisdictional issue, the Commission must now determine whether the Agreements have been demonstrated to be required by a serious transportation need, necessary to secure important public benefits, or in furtherance of a valid regulatory purpose of the Shipping Act. Also to be determined is whether the Agreements are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports or between exporters from the United States and their foreign competitors or operate to the detriment of the commerce of the United States. As might be expected, the Agreements' proponents and their protestants are divided over the quantity and quality of the evidence presented on these issues.[30]

In general, the Agreements' proponents take the position that the Agreements are justified by the Argentine cargo preference laws, and the Blackwell-Guevara Memorandum of Understanding. They point out that the Commission has previously recognized that cargo preference laws tend to bring about international conflict and that these conflicts are generally resolved by commercial arrangements, such as the ones now in issue. In proponents' view, the disapproval of these Agreements would result in a disruption of United States-flag service and adversely impact on shippers particularly in the United States/Argentina southbound trade. Proponents cite the evidence of record which indicates that the northbound and southbound trades are "interlinked" and submit that disapproval of these northbound Agreements could well mean a return to the chaotic conditions that arose in 1977. Finally, proponents contend that the protestants have failed to demonstrate that the Agreements are unjustly discriminatory or unfair.

Protestants argue that the Agreements have not been properly justified, and that they are unjustly discriminatory and unfair. They point out that while the Blackwell-Guevara Memorandum may contemplate a pool, it does not require the shares provided for in the Agreements. Furthermore, protestants submit that the proponents have not established that the Argentine government has directed the allocations of the shares provided for in the Agreements.

Protestants note that the national-flag lines, ELMA, Delta, and Mormac were carrying approximately the same share of the trade now allocated to them prior to the implementation of these Agreements. This fact, protestants argue, evidences the lack of any economic justification for the Agreements. This failure of justification is further allegedly supported by the fact, admitted by proponents, that the trade is not overtonnaged and is generally free of malpractices.

Protestants take the position, that *Svenska, supra*, requires proponents to come forth with economic justification before the Commission may approve an agreement which is *per se* violative of the antitrust laws. In protestants' view, this evidence is lacking. Protestants take issue with proponents' attempt to justify these Agreements on the grounds that they will avoid international conflict and promote governmental harmony. Protestants submit that even if these were proper grounds for approval, a point which the protestants do not concede, the evidence of record in these proceedings does not establish that disapproval of the Agreements will result in such conflict or disharmony.

[30] While Hearing Counsel urges approval of the Agreements, it submits that the third-flag share should be reallocated. Justice, on the other hand, argues for the disapproval of the Agreements. State takes a middle ground but advises that disapproval could have at least some short-term disruptive effects.

Finally, protestants argue that the third-flag allocations are unjustly discriminatory and unfair because they were determined without regard to the third-flag participants' past carryings in the trades.

Upon consideration of the entire record in these proceedings, including the proposed findings and briefs of the parties, and for reasons stated below, the Commission finds the Agreements have been justified under the *Svenska* standard. We further find that the Agreements are not unjustly discriminatory or unfair providing they are modified as required herein. Accordingly, Agreement Nos. 10346 and 10349 are approved subject to certain conditions.

Argentina has since 1948 "adopted certain discriminatory practices which effected a routing preference in favor of its national-flag line," ELMA. *Agreement No. 10056–Pooling, Sailing, and Equal Access to Cargo in the Argentina/U.S. Pacific Coast Trade,* 20 FMC 255, 17 S.R.R. 1323 (1977). (See page 14 of the Slip Op. Appendix which was not published in the S.R.R.) Since that time, the Argentine Government has continued to take actions designed to assure that Argentine-flag vessels carry a substantial portion, if not all, of Argentina's water-borne foreign commerce. While the cargo preference laws and decrees, promulgated by Argentina may not be wholly consistent with the policies of the United States, they are nevertheless duly enacted promulgations of a sovereign state. The actions of the Argentine Government must, in the interest of international comity, be recognized and to the extent possible be accommodated by this Commission, an agency of the United States Government.[31]

The Argentine Government has enacted legislation that virtually assures that 100% of its imports will be carried on its national-flag vessels in the United States/Argentina trades. However, as the United States has itself provided by its limited cargo preference laws,[32] Argentina has preserved a right for its trading partners' vessels to carry a portion of the reserved cargo. Thus, Argentina enacted Law 19.887 which permits Argentine imports to be carried on vessels of the exporting nation where a government to government or commercial agreement exists which allocates no less than 50% of the freight revenues earned to Argentine-flag vessels.

The United States-flag carriers serving the southbound United States/Argentina trades were insured a share of Argentine imports by virtue of Agreements Nos. 10038 and 10039.[33] SEIM resolution 507 effectively vitiated these Agreements by requiring United States-flag carriers to obtain waivers for cargo carried in the trades. The impact of Resolution 507 resulted in the Blackwell-Guevara negotiations. At these negotiations the Argentine officials took the position that the southbound trade, and the availability of Argentine imports for carriage by non-Argentine-flag carriers, was tied to the northbound trade and that

[31] *Agreement No. 9939–1–Modification and Extension of a Pooling, Sailing and Equal Access Agreement,* ___ F.M.C. ___, 18 S.R.R. 1623 (1979); *Agreement No. 10066–Cooperative Working Arrangement,* ___ F.M.C. ___, 18 S.R.R. 1229 (1978); *Agreement No. 9932–Equal Access to Government Controlled Cargo and Interim Cooperative Working Arrangement, et al.,* 16 F.M.C. 293 (1973).

[32] See for example, P.L. 664, the Cargo Preference Act of 1954, 68 Stat. 832; Public Resolution 17, 46 U.S.C.A. 124(b) (1). *Agreement No. 10066, supra.*

[33] Although the Commission must give the same measure of protection to third-flag carriers that it does to United States-flag carriers, this does not necessarily mean that the third-flag carriers receive identical treatment. Third-flag carriers may be subject to handicaps and impediments not borne by United States-flag carriers, in the same trades, for the third-flag carriers, as cross-traders, cannot offer the required reciprocity in the concerned trade. *Agreement No. 9939–1, supra,* and *Agreement No. 9932, supra.* See also *Alcoa Steamship Company v. FMC,* 321 F.2d 756 (D.C. Cir. 1963).

Argentina was to carry at least 50% of that cargo. As Mr. Blackwell testified, the Memorandum was negotiated and executed in order to address these concerns of the Argentine Government and to protect the United States maritime interest in the trades.

The United States Government itself therefore has recognized the interdependence of the north and southbound United States/Argentina trades.[34] It is therefore not only appropriate but a sound regulatory practice that the impact of the Agreements on United States commerce in the southbound trades be considered in determining whether the Agreements now in issue are justified.

In the northbound United States/Argentina trades, Argentina has asserted its right to carry 50% of its export cargoes in Argentine-flag vessels. To guarantee its access to 50% of the *export* cargoes, Argentina has limited the availability of Argentine *imports* for carriage by non-Argentine-flag vessels. Moreover, it has initiated and sanctioned these Agreements which are designed to assure substantial Argentine-flag participation in its export trade with the United States.[35] Absent these Agreements, the Argentine Government is, at a minimum, likely to reinstitute the pre-waiver requirements of Resolution 507. Such action would again adversely affect United States shipper and carrier interests and operate to the detriment of the commerce of the United States.[36] These interests and our commerce would be further impaired if the United States took retaliatory measures to offset any unfavorable conditions caused by the Argentine Government.[37]

As we explained in *Agreement No. 9939-1, supra,* at 1628:

> When a commercial arrangement . . . provides a means to reconcile conflict between the laws and policies of the United States and its trading partners, the Agreement clearly yields important public benefits through the avoidance of disruptive retaliatory action and the resultant intergovernmental conflict. In addition, to the extent . . . [an agreement] allows United States-flag carriers access to a significant portion of government-controlled cargo that would otherwise not be available [or readily available], thereby also improving common carrier service to shippers and consignees, [the agreement] provides additional important public benefits.[38]

The rationale expressed in *Agreement No. 9939-1* also applies to Agreement Nos. 10346 and 10349. These Agreements serve an important public benefit by maintaining international harmony through the avoidance of disruptive retaliatory action and resultant international conflict. Additionally, because the inbound and outbound trades are "interlinked," the Agreements serve a serious transportation need by avoiding a disruption of United States foreign commerce and the consequential injury to shipper and carrier interest in the United States/ Argentina trades, particularly southbound.

[34] This interdependence also takes into consideration the manner in which cargo moves and trades are served. Liner operators generally serve a geographic area both inbound and outbound with the same service and vessels. It is therefore appropriate to consider the effects of an agreement on both the inbound and the reciprocal outbound trade. Similarly, it is pertinent to consider the effects an agreement may have on related geographic trade areas served by the parties to that agreement. At least some of the parties to these proceedings call at other South American ports with their United States/Argentina trade vessels.

[35] Even were the Commission to find, that SEIM had not initiated the Agreements now in issue, the Agreements nevertheless may have Argentine Government sanction in view of the fact that Argentine Law 20.447 declares the Argentine merchant marine, which presumably includes ELMA, as an instrument of Argentina's national economic policy.

[36] The United States Department of State, has advised that disapproval of these Agreements would strain diplomatic relations with Argentina and would disrupt, at least on a short-term basis, United States maritime and commercial interests.

[37] As we have previously explained, "whenever section 19 of the Merchant Marine Act, 1920 has been invoked in the past it has almost always resulted in a commercial arrangement," like the ones now in issue, which has offset the restrictive measures imposed. *Agreement No. 10056, supra,* Slip. Op. App. at 25; see also *Agreement No. 10066, supra,* and *Alcoa Steamship Company v. FMC, supra.*

[38] See also *Agreement No. 10066, supra.*

This does not end our inquiry, however. In considering the grant of an antitrust exemption for these Agreements, the Commission must make certain that the conduct legalized does not invade the antitrust laws any more than is necessary to serve the purposes of the Shipping Act, 1916 and the legitimate objectives of the Agreements. *United States Lines v. FMC,* 584 F.2d 519 (D.C. Cir. 1978).

The Agreements allocate 80% of the pool to the national-flag lines on an equal basis. These allocations appear reasonable in view of the past carryings of the national-flag carriers in these trades. In fact, in the Gulf trade, the national-flag carriers ceded a portion of their past carryings to the third-flag lines. Furthermore, the national-flag allocations appear to be consistent with the Blackwell-Guevara Memorandum and the declared intent of the Argentine Government.

The methodology used to divide the third-flag allocation however places unwarranted and unjustified emphasis on zonalism without regard to the past carryings of the third-flag carriers in these trades. Moreover, the third-flag divisions appear to unduly restrict competition within the third-flag share.

The third-flag allocations were determined at the Buenos Aires meetings in the caucuses among third-flag lines. These caucus meetings were chaired by an ELMA representative, although neither ELMA, the other national flag lines, *nor the Argentine Government had an interest in the actual divisions of the third-flag shares.*

Unlike the principals' meetings, the third-flag caucus meetings were not transcribed. The only evidence in these proceedings that addresses the individual allocations of the third flag shares, is certain testimony presented at the hearing and a brief portion of the transcript from the Buenos Aires principals' meetings. In general, this evidence reveals that the third-flag allocations were determined by: (1) best performance during the last several years; (2) historical participation in the trade; and, (3) with respect to the Brazilian share, reciprocity and compensation to the Brazilian lines for the cargo and shares contributed by Brazil in the Brazil/United States trade.

Mr. Arieira of Lloyd explained that the Brazilian lines were entitled to some compensation in the Argentine pool because of the Brazilian contribution to the overall United States/South American trade. In this regard, he testified that common carriers generally serve the Argentina/Brazil/United States trade with the same service and vessels, and that Brazil had made some of this cargo available for carriage by non-Brazilian-flag vessels.[39] He advised that the Brazilian-flag shares, and the reciprocity and compensation to Brazil, were based at least in part on what he calls a "zonal concept." This "zonal concept" relates to Brazil's geographic proximity to Argentina. In Mr. Arieira's view, the Argentina/Brazil/United States trade is a "neighborhood trade" and, as he testified:

> We feel that we are entitled to have a participation in the trades between Argentina and the United States because we are third-flag but we are also a zonal flag in that area. We carry something for the trade. We have the trade of Brazil in between so we feel that we are entitled to a larger share than anybody else that doesn't bring anything into the trades. He is just there giving service. (Tr. p. 714).

[39] Like many South American countries, Brazil has also promulgated cargo preference laws which reserve a substantial portion of Brazil's water-borne commerce to Brazilian-flag vessels. The Commission has recently approved certain agreements in the United States/Brazil trade which have the effect of permitting non-Brazilian-flag carriers to carry Brazilian cargo (see for example Agreements Nos. 10320 and 10027).

The Commission has been urged to reject the zonal concept as contrary to the Commission's decision in *Northern Pan-American Lines, (Nopal) v. Moore-McCormack Lines, Inc., et al.*, 8 F.M.C. 213 (1964). In that proceeding, the Commission considered three criteria, *i.e.* national-flag interests, pioneering efforts developing the trade, and actual carryings under the previous pooling agreement, to determine the pool allocations. The Commission approved the last of these criteria, explaining:

> In concluding that the use of the "national-flag" "pioneering" factors is contrary to the provisions of section 15, we do not mean to imply that past carryings is the sole permissible standard for allocating pool quotas. Where factors other than past earnings are employed, however, they must be acceptable ones under the act; and as we have indicated, no such acceptable factors have been suggested to us by the parties to these proceedings. *Nopal, supra,* at 231.[40]

The "zonal concept" was the major, if not the sole criteria, used in allocating third-flag shares under the Agreements. This is evidenced by the fact that shares were allocated to Brazilian-flag carriers although these carriers have not recently served the trades covered by the Agreements. The evidence of record also suggests that there was little, if any, consideration given to the past trade carryings of the other third-flag carriers during the last several years.

Although Brazil's contribution to the overall trade area and its geographic proximity to Argentina are a consideration, the past carryings of other carriers cannot be disregarded. To do so, could well result in the abrupt curtailment of the services provided by a carrier who had been carrying significant amounts of cargo. On the other hand, if only past carryings were to be considered, Ivarans with past carryings of 20-23% would be entitled to the entire third-flag allocation, at least in the Atlantic trade. Either criteria, applied exclusively, would be inequitable and would unreasonably deny other third-flag carriers access to the United States/Argentina trades.

The record indicates that neither the national-flag lines *nor the Argentine Government* has an interest in how the third-flag allocations are divided. Therefore, although third-flag carriers may operate at some fundamental disadvantage with respect to government-controlled cargo, the Commission must nevertheless assure that the third-flag allocation is fairly divided and preserves as much competition as possible within the limits prescribed.

The Commission finds that the Agreements' allocations of the third-flag shares are unjustly discriminatory and unfair because of the manner in which the third-flag allocation criteria were applied. However, because these Agreements otherwise provide important public benefits and are approvable, the Commission shall approve the Agreements on the condition that they be modified to provide for open competition *within* the third-flag share as described herein. This will not only obviate the Commission having to undertake a possible arbitrary reallocation of the third-flag share but is also consistent with the Commission's interest in preserving as much competition as possible within that share.

The condition imposed should not provoke international conflict since the Argentine Government admittedly has no interest in the specific allocations of the third-flag share. Moreover, this condition will not operate to expand the

[40] Since its decision in *Nopal*, the Commission has, at least to some extent, determined that national-flag interests are an appropriate factor that should be considered when evaluating section 15 agreements that derive their impetus from foreign cargo preference laws. *See Agreement No. 10066, supra; Agreement No. 9939-1, supra;* and *Agreement No. 9932, supra.*

shares available to third-flag carriers. Each third-flag party to the Agreements[41] can compete for and carry any cargo which it can secure. To the extent that the *total* third-flag carryings exceed the twenty percent allocated to the third-flag carriers, each participating third-flag carrier would repay to the national-flag pool a proportionate share of the revenues resulting from such overcarriage.[42] For example, given the following hypothetical third-flag carryings in a given pool year, each participant would have overcarried and would make overcarriage payments proportionally as follows:

Carriers % of Total Pool	Share Overcarried	Overcarriage Proportional Payment Rate[43]
A 15%	3/7 (15/35)	6.4285
B 10%	2/7 (10/35)	4.2857
C 5%	1/7 (5/35)	2.1428
D 3%	3/35 (3/35)	1.2857
E 2%	2/35 (2/35)	.8571
Total 35%		

The condition imposed not only appears to be consistent with the Blackwell-Guevara Memorandum, but also satisfies the Commission's statutory duty to make certain that an agreement, which is violative of the antitrust laws, does not invade those laws any more than is necessary to serve the purpose of the Shipping Act, 1916, and the legitimate objectives of the agreement. Accordingly, if they are modified as provided above, the Agreements will be approved and if not so modified the Agreements will be disapproved.

Possible Unfiled Section 15 Agreement

Much has been made in these proceedings of an alleged side agreement between the Brazilian Government or carriers and the Argentine Government or carriers.[44] This agreement allegedly assures the Brazilian-flag carriers a significant portion of the Argentine pool as compensation for the shares received by Argentine-flag carriers in the Brazil/United States pool. The record in this proceeding will not support the finding that such an agreement exists.

The Lloyd representative at the Buenos Aires meetings, indicated that the Brazilian share in these Agreements, was based, at least in part, on the "zonal concept" and compensation to Brazil for the shares contributed by it to the overall trade. It is this representation that is cited to us as evidence of the alleged side agreement. We are not advised, however, as to how the Argentine carriers fulfilled their end of the bargain. While the record does reveal that an ELMA representative did chair the third-flag caucus meeting, it also confirms that ELMA's representative did not actively participate in the third-flag negotiations. Nor did ELMA dictate or approve, insofar as the record reflects, the third-flag allocations agreed upon by the parties.

[41] In view of SEIM Resolution 619, a carrier would have to be a signatory to the Agreements to lift Argentine export cargo. REL and TMM therefore must become signatories to these agreements in order to participate in the third-flag allocation.

[42] The provisions for overcarriage must apply to all carriers alike regardless of flag.

[43] Amount carried, divided by the percentage of the total pool carried by third-flag lines, times the amount the third-flag percentage exceeds the twenty percent, equals the proportional payment rate.

[44] The Commission's jurisdiction, however, is limited to any agreement that may exist between the carrier parties.

Mr. Arieira's statement that the Brazil share was based on "zonalism" and compensation explains the basis upon which the Brazilians bargained in the commercial negotiations, rather than bearing out any allegation of a side agreement. Moreover, as found earlier, the impact of related geographic regions is generally not an inappropriate factor to consider in determining the approvability of a pooling agreement, such as the ones before us here. Indeed, the record reveals that geographic proximity and contribution to the overall trade route were the paramount factors in the negotiations that preceded the execution of these Agreements. As Mr. Arieira testified:

> Yes. We supported ELMA's application [in the Brazil pool] not because of any alleged secret agreement, but rather because we believe there is an economic and geographic community of interest between Argentina and Brazil, and it was our judgment that ELMA's participation in the Brazilian pool would result in improving the economic strength of both countries. In addition, and just as significant, from a purely commercial sense, I believe that as a matter of Lloyd's future bargaining position, if and when an Argentine pool would be formed, Lloyd stood a better chance of obtaining a portion of any Argentine pool on the basis of the strong argument that it was entitled to reciprocity. This decision was made without discussion or negotiation with ELMA. It was arrived at on the basis of my assessment of what was best for Lloyd and what was best for Brazil. (Lloyd Exhibit 2, at 3).

The fact that the Brazilian and Argentine-flag carriers invited each other to participate in their respective pools, is certainly not determinative of the existence of a side agreement between these parties, given their conference membership, geographic proximity and their respective contributions to the overall trade route.

Finally, although Mr. Holter-Sorensen testified that certain ELMA officials had admitted the existence of an unfiled agreement, these same officials categorically denied the existence of such an agreement at the hearings in these proceedings.

For the foregoing reasons, the Commission finds that the evidence in these proceedings does not establish the existence of an unfiled agreement.[45]

Article 16 of the Agreements

Article 16 of both Agreements provides for the establishment of a "Pool Committee" to, *inter alia*, collaborate in the development of, and render service in, the trades and to solve any differences which may arise. Mormac advises that the Atlantic Agreement "Pool Committee" has met two or three times and that no action has been taken which would *restrict any carrier's service*.[46] Because it appears that Article 16 gives the "Pool Committees" authority to restrict or otherwise affect the services provided by the signatories of these Agreements, we shall require that any action taken under this provision be submitted to the Commission for its approval before it is implemented.

CONCLUSION

In reaching our decision in these proceedings, the Commission has considered the complete record, including the objections thereto, and the briefs and argu-

[45] Even if such an agreement did exist, however, its impact in these proceedings has been negated by our disapproval of the third-flag criteria and allocations in these proceedings.

[46] Presumably, because Article 16 is identical in both Agreements, the Gulf Agreement Pool Committee could also restrict a carrier's service.

ments of the parties. Arguments and contentions not specifically discussed in this Report were nevertheless considered and determined to be either without merit or resolved by our decision in these proceedings.

Agreement Nos. 10346 and 10349, if modified as provided herein, are found to be in the public interest, and not to constitute a greater invasion of the prohibitions of the antitrust laws than necessary, to further the purposes of the Shipping Act, 1916 and the objectives of the Agreements. Moreover, the extent of the anticompetitive impact of the Agreements, as conditionally approved is not sufficient to outweigh the benefits found and warrant disapproval. Furthermore, the Agreements as so modified are not unjustly discriminatory or unfair, or detrimental to the commerce of the United States or otherwise in violation of the Shipping Act, 1916.

Finally, because a lapse in these Agreements could result in a disruption to United States foreign commerce in the United States/Argentina trade, and because such a result outweighs any harm that implementation of the Agreements as submitted may cause the third-flag carriers pending modification of the Agreements as required by this Report and Order, the Commission is granting the Agreements interim approval through July 23, 1979.

THEREFORE, IT IS ORDERED, That Agreement Nos. 10346 and 10349 are interimly approved through July 23, 1979.

IT IS FURTHER ORDERED, That Agreement Nos. 10346 and 10349 are approved pursuant to section 15, Shipping Act, 1916, providing that the Commission receive at its offices in Washington, D.C. on or before July 23, 1979, the Agreements modified as required herein.

IT IS FURTHER ORDERED, That Agreement Nos. 10346 and 10349 are disapproved effective July 24, 1979, if the above conditions are not met.

IT IS FURTHER ORDERED, That these proceedings be discontinued.

Commissioner Karl E. Bakke, concurring.

I concur in the reasoning and the result of the majority as set forth in the Report and Order. However, I wish to confirm my previously expressed views with respect to the proper consideration of potential intergovernmental conflict in section 15 proceedings.

Since there is probative evidence in this proceeding to support a finding of intergovernmental conflict if these agreements should not be approved, I agree that avoidance of such conflict is a valid public benefit consideration. However, I continue to be of the view that mere speculation that intergovernmental conflict might result, from disapproval of an agreement, without good evidence to support such a conclusion, cannot be a basis for section 15 approval. See my dissenting opinions in *Agreement No. 9939-1, supra*, and *Agreement No. 10066, supra*.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 497(I)

ORGANIC CHEMICALS (GLIDDEN-DURKEE) DIVISION OF SCM CORPORATION

v.

LLOYD BRASILEIRO

ORDER OF ADOPTION

June 26, 1979

On May 5, 1978, the Commission served notice of its determination to review the decision of the Settlement Officer served in this proceeding on April 19, 1978. In that decision the Settlement Officer awarded reparation to Complainant Organic Chemicals (Glidden-Durkee) Division of SCM Corporation (Organic Chemicals) for freight overcharges by Respondent Lloyd Brasileiro on shipments of industrial chemicals from Savannah, Georgia, to Brazil.

The Commission's determination to review the decision of the Settlement Officer was based on the fact that other complaint proceedings initiated by Organic Chemicals against different carriers but involving the same facts and issues, were pending in Docket Nos. 78–2 an 78–3.[1]

Chief Administrative Law Judge John E. Cograve has now issued an Initial Decision in Docket No. 78–2 in which he determined that Organic Chemicals had sustained its burden of proving freight overcharges and on that basis awarded reparation.[2] No exceptions were filed to the Initial Decision in Docket No. 78–2, and that decision became administratively final on June 11, 1979.

In view of the foregoing, the decision of the Settlement Officer issued in this proceeding is hereby adopted by the Commission.

IT IS SO ORDERED.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[1] The complaint in Docket No. 78–3 was subsequently dismissed after a settlement proposed by the parties was approved by the Commission.

[2] The Chief Administrative Law Judge determined in Docket No. 78–2, as did the Settlement Officer in this proceeding, that freight overcharges by the carriers resulted from erroneous statements on the measurements of the cargo in the bills of lading by Complainant. The evidence relied upon in these proceedings appears to support the conclusion reached.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 497(I)

ORGANIC CHEMICALS (GLIDDEN-DURKEE) DIV. OF SCM CORPORATION

v.

LLOYD BRASILEIRO

Adopted June 26, 1979

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

Reparation Awarded in part.

Organic Chemicals (Glidden-Durkee) Division of SCM Corporation (complainant) claims $168.25 from Lloyd Brasileiro (carrier) for alleged freight overcharges on two shipments of industrial chemicals from Savannah, Georgia to Brazil. One shipment consisted of nine (9) drums of Camphene 46 to Santos, Brazil via the LLOYD ESTOCOLMO on a bill of lading dated April 19, 1976; and the second consisted of twenty-eight (28) drums of Intermediate Geraniol 60 to Rio de Janeiro, Brazil via the LLOYD JACKSONVILLE on a bill of lading dated October 9, 1976. Complainant specifically alleges a violation of Section 18 [(b) (3)] of the Shipping Act, 1916.

The transportation charges assessed by the carrier were based upon total measurements of 104 and 326 cubic feet, declared by complainant and shown on the respective bills of lading, on the shipment of nine (9) drums of Camphene 46 and the shipment of 28 drums of Intermediate Geraniol 60, respectively. The total cubic measurement of each shipment was based upon a measurement of 11.66 cubic feet per drum. Complainant now asserts that the correct total cubic measurement of the shipments should have been 96 and 300 cubic feet on the Camphene 46 and Intermediate Geraniol 60, respectively, based upon a measurement of 10.715 cubic feet per drum. Complainant contends that the declared cubic measurements were unintentionally incorrect and were the result of an unintentionally erroneous application by complainant of Rule 12(a) of the governing conference tariffs[2] which provides, in pertinent part, as follows:

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

[2] Inter-American Freight Conference-Section A Tarriff No. 5, FMC No. 11, Inter-American Freight Conference-Section A Tariff No. 6, FMC No. 13.

RULE 12 *MEASUREMENT*
(a) Weight or measurement freight rates shall be assessed on actual measurement calculated when cargo is delivered to carrier, in accordance with the following regulations:
1-All fractions under ½ inch are dropped.
2-All fractions of ½ inch or over shall be taken to the next full inch, except where three such fractions occur, that on the largest and smallest dimensions which shall be taken to the next full inch, and the other dropped.
3-Where two dimensions of exactly ½ inch appear the one on the smaller dimensions shall be carried to the next full inch and the other dropped.

Specifically, complainant computed the cubic measurement of a drum by increasing all three dimensional fractions to the next full inch, rather than by dropping the two fractions of less than one-half inch and increasing only the one remaining fraction of over one-half inch to the next full inch. A drum measures 23-15/32" × 23-15/32" × 34-3/4". In other words, complainant computed the cube of a drum by multiplying 24" × 24" × 35" for a total of 20,160 cubic inches or 11.66 cubic feet per drum (1,728 cubic inches equal one cubic foot), instead of by multiplying 23" × 23" × 35" for a total of 18,515 cubic inches or 10.715 cubic feet per drum.

In support of its claim complainant has submitted the following:

1. An affidavit signed by complainant's Director of Purchasing. This document declares that all 55-gallon drums used by complainant conform to the United States Department of Transportation Specification 17E (DOT-17E) published in 49 CFR 178.116; and that the drums are procured from one or the other of the following three sources: Florida Steel Drum Company, Inc. (Florida Drum), Pensacola, Florida; Inland Steel Container-Division of Inland Steel Company (Inland Steel), New Orleans, Louisiana; and Rheem Manufacturing Company (Rheem), Savannah, Georgia.

2. A copy of *American National Standard Specifications for 55-Gallon Tight-Head Drums (DOT-17E)* (ANSI). In pertinent part, this publication reveals that the ocean shipping cube of the drums covered thereby is 10.715 cubic feet. The figure contained in the standard shows the drums to measure 23-15/32" in diameter over rolling hoops and 34-3/4" in overall height. Based upon these dimensions, the resultant ocean shipping cube of a drum is 10.715 cubic feet. (23-15/32" × 23-15/32" × 34-3/4" or, in conformity with Rule 12(a) of the conference tariffs 23" × 23" × 35" equals 18,515 cubic inches, divided by 1,728 cubic inches per cubic foot, equals 10.715 cubic feet.)

3. A copy of the specification sheets of Florida Drum, Inland Steel and Rheem. These specification sheets indicate that the ocean shipping cube of the drums manufactured and sold by these companies is, respectively, 10.72 cubic feet; "conform to ANSI Standards"; and "10/9—meaning 10-9/12, or 10.75 cubic feet."

4. A brief prepared by attorneys for complainant.

In considering claims involving disputes as to the nature of cargo, if the cargo has left the custody of the carrier before the claim is brought and the cargo cannot be reexamined, the Commission has traditionally imposed a heavy burden of proof on complainant. In Informal Docket 283(I), *Western Publishing Company, Inc. v. Hapag Lloyd A.G.*, order served May 4, 1972, the Commission stated:

"the test is what claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description. In rating a shipment the carrier is not bound by shipper's misdescription appearing on the bill of lading. *Likewise, claimant is not bound at least where the misdescription results from shipper's unintentional mistake or inadvertence.* But where the shipment has left the custody of the carrier and the carrier is thereby prevented from personally verifying claimant's contentions, the claimant has a heavy ulitmate burden of proof to establish his claim." (emphasis added).

On the shipment of Camphene 46 to Santos complainant was assessed:

$\frac{104}{40}$ cu. ft.	= 2.6Mt (rate $142.50)	=	$370.50
	2.6Mt (Bunker S/C of $10.00)	=	26.00
Transportation charges paid			$396.50

Correct assessment:

$\frac{96}{40}$ cu. ft.	= 2.4Mt (rate $142.50)	=	$342.00
	2.4Mt (bunker S/C of $10.00)	=	24.00
			$366.00
	Claim		$ 30.50[3]

On the shipment of Intermediate Geraniol 60 to Rio de Janeiro complainant was assessed:

$\frac{326}{40}$ cu. ft.	= 8.15Mt (rate $165.00)	=	$1,344.75
	8.15Mt (bunker S/C of $10.00)	=	81.50
	Ad. Val. 5.5 long tons ($.24)	=	1.32
Transportation charges paid			$1,427.57

Correct assessment:

$\frac{300}{40}$ cu. ft.	= 7.5Mt (rate $165.00)	=	$1,237.50
	7.5Mt (bunker S/C of $10.00	=	75.00
	Ad. Val. 5.5 long tons ($.24)	=	1.32
			$1,313.82
	Claim		113.75

Here complainant seeks an adjustment in freight charges which were levied by the carrier on the basis of an unintentional and erroneous declaration by complainant of the cubic measurement of the cargo. Thus, the heavy burden of proof requirement applies. It is believed complainant has met this requirement.

Complainant has provided detailed specifications and information sufficient to clearly establish the dimensions of the 55-gallon drums it utilizes and the resultant ocean shipping cube of 10.715 cubic feet, and also that the declared excess cubic measurements were erroneous and unintentional. Reparation is awarded. However, in computing the correct total freight charges on the shipment of Camphene 46 to Santos, complainant neglected to add, no doubt inadvertently, the sum of $24.00 attributable to the application of the bunker surcharge to the freight rate computation. Accordingly, reparation in the amount of $144.25, rather than $168.25 is proper.

(S) GEORGE D. UNGLESBEE
Settlement Officer

April 19, 1978

[3] Complainant's claim was for $54.50. The bunker surcharge of $24.00 was incorrectly excluded from the correct assessment.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 502(I)

ORGANIC CHEMICALS (GLIDDEN-DURKEE)
DIVISION OF SCM CORPORATION

v.

JAPAN LINE

ORDER OF ADOPTION

June 26, 1979

On June 7, 1978, the Commission served notice of its determination to review the decision of the Settlement Officer served in this proceeding on May 24, 1978. In that decision the Settlement Officer awarded reparation to Complainant Organic Chemicals (Glidden-Durkee) Division of SCM Corporation (Organic Chemicals) for freight overcharges by Respondent Japan Line on shipments of industrial chemicals from Jacksonville, Florida to Tokyo, Japan.

The Commission's determination to review the decision of the Settlement Officer was based on the fact that other complaint proceedings initiated by Organic Chemicals against different carriers but involving the same facts and issues, were pending in Docket Nos. 78-2 and 78-3.[1]

Chief Administrative Law Judge John E. Cograve has now issued an Initial Decision in Docket No. 78-2 in which he determined that Organic Chemicals had sustained its burden of proving freight overcharges and on that basis awarded reparation.[2] No exceptions were filed to the Initial Decision in Docket No. 78-2, and that decision became administratively final on June 11, 1979.

In view of the foregoing, the decision of the Settlement Officer issued in this proceeding is hereby adopted by the Commission.

IT IS SO ORDERED.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[1] The complaint in Docket No. 78-3 was subsequently dismissed after a settlement proposed by the parties was approved by the Commission.

[2] The Chief Administrative Law Judge determined in Docket No. 78-2, as did the Settlement Officer in this proceeding, that freight overcharges by the carriers resulted from erroneous statements on the measurements of the cargo in the bills of lading by Complainant. The evidence relied upon in these proceedings appears to support the conclusion reached.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 502(I)
ORGANIC CHEMICALS (GLIDDEN-DURKEE) DIV. OF SCM CORPORATION

v.

JAPAN LINE

Adopted June 26, 1979

DECISION OF ROLAND C. MURPHY, SETTLEMENT OFFICER[1]

Reparation Awarded

Organic Chemicals (Glidden-Durkee) Division of SCM Corporation (complainant) claims $613.07 from Japan Line (carrier) for alleged freight overcharges on a shipment of industrial chemicals from Jacksonville, Florida to Tokyo, Japan. The shipment consisted of 187 drums of intermediate linalool-95 (beta type), intermediate-750 and hydroxycitronella pure, myrcene 85. Complainant specifically alleges a violation of Section 18(b)(3) of the Shipping Act, 1916.

The transportation charge assessed by the carrier was based upon a total measurement of 2180 cubic feet declared by the complainant and shown on the applicable bill of lading. The total cubic measurement of the shipment was based upon a measurement of 11.66 cubic feet per drum. Complainant asserts that the correct total cubic measurement of the shipment should have been 2001 cubic feet based on a measurement of 10.715 cubic feet per drum. The complainant contends that the declared cubic measurements were unintentionally incorrectly assessed and resulted from an erroneous application by complainant of Rule No. 2(b) of the governing conference tariff[2] which provides, in part, as follows:

"(b) *Measurement Cargo:*

Cargo freighted on a measurement basis shall be assessed rates on the gross or overall measurement of individual pieces or packages when the cargo is delivered to the carrier, and shall be computed in accordance with 'Tweed's Accurate Tables', except as may be otherwise provided in paragraphs (c), (d), (e), (f) of this rule, subject to the following rule with respect to disposition of fractions of inches:

"All fractions UNDER one-half inch are dropped.

"All fractions OVER one-half inch are extended to the next full inch.

"Where there is a fraction of one-half inch on ONE dimension, it is extended to the next full inch.

---

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

[2] Far East Conference Tariff No. 27, FMC No. 10.

"Where there are fractions of one-half inch on TWO dimensions, the one on the small dimension is extended to the next full inch and the other dropped. If these dimensions are equal, drop one and increase the other to the next full inch.

"Where there are fractions of one-half inch on THREE dimensions, those on the largest and smallest dimensions are extended to the next full inch and the other dropped."

The complainant computed the cubic measurement of a drum by increasing all three dimensional fractions to the next full inch instead of dropping the two fractions of less than one-half inch and increasing only the one remaining fraction of over one-half inch to the next full inch. A drum measures 23 15/32" x 23 15/32" x 34". Complainant computed the cube of a drum by multiplying 24" x 24" x 35" for a total of 20,160 cubic inches or 11.66 cubic feet per drum (1,728 cubic inches equal one cubic foot), instead of multiplying 23" x 23" x 35" which equals 18,515 cubic inches or 10.715 cubic feet per drum.

Complainant in support of his claim submitted the following:

1. An affidavit signed by complainant's Director of Purchasing. This document declares that all 55-gallon drums used by complainant conform to the United States Department of Transportation Specification 17 E (DOT-17E) published in 49 CFR 178.116; and that the drums are procured from one or the other of the following three sources: Florida Steel Drum Company, Inc. (Florida Drum), Pensacola, Florida; Inland Steel Container-Division of Inland Steel Company (Inland Steel), New Orleans, Louisiana; and Rheem Manufacturing Company (Rheem), Savannah, Georgia.

2. *A copy of American National Standard Specifications for 55-Gallon Tight-Head Drums (DOT-17E)* (ANSI). In pertinent part, this publication reveals that the ocean shipping cube of the drums covered thereby is 10.715 cubic feet. The figure contained in the standard shows the drums to measure 23 15/32" in diameter over rolling hoops and 34 3/4" in overall height. Based upon these dimensions, the resultant ocean shipping cube of a drum is 10.715 cubic feet. (23 15/32" x 23 15/32" x 34 3/4" or in conformity with Rule 12(a) of the conference tariffs 23" x 23" x 35" equals 18,515 cubic inches, divided by 1,728 cubic inches per cubic foot, equals 10.715 cubic feet).

3. A copy of the specification sheet of Florida Drum, Inland Steel and Rheem. These specification sheets indicate that the ocean shipping cube of the drums manufactured and sold by these companies is, respectively, 10.72 cubic feet; "conform to ANSI Standards", and "10/9—meaning 10 9/12, or 10.75 cubic feet."

4. A brief prepared by attorneys for complainant.

The Commission in considering claims involving disputes as to the nature of cargo, if the cargo has left the custody of the carrier before the claim is brought and the cargo cannot be reexamined, has traditionally imposed a heavy burden of proof on complainant. In Informal Docket 283(I), *Western Publishing Company, Inc. v. Hapag Lloyd A.D.*, Order served May 4, 1972, the Commission stated:

"the test is what claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description. In rating a shipment the carrier is not bound by shipper's misdescription appearing on the bill of lading. *Likewise, claimant is not bound at least where the misdescription results from shipper's unintentional mistake or inadvertence.* But where the shipment has left the custody of the carrier and the carrier is thereby prevented from personally verifying claimant's contentions, the claimant has a heavy ultimate burden of proof to establish his claim." (emphasis added)

It is readily apparent there could have been no intent, purpose or motivation of ultimate gain or advantage in the claimant/shipper's perpetration of the error underlying the claims. Since the shipper's error was an unintentional mistake, he is not bound by his erroneous declaration of cubic measurement.

On the shipment of 187 drums of industrial chemicals complainant was assessed:

$\frac{2180 \text{ cu ft}}{40}$ = 54.5 cu ft X Rate of $137.00 M = $7,466.50 transportation charges paid

Correct assessment:

$\frac{2001 \text{ cut ft}}{40}$ = 50.025 cu ft X Rate of $137.00 M = $6853.43 transportation charge

Overcharge is $613.07

Complainant seeks an adjustment in freight charges which were assessed by the carrier based on an unintentional and erroneous declaration by complainant of the cubic measurement of the cargo. Therefore, the heavy burden of proof requirement applies. It is believed complainant has met this requirement.

The carrier has interjected a statement to the effect that he has refused to honor the subject claim on the basis of Tariff Rule No. 9 in Tariff FMC-10 which requires that claims be filed within six-months after date of shipment.[3]

Complainant has supplied detailed specifications and data sufficient to establish the dimensions of the 55-gallon drums it utilizes and the correct ocean shipping cube of 10.715 cubic feet. It was also determined that the declared excess cubic measurement was erroneous and unintentional. Complainant is therefore awarded reparation in the amount of $613.07.

(S) ROLAND C. MURPHY
Settlement Officer

May 24, 1978

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–50

NORTH CAROLINA STATE PORTS AUTHORITY;
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO LOCAL 1426; INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, AFL-CIO, LOCAL 1426-A, WAREHOUSEMEN

v.

DART CONTAINERLINE COMPANY, LIMITED

June 28, 1979

The use of an intermodal through rate to absorb the full cost of motor carrier transportation between the adjacent container ports of Wilmington, North Carolina, and Norfolk, Virginia, is an unjust and unreasonable device violative of sections 16 and 17 of the Shipping Act, 1916, when the diverting carrier makes no vessel calls at Wilmington, the containerized cargo in question is first brought to Wilmington from inland locations at shipper expense, facilities available at Wilmington can adequately accommodate the diverted cargo, and no transportation efficiencies are created.

George J. Oliver for North Carolina State Ports Authority.
A.A. Canoutas for International Longshoremen's Association, AFL-CIO, Local 1426.
Samuel Whitt for International Longshoremen's Association, AFL-CIO, Local 1426-A, Warehousemen.
Edwin Longcope and *Frederick L. Shreves* for Dart Containerline Co., Ltd.
Martin A. Hecksher and *Thomas P. Preston* for Delaware River Port Authority, *et al.*

REPORT

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

This is a complaint proceeding brought by Wilmington, North Carolina port interests (Complainants) against the indirect or "substituted" service arrangement offered by Dart Containerline Company, Limited (Dart), under its FMC Tariff No. 28.[1] Tariff No. 28 pertains exclusively to the export carriage of unmanufactured tobacco in containers. It states that Dart has the "option" of serving Wilmington by direct vessel call or by overland service. Dart has admitted, however, that it does not intend to send ships to Wilmington and is in fact offering an intermodal motor/water service between Wilmington and

* Commissioner Karl E. Bakke dissenting and issuing a separate opinion. Commissioner Leslie L. Kanuk dissenting.

[1] Dart is a common carrier by water in the foreign commerce of the United States. The Complainants are: (1) the North Carolina State Ports Authority; (2) Local 1426 of the International Longshoremen's Association; and (3) Local 1426-A, Warehousemen, of the International Longshoremen's Association.

Europe.[2] Complainants allege that this one commodity intermodal service will thereby unfairly divert cargo from Wilmington in violation of sections 16 and 17 of the Shipping Act, 1916 (46 U.S.C. 815 and 816).[3]

Under Tariff No. 28, Dart would accept containerized shipments of unmanufactured tobacco at the Port of Wilmington and pay motor carriers to transport this cargo to Dart vessels calling at Norfolk, Virginia, an area within the Port of Hampton Roads located some 236 highway miles to the north.[4] An ocean bill of lading would be issued listing Wilmington as the port of origin and applying the liability limitation of the Carriage of Goods by Sea Act (46 U.S.C. 1300 *et seq.*) to the inland segment of its route. Dart's tariff rates from Wilmington and Norfolk would be identical. Accessorial charges at the two ports are basically equal. The overland cost of moving a container of tobacco from Wilmington to Norfolk is approximately $300. Dart's rate for the ocean transportation of Wilmington cargo is therefore effectively $300 less than its ocean rate for Norfolk cargo.[5]

All unmanufactured tobacco moving from Wilmington to Europe is containerized. Almost 32,000 tons of such cargo passed through Wilmington in 1977. It represented 11.4% of that port's total exports. Regular all-water container service is provided to Wilmington by Seatrain International, S.A. (Seatrain), and Polish Ocean Lines (POL), and vessel calls from these lines are highly important to the economic position of Wilmington's port. During 1977, Seatrain carried 27,946 tons of tobacco in 1,449 containers. POL carried 4,031 tons in 101 containers. Because the tobacco carried by POL is purchased on behalf of the Polish Government's trade monopoly, only the tobacco carried by Seatrain is likely to be diverted by Dart's overland service. Seatrain's tobacco carryings represent about 10% of Wilmington's total export cargo and have an annual revenue potential to the port of approximately $80,000.00. Seatrain provides adequate service to the Port of Wilmington to meet the needs of tobacco shippers, and that port has adequate facilities for handling containerized tobacco shipments.[6]

Wilmington is closer (between 6 and 66 miles) to most of the major tobacco markets of North Carolina and Virginia than is Norfolk.[7] Dart and Seatrain offer a

---

[2] Tariff No. 28 does not involve "substituted service" as that term is generally understood by the Commission. "Substituted service" occurs when a carrier making regular vessel calls to a port is faced with unexpected operating conditions requiring the use of alternate service to fulfill the carrier's existing cargo commitments. A "port" is a place where actual transportation by ocean going vessels begins or ends and not merely a place possessed with port facilities. *See* 46 C.F.R. 531.2(m) adopted in Report and Order in Docket No. 76–40, 17 S.R.R. 1255, 42 *Fed. Reg.* 54810; *see generally Austasia Container Express*, 17 S.R.R. 89, 100 (1977) *rev'd on other grounds*, 580 F.2d 642 (D.C. Cir. 1978).

[3] Complainants also allege violations of section 8 of the Merchant Marine Act, 1920 (46 U.S.C. 867), a statute not administered by the Federal Maritime Commission and which contains no specific prohibitions in any event.

[4] Although Tariff No. 28 has a September 19, 1977 effective date, Dart's overland service had not been implemented at the time of the Initial Decision and may still be inactive. Complainants obtained a preliminary injunction against Tariff No. 28 from the United States District Court for the Eastern District of North Carolina pending resolution of the instant FMC proceeding. Civil Action No. 77–73–CIV–7, served January 18, 1978. This injunction was dissolved on February 15, 1979 by the United States Court of Appeals. *North Carolina State Ports Authority v. Dart Containerline Company, Ltd.*, 592 F.2d 749 (4th Cir. 1979).

[5] The Commission's intermodal tariff filing regulations apply to the through routes of single carriers as well as the joint offerings of more than one carrier. Because motor carriage of agricultural products is exempt from Interstate Commerce Commission regulation Dart's motor/water service from Wilmington to Europe is not considered *joint* through transportation, but it is still an intermodal through route subject to the requirement that the ocean portion of the through rate be separately stated in Dart's tariff. 46 C.F.R. 536.8.

[6] Wilmington installed a modern, high speed container crane in May, 1977 and was to have expanded conteiner storage and handling facilities in place by May, 1979. Wilmington's major disadvantage in attracting containerized tobacco shipments is the absence of a four lane highway system between the major tobacco markets and its docks.

[7] *See* Exhibit No. 11 attached as Appendix "A" hereto. The 12 tobacco markets in question are the most commercially significant to

weekly service from Norfolk and Wilmington, respectively. Dart's service reaches certain relevant European destinations a few days sooner than Seatrain's, but any advantage in speed is usually unimportant to tobacco shippers because unmanufactured tobacco is not a time sensitive commodity.[8] The largest single destination for unmanufactured tobacco leaving both Wilmington and Norfolk is Hamburg, Germany. Containerized tobacco is sensitive to differences in inland transportation costs.

On January 19, 1979, Administrative Law Judge Stanley M. Levy (Presiding Officer) issued an Initial Decision denying the Complaint. The Initial Decision relied heavily upon the Commission's 1978 minilandbridge decisions, particularly upon the port diversion standards articulated in the "*CONASA*" decision.[9]

POSITION OF THE PARTIES

1. *Complainants*

Exceptions to the Initial Decision were filed by Complainants which argue that the Presiding Officer:

(1) failed to find that Dart would not move containers through the Port of Wilmington;[10]

(2) failed to find that Wilmington is closer to eight of the twelve tobacco markets examined in the proceeding;[11]

(3) erroneously applied the cargo diversion standards articulated in the Commission's *CONASA* decision to the instant proceeding;

(4) failed to distinguish the facts of the present case from those of the *CONASA* decision;

(5) failed to recognize the continuing validity and present applicability of local absorption cases such as *Intermodal Service to Portland, Oregon,* 17 F.M.C. 106 (1973); *Sea-Land Service, Inc. v. South Atlantic & Caribbean Line, Inc.,* 9 F.M.C. 338 (1966); and *City of Portland v. Pacific Westbound Conference,* 4 F.M.B. 664 (1955).

(6) failed to place upon Dart the burden of proving that unmanufactured tobacco in containers is not naturally tributary to Wilmington;

(7) failed to consider the long-term effects of cargo diversion on the viability of carrier service to a port.

Wilmington, but are not necessarily the sole source of unmanufactured tobacco shipments handled by that port. The market at Goldsboro, North Carolina closed in early 1978.

[8] Dart's southeastern sales manager testified that some tobacco shipments are handled on an expedited basis, but that most tobacco is stored for a year after arrival in Europe. The record does not indicate that tobacco is warehoused in port terminal areas. European consignees seeking special types of tobacco would therefore obtain it from warehouses located in the major tobacco markets and would best save transit time by sending their cargo directly to Norfolk rather than using an intermodal routing through Wilmington.

[9] The Commission has denied port diversion complaints based upon intermodal through rates between U.S. East Coast ports and the Far East, *Council of North American Shipping Associations (CONASA) v. American President Lines, Inc.,* 18 S.R.R. 774 (1978), and between U.S. Gulf Coast ports and Europe, *Port of New Orleans v. Seatrain International, S.A.,* 18 S.R.R. 763 (1978). In these cases, vessel calls were made at a different range of ports under a direct intermodal routing hundreds of miles shorter and several days faster than the all-water route available through the complaining ports.

[10] Complainants must believe insufficient emphasis was given to this fact, as it was stipulated by the parties and plainly stated in the Initial Decision.

[11] The Initial Decision discusses four of the twelve tobacco markets examined in the proceeding and makes the accurate, but diluted finding that Wilmington is an "average of 11 miles" closer to the major markets than is Norfolk. Complainants urge that the findings be modified to state that the "major tobacco markets are from 6 to 66 miles closer to Wilmington."

2. *Intervenors*

On March 7, 1979, the Delaware River Port Authority and related Philadelphia port interests filed a "Petition to Intervene" for the limited purpose of excepting to the Initial Decision. The Commission granted this petition on May 9, 1979.

The intervenors espouse the same position as Complainants. Their Exceptions are largely duplicative, except that they include the broader policy argument that denial of the complaint would unduly concentrate shipping services at the Port of Norfolk and injure Wilmington's viability as a container port. They also argue that the Presiding Officer erroneously concluded that Dart's substituted service would further the public interest and economic welfare of the entire nation.

3. *Respondent*

Dart contends that the Initial Decision is correct in all respects. Particular emphasis is given to the fact that the Presiding Officer's findings relating to the naturally tributary status of the major tobacco markets were based upon Complainants' own evidence. Dart argues that Tariff No. 28 must be lawful because cargo originating at these markets is clearly tributary to both Norfolk and Wilmington.

DISCUSSION

The gravamen of any port equalization complaint is whether a class of shippers *should* bear certain costs which the carrier is willing to assume; to analyze equalization practices in terms of whether the carrier is "assuming costs the shipper otherwise would have borne" evades the issue. Although intermodal transportation may not result in the ocean carrier assuming a *particularly identified* cost item for the shipper, the incremental pricing theory ordinarily employed in such cases clearly permits cost savings which are not experienced by port-to-port shippers. An ocean carrier therefore "absorbs" elements of shipper cost whenever it publishes a joint through rate (or a proportional rate) which is lower than its local rate.[12] An "absorption" is not necessarily unlawful.[13] The question presented by the instant case, therefore, is should Dart be permitted to absorb the entire costs of transporting export tobacco to the next closest competing port after the tobacco has arrived at Wilmington from inland points of origin.[14]

The Commission recently held that the cargo diversion *standards* developed in its minibridge decisions are applicable to local port equalization practices as well as equalization affecting ports in distant port ranges.[15] The fact that the *CONASA* standards apply to all cargo diversion complaints does not mean that all diver-

[12] The cost of bringing cargo to the place where ocean transportation begins is a cost for which the shipper is fully responsible absent some alleviation of that cost by the ocean carrier. Special ocean rates which make through carriage more attractive effectively reduce the shipper's inland costs.

[13] The terms "absorption" and "equalization" tend to be used interchangeably to describe diversionary activities. The choice of terminology has little, if any, substantive significance in such matters, each of which must be examined on its own particular facts. *See Intermodal Service to Portland, Oregon, supra*, at 132.

[14] There are closer ports (*e.g.*, Morehead City, North Carolina), but not with comparable *container cargo* facilities. Except when Tariff No. 28 applies, Dart places the cost of transporting tobacco to ship's tackle upon the shipper.

[15] *Pacific Westbound Conference–Equalization Rules and Practices*, Order Restructuring Proceeding, 19 S.R.R. 133 (1979), note 5.

sionary practices are lawful.[16] These standards were designed to accommodate and promote transportation improvements, not to encourage unnecessary back-hauling and other inefficiencies.

The burden of establishing whether unmanufactured tobacco in containers is naturally tributary to Wilmington is upon the Complainants, not upon Dart. It is unnecessary, however, for Complainants to prove the existence of a precise zone from which tobacco would move only to Wilmington. It is sufficient that legitimate transportation factors consistently direct an identifiable quantity of cargo from identifiable points of origin to the Port of Wilmington.

Inland freight rates from the major Virginia/North Carolina tobacco markets to Norfolk and Wilmington vary significantly because tobacco is an ICC-exempt commodity and shippers negotiate individualized rates with motor carriers.[17] In any given case, it may cost more to ship to Wilmington than to Norfolk, even if Wilmington is the shorter haul. Nonetheless, it must be assumed that there is a consistent inland cost differential favoring Wilmington. Other things being equal, shippers would not otherwise send containerized tobacco to Dart at *Wilmington*—they would send it to Dart at *Norfolk*. The very nature of Dart's intermodal service depends upon the fact that some unmanufactured tobacco will naturally move to Wilmington. That tobacco from the same or similar origins also moves consistently through the Port of Hampton Roads does not defeat Wilmington's claim to naturally tributary status as to cargo which has already arrived at its port.

One of the four criteria for determining whether cargo is naturally tributary to a port is the "natural or geographical transportation patterns and efficiencies" governing the proposed movement.[18] *CONASA* decision, at 779. *See generally Proportional Commodity Rates on Cigarettes and Tobacco,* 6 F.M.B. 48 (1960). Minibridge transportation allows cargoes originating within a reasonable distance of East Coast port cities to benefit from the natural transportation efficiencies of a rail/water movement through West Coast gateways. In the instant case, tobacco shippers are encouraged to benefit from Wilmington's geographic and inland rate advantages, by delivering European trade tobacco containers to that port from destinations 60 to 200 miles away. Dart then deprives Wilmington of these advantages by backhauling this cargo to Norfolk—a greater overland distance than the direct route—without moving it significantly closer to its ultimate destination. This inefficient practice would also result in "subsidization" of the transportation costs of tobacco shippers which use Dart's Wilmington service by those similarly situated shippers which send their containers directly to Norfolk. In this era of inflation and dwindling fuel resources, shippers, carriers and the commerce of the United States are best served by competi-

[16] In this sense, *Intermodal Service to Portland, Oregon, supra,* and *Sea-Land Service, Inc. v. South Atlantic & Caribbean Line, Inc., supra,* still reflect Commission policy. The actual holdings of the minibridge cases are not precedent for overland cost absorptions intended to attract cargo tributary from *nearby ports* with adequate facilities for handling such cargo.

[17] Inland freight costs from the tobacco markets to Wilmington range between $120 and $360 and between $140 and $330 to Norfolk. *Shippers located in most of the 12 markets* can find at least one motor carrier with a Norfolk rate that is lower than another motor carrier's Wilmington rate and *vice versa*. However, rates from Goldsboro, Kinston and Smithfield, North Carolina will generally be lower to Wilmington than to Norfolk because these three markets are so much closer to Wilmington. Exhibit 10.

[18] The other three criteria are: historic cargo patterns, inland transportation rates, and shipper/cargo needs. The record indicates that containerized tobacco has moved through Wilmington in consistent quantities since 1972, that Wilmington is inland rate favorable to certain tobacco markets and that Wilmington can accommodate containerized tobacco shipments.

tion which increases productivity rather than competition based upon artificial shipper inducements.[19]

Whatever the inland rate differential between a particular tobacco market and Wilmington and between that market and Norfolk, it is considerably less than the $300 cost of transporting a container 236 miles from Wilmington to Norfolk.[20] Under these circumstances, Dart's payment of the full $300 to attract the business of shippers who stand to save only some small fraction of that amount is an unfair competitive device. This unfairness is aggravated by the fact that Dart's tariff applies to all containerized tobacco tendered at Wilmington, regardless of its point of origin.

The record fails to show why it is necessary for Dart to compete for unmanufactured tobacco in this manner.[21] Although Dart's intermodal service from Wilmington may fail to achieve commercial acceptance, it is also possible that containerized tobacco is so cost sensitive that the prospect of saving $40 or $50 on inland transportation will cause the diversion of all Wilmington's present tobacco business—a full 10% of that port's export cargo. The *CONASA* standards do not require that a port actually suffer a substantial loss of cargo before remedial action may be taken. The clear possibility of substantial harm is sufficient. Such a possibility exists when a substantial quantity of cargo is subject to an unfair diversionary practice. The export tobacco subject to Dart's Tariff No. 28 represents a substantial quantity of Wilmington's cargo.

Diversion of naturally tributary cargo cannot be justified simply because a carrier makes a business decision not to compete head on with carriers which serve a particular port by direct vessel call. In the present case, Dart contended that its overland service from Wilmington was justified because the containerized tobacco Seatrain carried from Wilmington in 1977 could be transported by Dart at considerably less expense by using a motor carrier rather than a feeder barge or direct containership call. This "single commodity" analysis only emphasizes the unfairness of Tariff No. 28 to those carriers which do invest in all-water service to Wilmington. A diverting carrier must demonstrate more than the attractiveness of certain cargoes at effectively lower ocean rates. Dart has not proven that the cost, operational and competitive characteristics of serving Wilmington make regular containership service to that port inherently unreasonable.

Accordingly, the Commission concludes that Dart's FMC Tariff No. 28 is unduly preferential and unjustly discriminatory within the meaning of sections 16 and 17 of the Shipping Act, 1916.

THEREFORE, IT IS ORDERED, That the complaint of the North Carolina State Ports Authority and International Longshoremen's Association is granted; and

IT IS FURTHER ORDERED, That Dart Containerline Company, Limited's, FMC Tariff No. 28 is cancelled; and

---

[19] A different situation would be presented if Dart were to compete for North Carolina tobacco by openly adjusting its *Norfolk* rates rather than publishing fictitious Wilmington rates. In any event, it would be most appropriate for Dart to publish a true point-to-point intermodal tariff from the major tobacco markets to Europe (*e.g.*, Danville, Virginia, to Hamburg, Germany).

[20] Excluding Goldsboro, the greatest geographical differential is 66 miles in favor of Wilmington.

[21] Dart apparently devised its inefficient "triangular route" because of restrictions in U.S. North Atlantic conference agreements to which Dart is a party. *See* February 14, 1978, "Petition for Declaratory Order" at 4, wherein Dart states that it is an independent operator at Wilmington, but a conference operator at Norfolk.

IT IS FURTHER ORDERED, That Dart Containerline Company, Limited, cease and desist from publishing tariffs or offering transportation between the Port of Wilmington, North Carolina and European destinations whereby containerized tobacco is carried overland at Dart's expense from Wilmington, North Carolina to vessels calling at Norfolk or other areas within the Port of Hampton Roads, Virginia; *Provided,* that any cargo which has been already accepted by Dart at Wilmington, but not yet delivered to its European destination, may be so transported.

(S) FRANCIS C. HURNEY
Secretary

APPENDIX A

MILEAGE

FROM	TO		
	Norfolk, VA	Wilmington, NC	Morehead City, NC
Danville, VA	191	202	223
Farmville, NC	131	112	93
Goldsboro, NC	160	89	92
Greenville, NC	123	117	80
Henderson, NC	137	158	163
Kinston, NC	151	85	67
Oxford, NC	145	163	171
Rocky Mount, NC	116	134	115
Smithfield, NC	161	110	113
Wendell, NC	153	132	130
Wilson, NC	134	117	118
Williamston, NC	114	148	79
And From			
Wilmington, NC	236		102

North Carolina State Ports Authority

Commissioner Karl E. Bakke, dissenting.

In my view, the Administrative Law Judge's analysis of the facts of record and applicable law is sound and should have been adopted.

The majority, in choosing to do otherwise, have sought to substitute an "ivory tower" regulatory theory for pragmatic commerical judgment. This rather surprises me, given the dispositon of my esteemed colleagues to joining consistent (and legitimate) criticism of the Department of Justice for precisely that presumption.

Significant, and fatal, inconsistences in the majority's reasoning are apparent:

- They observe that "A different situation would be presented if Dart were to compete for North Carolina tobacco by openly adjusting its *Norfolk* rates . . ."[i]t would be most appropriate for Dart to publish a true point-to-point intermodal tariff from the major tobacco markets to Europe . . ." [Report, p. 12, n. 19.] So much, at the majority's own hands, for the "naturally tributory cargo" theory that the majority seek to resurrect for purposes of this case.
- They imply that by underwriting the "backhaul" cost from Wilmington to Norfolk, Dart is prejudicing Seatrain's ability to compete for handling that cargo out of Wilmington. (Report, p. 12.) Yet, the commercial reality of the competition involved is ignored. If it costs Dart $300 per box to move the export tobacco cargo to Norfolk, Seatrain ought to be able to adjust its rate out of Wilmington downward by an amount sufficient to retain a competitive price advantage, which could even be less than the net cost basis of Dart's "backhaul" to Norfolk. Would the majority view such a rate adjustment by Seatrain as unjustly discriminatory as to Dart if the lower ocean freight cost to shippers were to divert tobacco from Norfolk to Wilmington?
- They imply that Dart is required to demonstrate that it is "necessary . . . to compete for unmanufactured tobacco in this manner." [Report, p. 12] Balder-

dash. If imagination or innovation in competitive mechanisms must be *necessary* before it will be permitted, the free enterprise system is dead.

• They cite "dwindling fuel resources" in condemning Dart's "backhaul" from Wilmington to Norfolk [Report, p. 12], yet observe that Dart has "not proven that the cost, operational and competitive characteristics of serving Wilmington make regular containership service to that port inherently unreasonable." [Report, p. 14.] The record clearly demonstrates the contrary: for the cargo here involved, which is the only issue before the Commission, it is manifest that the bunkerage consumption alone for direct pick-up at Wilmington rather than Norfolk would be prohibitive.

In short, I view the majority decision as a classic of rationalization, rather than of the ratiocination that one might reasonably expect of a quasi-judicial body.

Commissioner Leslie Kanuk, dissenting: I would adopt the Initial Decision and agree with the points raised in Commissioner Bakke's dissent.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-4

SOL SPITZ COMPANY, INC.

v.

AMERICAN PRESIDENT LINES, LTD.

NOTICE

June 28, 1979

Notice is given that no appeal has been filed to the May 15, 1979, order of dismissal in this proceeding and the time within which the Commission could determine to review that order has expired. No such determination has been made and, accordingly, the order of dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79–4

SOL SPITZ CO., INC.

v.

AMERICAN PRESIDENT LINES, LTD.

Finalized on June 28, 1979

Merel G. Nissenberg of Nissenberg & Nissenberg for Complainant.
J. Donald Kenny of Kenny & Finan for Respondent.

NOTICE OF (1) WITHDRAWAL OF COMPLAINT (2) DISCONTINUANCE OF PROCEEDING

In Docket No. 78–37, *Rene D. Lyon Co., Inc. v. American President Lines,* Initial Decision of Administrative Law Judge Charles E. Morgan, served April 16, 1979 (19 SRR 213) footnote 2, page 1 states, "Another proceeding in which the issues appear to be similar is No. 79–4, *Sol Spitz v. American President Lines, Ltd.*" A letter from counsel for the complainant, dated and postmarked San Diego, California May 10, 1979, received May 14, 1979, stated. *inter alia:*

Subsequent to the decision handed down in the case of *Rene D. Lyon, Inc., v. American President Lines, Ltd.* (Docket No. 78–37), the Complainant in Docket No. 79–4, *Sol Spitz Co., Inc.,* has decided to dismiss its Complaint and has agreed with Respondent American President Lines to terminate the said proceedings, with each side to bear its own costs.

Accordingly, I am enclosing herewith the original of a stipulation incorporating the above terms and signed for said parties by the attorneys therefor.

STIPULATION

IT IS HEREBY STIPULATED by and between SOL SPITZ CO., INC., and AMERICAN PRESIDENT LINES, LTD., by and through the parties' respective attorneys, that the Complaint in the matter of SOL SPITZ CO., INC. v. AMERICAN PRESIDENT LINES, LTD., Docket No. 79–4, be dismissed and the entire action terminated, each party to bear its own costs.

DATED: May 7, 1979.

[/s/ *Merel G. Nissenberg*]
MEREL G. NISSENBERG
Attorney for Complainant,
SOL SPITZ CO., INC.

DATED: May 8, 1979.

[/s/ *J. Donald Kenny*]
J. DONALD KENNY
Attorney for Respondent,
AMERICAN PRESIDENT LINES, LTD.

DISCUSSION

The complainant has decided to dismiss its complaint, i.e., to remove it, to take it away from the Commission without any further hearing. It is *found* and *concluded* that the complainant has this right. It is commendable that the Initial Decision of Judge Morgan in the *Lyon Co.* case, *supra,* aided and abetted counsel's decision to dismiss the complaint herein.

The stipulation above of counsel also helps clarify the termination of the entire action.

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

1. Dismissal of the complaint by the complainant is accepted and approved.
2. Termination of this proceeding is approved.

Wherefore, it is *ordered,* subject to review by the Commission as provided in the Commission's Rules of Practice and Procedure, that:

(A) The complaint in this proceeding be and hereby is dismissed in conformity with complainant's decision so to do.

(B) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

May 15, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 71–70

DELAWARE RIVER PORT AUTHORITY, ET AL.

v.

UNITED STATES LINES, INC., ET AL.

DOCKET NO. 73–13

DELAWARE RIVER PORT AUTHORITY, ET AL.

v.

SEATRAIN LINES, INC.

NOTICE

June 28, 1979

Notice is given that no appeal has been filed to the May 15, 1979, order of dismissal in this proceeding and the time within which the Commission could determine to review that order has expired. No such determination has been made and, accordingly, the order of dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 71–70

DELAWARE RIVER PORT AUTHORITY, ET AL.

v.

UNITED STATES LINES INC., ET AL.

No. 73–13

DELAWARE RIVER PORT AUTHORITY, ET AL.

v.

SEATRAIN LINES, INC.

(1) MOTION TO WITHDRAW COMPLAINTS GRANTED; PROCEEDINGS DISCONTINUED

Finalized on June 28, 1979

Complainants Delaware River Port Authority and six other complainants representing Philadelphia interests[1] have filed a motion seeking permission to withdraw their complaints in these two proceedings. Complainants assert that because of the long passage of time in connection with a companion Commission investigation, Docket No. 73–35, *Intermodal Service of Containers and Barges at the Port of Philadelphia, etc.*, which was discontinued by order of the Commission, served January 2, 1979, they are no longer in a position to proceed to a hearing on their complaints, witnesses having become unavailable, and evidence having become stale or unavailable as to the events described in the old complaints. They seek to withdraw their complaints without prejudice and have obtained the concurrence in this request from the only two respondents remaining in the cases, United States Lines, Inc. and Seatrain Lines, Inc. However, these two respondents disassociate themselves from the lengthy statement of reasons

[1] The other six complainants are in Docket No. 73–13 and except for the Greater Philadelphia Chamber of Commerce, are also complainants in Docket No. 71–70. The six are: Philadelphia Port Corporation; Port of Philadelphia Marine Terminal Association; Philadelphia Marine Trade Association; City of Philadelphia; ILA, Philadelphia District Council; and the Greater Philadelphia Chamber of Commerce.

which complainants advance in support of their motion, having advised complainants' counsel that while not objecting to withdrawal of the complaints without prejudice, respondents do not concur in the supporting statement.

If complainants wish to withdraw their complaints for whatever reasons, there is no authority of which I am aware which would require that they continue to litigate or that the case must continue under the circumstances which now exist. Accordingly, the motions to withdraw the complaints are granted and these proceedings are discontinued.

(S) NORMAN D. KLINE
Administrative Law Judge

May 15, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 79–20

C. S. GREENE AND COMPANY, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE

June 28, 1979

Notice is given that no exceptions were filed to the May 23, 1979 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, the initial decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79–20

C. S. GREENE AND COMPANY, INC.

v.

SEA-LAND SERVICE, INC.

Finalized on June 28, 1979

Reparation granted.

Glenn Weisenberger for C. S. Greene and Company, Inc.
J. M. Ridlon for Sea-Land Service, Inc.

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

C. S. Greene and Company, Inc. holder of freight forwarder license FMC No. 927, seeks the recovery of alleged overcharges in the amount of $6,373.29 from Sea-Land Service, Inc., a common carrier by water subject to the Shipping Act, 1916. Greene alleges that Sea-Land violated section 18(b) (3) of the Shipping Act by imposing an improper freight rate on two shipments of "carbon paper" which were carried by Sea-Land from New Orleans, Louisiana, to Rotterdam, Holland. Greene requests that claim be handled by the shortened procedure allowed under Subpart K of the Commission's Rules of Practice and Procedure (46 CFR 502.181 et seq.).[2] Sea-Land has consented to the shortened procedure.

The basis for Greene's complaint is that Sea-Land applied the rate for "carbon paper" to the cargo in question when in actuality the shipment was made up of electrostatic masters. It appears from the record here that the erroneous description was made by Greene who prepared the bill of lading. In any event, Sea-Land using the description on the bill of lading, applied the Paper N.O.S. rate since the Gulf European Freight Association Tariff No. 2 (FMC 2) had no specific commodity rate for carbon paper. The N.O.S. rate $159.52 W/M was applied and resulted in freight charges of $9,297.22. Greene paid the charges and then billed the A.B. Dick Company, Greene's principal, for the same amount. A.B. Dick, however, deducted $6,373.29 from Greene's bill on the ground 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).

[2] In brief Subpart K provided for the decision of a case on the complaint, affidavit, and memorandum of law by the complainant and the answer and memorandum of respondent. No oral hearings are contemplated.

Greene had misdescribed the shipment as carbon paper when it was in fact a shipment of "Electrostatic masters."

By letter dated August 28, 1978, Greene sought to recover the overcharges from Sea-Land. The letter assigned the Overcharge Claim number 6,187,051 and had attached to it as supporting documents:

1 Copy of Standard Overcharge Claim
1 Copy of Shipper's Export Declaration
1 Copy Shipper's Corrected Export Declaration
1 Copy your [Sea-Land's] B/L 031-717434 dated 4-08-77
1 Copy Shipper's Commercial Invoice/Packing List[3]

The letter closed by requesting Sea-Land to acknowledge the complaint and inform Greene of its disposition. The claim was submitted some 16 months after date of shipment. In a letter dated October 23, 1978, Sea-Land told Greene that:

> . . . it would appear that your claim is indeed in order. However, further review of the claim indicated that the claim for adjustment of freight charges was filed on August 29, 1978 as opposed to the sailing date of the vessel, April 7, 1977.

Sea-Land then noted that Original page 70 of the Gulf European Freight Association Tariff No. 2 prohibited Sea-Land from processing the claim. Sea-Land then "respectfully" declined any responsibility for payment of the claim. Greene then filed this complaint.

On the basis of the foregoing Greene alleges in addition to the already noted 18(b) (3) violation, that Ru' 28 violates section 17 of the Shipping Act because it provides for an unjust and unreasonable practice in the adjustment of claims. The fact that the Association itself is not a party aside, the Commission has considered this so-called six-month rule on several past occasions and has refused to *find it in violation of section 17. See e.g., Time Limit on Overcharge Claims,* 10 F.M.C. 1 (1966); *Proposed Rule–Time Limit on Filing Overcharge Claims,* 12 F.M.C. 298 (1969). As for the alleged violation of section 18(b) (3), Sea-Land "neither admits or denies" that it has committed a violation. Sea-Land does admit, however, that the claim is accurate with appropriate mathematical corrections.[4]

The record before me indicates that the commodity actually carried by Sea-Land was electrostatic masters and that the rate which should have been applied was that found on 9th Rev. Page 98, Gulf European Freight Association Tariff No. 2 for "electrostatic paper in rolls, etc." I therefore find that Sea-Land has violated section 18(b) (3) of the Shipping Act.[5]

Although Greene described the shipment as carbon paper on the bill of lading, A.B. Dick, the shipper described shipment as electrostatic masters on its own Shipper's Invoice and Packing List. Additionally, the record contains a specification sheet put out by A.B. Dick which demonstrates that the term electrostatic masters as used by that company means the same thing as "electrostatic copy paper in rolls, etc." as set out in the Association tariff. Finally, there is in the

---

[3] The letter and supporting documents were attached to the complaint as exhibits.

[4] The correct rate for "electrostatic masters" [i.e. electrostatic copy paper, in sheets or rolls, in cartons, on pallets, in house-to-house containers, minimum 18 tons per container] was $81.75. A.B. Dick erroneously applied a rate of $80.75. Using the $81.75 rate (the correct rate) the overcharge was $6,337.29.

[5] A finding of a violation is a necessary prerequisite to an award of reparation under section 22, even where as here the respondent was justified in relying on the description of the bill of lading.

record an affidavit by Edward Pudlo, a Senior Traffic Specialist for A.B. Dick which affirms that the shipment in question consisted of electrostatic masters. Thus, the complainant has shown by a preponderance of the evidence that the commodity shipped was electrostatic masters.

Accordingly, Sea-Land Service, Inc., is ordered to pay, as reparation, to C. S. Greene and Company, Inc., the sum of $6,337.29.

Upon notice from complainant that payment has been received the case will be dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

WASHINGTON, D.C.
May 18, 1979

☆ U.S. GOVERNMENT PRINTING OFFICE: 1981—322—571