FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 653(I)

J. T. BAKER CHEMICAL COMPANY

v.

YAMASHITA-SHINNIHON LINE

REPORT AND ORDER

March 3, 1980

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

This proceeding was instituted by complaint filed February 23, 1979, by J.T. Baker Chemical Company[1] seeking reparation from Yamashita-Shinnihon Line for an alleged overcharge in the amount of $609.63 on a shipment of lead dioxide, transported from Houston, Texas to Yokohama, Japan. The parties agreed to the Commission's informal procedure for resolution of the complaint.[2]

Settlement Officer Deana E. Rose served an Initial Decision on December 6, 1979, awarding Complainant reparation in the amount requested without interest. The proceeding is now before the Commission upon its determination to review the Initial Decision.

The issue in this proceeding is which of two of Respondent's tariff classifications should apply to the commodity shipped. Respondent assessed freight charges under its "Metallic Oxides, . . . N.O.S. Label Cargo" classification. Complainant, arguing that lead dioxide and lead oxide are synonymous, sought application of Respondent's lower rated "Lead Oxide, N.O.S." classification. The Settlement Officer accepted Complainant's argument and granted reparation. The Settlement Officer based her conclusions upon the principle that where two tariff classifications are applicable and one is more specifically descriptive than the other, the more specific will be applied.

[1] Traffic Bureau Service, Inc., represented J.T. Baker Chemical Company in this proceeding.

[2] 46 C.F.R. § 502.301 *et seq.*

While the Settlement Officer applied the correct standard, the Commission disagrees with the result reached. The Commission finds that the tariff classification applied by Respondent is the more specific.

It is undisputed that the commodity shipped was lead dioxide. The *Condensed Chemical Dictionary* reveals that lead dioxide is synonymous with lead oxide, brown and that both are yellow label.[3] However, that dictionary also reveals that there are four other types of lead oxide, *viz:* lead oxide, black; lead oxide, hydrated; lead oxide, red; and lead oxide, yellow, none of which is lead dioxide or yellow label cargo. The "Lead Oxide, N.O.S." rate would apply to any of these types of lead oxides without regard to labelling status. The "Metallic Oxides, . . . N.O.S. Label Cargo" rate includes lead dioxide and, *more specifically* than the "Lead Oxide, N.O.S." tariff rate, expressly applies to label cargo.

THEREFORE, IT IS ORDERED, That the Initial Decision served December 6, 1979, is reversed; and

IT IS FURTHER ORDERED, That the complaint of J.T. Baker Chemical Company is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

[3] Yellow label cargo is cargo which presents a dangerous fire risk requiring special handling and stowage and, therefore, ordinarily is assessed a higher shipping rate than nonlabel cargo. See the requirements imposed for the carriage of hazardous cargo by ocean vessels in the Department of Transportation's Rules and Regulations (49 C.F.R. § 176.1 *et seq.*).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 690

APPLICATION OF MAERSK LINE AGENCY FOR THE BENEFIT OF LIBERTY GOLD FRUIT COMPANY

NOTICE OF ADOPTION OF INITIAL DECISION

March 12, 1980

Notice is given that upon completion of review, the Commission has determined to adopt the initial decision in this proceeding served January 4, 1980.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 690

APPLICATION OF MAERSK LINE AGENCY FOR THE BENEFIT OF LIBERTY GOLD FRUIT COMPANY

Adopted March 12, 1980

Application for permission to refund a portion of freight charges in the amount of $3,455.91 granted.

Applicant conference, of which Maersk Line is a member, found to have published a tariff page containing an error of a clerical or administrative nature when the conference unintentionally deleted a weight symbol next to the rate on onions. This mistake caused an increase in frieght cost to the shipper and is the type of error which qualifies for relief under the remedial provisions of section 18(b)(3) of the Shipping Act, 1916.

Bryce J. Herbst, for applicant Maersk Line.
Harold R. Rollins, for applicant Pacific/Straits Conference.

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

This is an application filed November 13, 1979, by Maersk Line Agency and by the Pacific/Straits Conference of which Maersk Line, the Agency's principal, is a member.[2] Applicants seek permission to refund a portion of freight charges in the amount of $3,455.91, in connection with a shipment of fresh onions in bags which were carried on the vessel *ARILD MAERSK* sailing out of Oakland, California, on September 8, 1979, bound for Singapore. The applicants state that the Conference unintentionally deleted a "WT" symbol next to the rate on onions when it republished its tariff on January 1, 1979, with the result that the rate on fresh onions moving in ventilated stowage became subject to a weight or measurement basis, in effect, a rate increase. Furthermore, this error continued in the tariff when all rates were subjected to a general rate increase on April 1, 1979, and was not noticed until after the first

[1] This decision will become the decision of the Commision in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. §502.227).

[2] The application, as originally filed, contained only the name of Maersk Line Agency, the Pacific/Straits Conference having neglected to complete the portion of the form which provides for conference participation. I contacted Mr. Harold R. Rollins, the Conference Chairman, who had furnished an affidavit in support of Maersk, to advise him of this oversight. Mr. Rollins furnished his notarized signature to the form, thereby adding the Conference as a party. *See* letter from Mr. Rollins to me, dated December 20, 1979.

shipment of onions occurred in September. When the shipper, Liberty Gold Fruit Company, Inc., was billed at the rate calculated on a higher measurement rather than weight basis, the shipper notified Maersk of the apparent tariff error. Maersk subsequently arranged to have the Conference tariff corrected to restore the "WT" symbol and filed this application to relieve the shipper of the additional freight which the shipper paid because of the mistake.

The application was filed under the remedial provisions of section 18(b)(3) of the Shipping Act, 1916 (the Act), as amended by P.L. 90-298, and in conformance with the governing Commission regulation, Rule 92(a), 46 C.F.R. § 502.92(a). It is supported by a number of documents confirming the sworn statement of facts contained in the application itself, such a letter from the shipper, the bill of lading, tariff pages, and an affidavit from Mr. Harold R. Rollins, Chairman of the Pacific/Straits Conference. This evidence reveals the following facts.

FACTUAL BACKGROUND

On January 1, 1979, the Conference republished its tariff to conform to the requirements of the Commission's General Order 13, as amended. In addition the Conference published new commodity descriptions and item numbers in its tariff. The new tariff (Pacific Straits Conference Local and Overland Freight Tariff No. 12, FMC-8) changed the commodity description and item number for onions moving in ventilated stowage from that which had been published in the previous tariff (No. 11, FMC-7). In the previous tariff the Conference had published a rate for "onions (ventilated stowage)" in the amount of $174, calculated on a "WT" (weight) basis. *See* Tariff No. 11, 7th rev. page 120. In the new tariff, effective January 1, 1979, the commodity was redescribed as "VEGETABLES, Fresh, viz: Onions, except Onion Sets in Ventilated Stowage." In publishing this new tariff, however, the Conference forgot to insert the "WT" symbol in the column marked "Rate Basis." *See* Tariff No. 12, original page 144. As provided in the tariff, this omission meant that the commodity would be rated on either a weight or measurement basis, whichever produced the greater revenue. Since the shipment in question would produce greater revenue if rated on the measurement basis, the omission of the symbol resulted in a rate increase, albeit unintended.

Since the movement of onions is seasonal, the Conference lines carried no onions under this item at all apparently until September 1979. Consequently, no one noticed the error in publication. On April 1, 1979, the rate on the item was increased pursuant to a general rate increase effectuated by the Conference on appropriate statutory notice. The new rate became $186 but since no one detected the fact that the "WT" symbol had been unintentionally deleted, the tariff continued to publish the new rate on a weight or measurement basis.

Finally, Liberty Gold Fruit Company, Inc., a shipper of onions, booked a shipment of onions weighing 19.47 kilo tons and measuring 36.125 cubic meters for the *ARILD MAERSK* which sailed out of Oakland on September 8, 1979. Liberty Gold had checked to determine the rate and was informed

that the rate would be $186 *weight.*[3] However, to its surprise, Liberty Gold was billed on the measurement basis. This caused an unexpected increase in freight costs which was almost double the cost had the shipment been rated on the weight basis ($7,495.94 compared to $4,040.03).[4]

In its request to Maersk for a refund of the excess freight, Liberty Gold pointed out that the rate on onions had always been calculated on a weight basis and onions were so rated by every Conference in which Liberty Gold shipped. Maersk and the Conference agreed that an error had occurred and took steps to correct it. Thus, the Conference telexed a correction to the Commission on October 10, 1979, restoring the weight basis to the tariff item and followed the telex with a permanent tariff page. *See* Tariff No. 12, 3rd revised page 144. Thereafter, this application was filed.

DISCUSSION AND CONCLUSIONS

The special-docket provisions of section 18(b)(3) of the Act are equitable and remedial. They were enacted by Congress in P.L. 90-298, in order to relieve shippers of financial harm which would fall on them because of carrier error in tariff publishing and filing. See, e.g., *Westinghouse Trading Co. v. American Export Lines, Inc.,* 20 F.M.C. 874, 878 (1978); *Farr Co. v. Seatrain Lines,* 20 F.M.C. 411, 414 (1978); *D. F. Young, Inc. v. Cie. Nationale Algerienne de Navigation,* 18 SRR 1645 (1979). The type of error which occurred in this case, namely, the error in the Conference's republished tariff, in which a critical symbol had been deleted unintentionally with resulting increase in cost to shippers, was one of the types of error which the law was enacted to remedy. See *Farr Co. v. Seatrain Lines, supra,* 20 F.M.C. at 415; House Report No. 920, 90th Cong., 1st Sess., at 4; Senate Report No. 1078, 90th Cong., 2d Sess., at 4.

I find, therefore, that there was an error in the Conference's tariff of a clerical or administrative nature within the meaning of the remedial provisions of section 18(b)(3) of the Act with resulting financial harm falling on the shipper, Liberty Gold. It now remains to determine whether the other requirements of the law are satisfied regarding prevention of discrimination among shippers if the application is granted, the filing of the new, corrective tariff, and the time of filing the application. I find that these conditions have also been met. Thus:

1. The application states that there were no other shipments of onions carried by Maersk during the relevant period of time with which the application deals. According to Conference statistics and other evidence, the movement of onions is seasonal and no shipments of onions were carried by any Conference line from January 1, 1979, at least through the month of June. If, as Liberty Gold stated, onions had traditionally been rated under the lower

[3] See letter dated October 19, 1979, from Mr. Franklin M. Bathat, Vice President of Liberty Gold, to Mr. Ed Murphy of the Maersk Lines Agency, attached to the application.

[4] The calculation of freight charges under the higher measurement rate and lower weight rate is easily done. The rated bill of lading shows that a shipment measuring 36.125 cubic meters rated at $186 per cubic meter, plus a terminal receiving charge of $6.50 and bunker adjustment of $15 per cubic meter, total $7,495.94. When recalculated by using 19.47 kilo tons applied against $186, $6.50, and $15 per ton, the freight totals $4,040.03.

weight basis, one would have expected that any other shipper of onions would have complained had such other shipper in fact existed. In any event, the tariff notice which the Conference will be required to publish will eliminate discrimination among shippers because it will ensure that any shipper who might have shipped after June besides Liberty Gold will be afforded the same rate on the weight basis.

2. The new, corrective tariff which reinstated the weight basis symbol was filed effective October 10, 1979, as previously noted. This date is prior to the time of filing the application (November 13, 1979) and therefore complies with the requirement set forth in the second proviso to section 18(b)(3), as amended by P.L. 90-298. This new tariff, furthermore, conforms in all respects to the rate which the shipper had been quoted and expected to be charged, namely, $186 WT. It therefore complies with the conformity doctrine enunciated by the Commission in *Munoz y Cabrero v. Sea-Land Service, Inc.,* 20 F.M.C. 152 (1977), and the many similar cases cited in Special Docket No. 649, *Application of Maersk Line Agency for the Benefit of Nomura (America) Corporation,* (I.D. August 21, 1979, at 7-9; F.M.C., November 20, 1979). 19 SRR 689 (1979); 19 SRR 1058 (1979).

3. The application was received by the Commission's Secretary on November 13, 1979.[5] The date of shipment, which, under Rule 92(a) is defined as date of sailing, was September 8, 1979. This is well within the 180-day period between date of shipment and date of filing of the application, required by law.

It is therefore ordered that the applicaiton for permission to refund the sum of $3,455.91, for the benefit of the shipper Liberty Gold Fruit Company, Inc., in connection with the shipment of onions discussed above is granted provided that applicants comply with the following conditions:

1. Applicants shall publish the following notice in an appropriate place in their tariff:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 690, that effective April 1, 1979, and continuing through October 9, 1979, inclusive, the local and overland contract rate on VEGETABLES, Fresh, viz: Onions, except Onion Sets in Ventilated Stowage, Item No. 135 4500 30, is $186 WT. This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the goods described which may have been shipped during the specified period of time.

2. Refund of the portion of freight charge in the amount specified above shall be effectuated within 30 days of date of service of the Commission's notice rendering this initial decision administratively final and applicants shall within 5 days thereafter notify the Commission of the date and manner of effectuating the refund.

(S) NORMAN D. KLINE
Administrative Law Judge

WASHINGTON, D.C.
December 27, 1979

[5] The application, as originally filed, did not show when the application was mailed. It does bear a stamp showing receipt by the Commission's Secretary on November 13, 1979. Rule 92(a)(3) permits applicants to use date of mailing as date of filing or, alternatively, the date when the application is received by the Commission's Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-15

WEST GULF MARITIME ASSOCIATION

v.

PORT OF HOUSTON AUTHORITY, ET AL.

REJECTION OF PETITION

March 12, 1980

Counsel for complainant in this proceeding has filed a petition for reconsideration of the Commission's January 28, 1980 Order Adopting Initial Decision.

The Commission's recent amendment to Rule 261 of the Rules of Practice states that a petition for reconsideration will be subject to summary rejection unless it (1) specifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order; (2) identifies a substantive error in material fact contained in the decision or order; or (3) addresses a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party.

Complainant's petition satisfies none of the three requirements. It merely alleges the Commission erred in reaching its conclusions. Accordingly, the petition for reconsideration is summarily rejected pursuant to Rule 261.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

*Commissioner Kanuk is opposed to summary rejection of the petition, but would deny it on the merits.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-102

SEA-LAND SERVICE, INC. PROPOSED TWENTY-FIVE PERCENT GENERAL RATE INCREASES IN THE PUERTO RICO/VIRGIN ISLANDS TRADES

ORDER APPROVING OFFER OF SETTLEMENT

March 17, 1980

On March 3, 1980, Administrative Law Judge Seymour Glanzer, issued a Decision and Order in this proceeding approving an offer of settlement tendered by Respondent Sea-Land Service, Inc., and agreed to by all other parties to the proceeding except Puerto Rican Manufacturers Association.* Also before the Commission at this time is a Joint Motion For Expedited Consideration of Settlement and Issuance of Order filed by Sea-Land Service, Inc., the Government of the Virgin Islands, Military Sealift Command and the Commission's Bureau of Hearing Counsel.

In the interest of expediting final disposition of this matter, the Commission on March 6, 1980 served a Notice on all parties to the proceeding requesting that they indicate by March 11, 1980 whether they intended to file exceptions to the settlement offer as approved by the Presiding Officer. The Notice also provided that failure to respond would be considered a waiver of the right to except to the Order. No notice of intent to file exceptions has been received by the Commission.

After examination of the entire record of this proceeding, the Commission has determined that the proposed settlement is in the public interest and that good cause exists warranting its approval, subject to the following discussion and clarification.

The Presiding Officer's Order contains a provision which precludes the Commission from suspending or investigating the individual tariff item rate changes made pursuant to the settlement agreement. The Commission accepts this provision to the extent it relates to the general revenue needs of the carrier but does not construe this provision as otherwise precluding suspension and/or investigation of such individual rate changes under section 16 First of the

*Puerto Rico Manufacturers Association did not endorse or approve the settlement offer but did not object or file a notice of intent to file exceptions to it.

Shipping Act, 1916 (46 U.S.C. §815), section 18(a) of the Shipping Act, 1916 (46 U.S.C. §817), and section 3(a) of the Intercoastal Shipping Act, 1916 as amended (46 U.S.C. §845). Similarly, the Commission construes the settlement as not affecting its authority under section 18(a) of the Shipping Act, 1916, or section 4 of the Intercoastal Shipping Act, as amended (46 U.S.C. §845a) to prescribe just and reasonable rates.

THEREFORE, IT IS ORDERED, That the Order of Administrative Law Judge Seymour Glanzer, issued March 3, 1980, is adopted by the Commission as clarified herein, and,

IT IS FURTHER ORDERED, That the suspension portion of the Order of Investigation is dissolved upon the filing of new individual rate items in accordance with the offer of settlement, and,

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. is permitted to raise its individual rates in the Puerto Rico trade tariffs (FMC-F Nos. 34, 36, 37, 40, 41 and 53) to a point not to exceed 21 percent over the December 31, 1979 base rates, through June 30, 1980, without further requirement for justifying those rates in terms of its general revenue needs, and, that such increases shall not be subject to suspension or investigation on the issue of whether they are, for general revenue purposes, unreasonably or unjustly high; provided however, that in approving the settlement, the Commission in all other respects retains the right to investigate and suspend any such increase of 21 percent or less on any individual rate item under section 16 First, 18(a) of the Shipping Act, 1916, and section 3(a) of the Intercoastal Shipping Act, 1933 and,

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. is granted Special Permission to reduce its base rates (as of January 1, 1980) in the Virgin Islands Tariff (FMC-F No. 27) on 5 days notice within 3 work days of the issuance of this Order to a level not to exceed 21 percent over the base rates which were in effect in December 31, 1979, and,

IT IS FURTHER ORDERED, That the motion to terminate this proceeding is granted, and,

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-102

SEA-LAND SERVICE, INC. PROPOSED TWENTY-FIVE PERCENT GENERAL RATE INCREASES IN THE U.S. MAINLAND-PUERTO RICO/VIRGIN ISLANDS TRADES

OFFER OF SETTLEMENT APPROVED; UPON FINAL APPROVAL OF THIS ORDER, SEA-LAND'S 25 PERCENT GENERAL RATE INCREASE SHALL, IN EFFECT, BE REDUCED TO 21 PERCENT; PROCEEDING TERMINATED; INVESTIGATION DISCONTINUED

Approved March 17, 1980

Pursuant to agreements reached at the hearing held on February 25, 1980, on February 26, 1980, Sea-Land Service, Inc., respondent, submitted a written offer of settlement for the purpose of terminating the Commission's investigation of general rate increases in Sea-Land's trades between United States East and Gulf Coast Ports/Puerto Rico and Virgin Islands Ports. Thereafter, on February 26, 1980, and February 27, 1980, the other parties to the proceeding who appeared at the hearing submitted written responses to Sea-Land's offer urging that it be approved. Together with Sea-Land, those parties also filed a joint motion requesting expedited consideration of the offer and issuance of an order of approval.

One party to the proceeding, Puerto Rico Manufacturing Association (PRMA), an intervenor, does not endorse the settlement, but it is fair to say that neither does it oppose the settlement.[1]

[1] PRMA was unable to appear at the hearing due to previous engagements, but it was kept informed of developments as they occurred, or as soon thereafter as possible, at the informal conferences and at the hearing by Hearing Counsel, in accordance with PRMA's request. PRMA's first reaction to the offer was to oppose it and PRMA so advised Hearing Counsel by telex on February 26, 1980. However, PRMA's telex proffered no reasons for its position. During subsequent telephone conversations with me, PRMA explained why it could not endorse the settlement, but, upon further reflection PRMA recognized that its reasons did not address substantive issues in the proceeding. Thereafter, on February 29, 1980, PRMA sent Hearing Counsel a substitute telex explicating why PRMA could not endorse the offer. The substitute telex contains no words of opposition. Rather, it acknowledges that PRMA's concerns are general to all rate cases but are not legally related to the issues in this docket. PRMA advises that it will deal with those important general concerns in a separate letter to the Commission. Certainly, it is implicit, if not explicit, that PRMA no longer wishes to be counted as opposed to the offer of settlement. PRMA's second telex appears as Appendix C.

In my judgment, the offer of settlement should be accepted, the proceeding should be discontinued and the outstanding suspension order should be dissolved.

I: Background and the Offer of Settlement

There is no real dispute concerning the facts.

A: *The Tariff Filing*

On November 1, 1979, Sea-Land filed a 25 percent general rate increase in various trades between United States East and Gulf Coast Ports/Puerto Rico and Virgin Islands Ports to become effective on January 1, 1980.

B: *The Orders*

1. By Order of Investigation and Suspension (OIS) served December 26, 1979, the Commission instituted an expedited investigation pursuant to sections 18(a) and 22 of the Shipping Act, 1916, as amended, 46 U.S.C. §§817(a) and 821, and sections 3 and 4 of the Intercoastal Shipping Act, 1933, as amended, 46 U.S.C. §§845 and 845(a), into the justness and reasonableness of the general rate increases in the Puerto Rico Trades, but not the Virgin Islands Trade.[2]

The OIS also suspended those portions of the general rate increases placed under investigation which exceeded 15 percent and directed that the use thereof be deferred to and including June 28, 1980, unless otherwise ordered by the Commission.

Defining the ultimate issue to be determined in the proceeding to be "whether or not the [general rate increase] results in an excessive rate-of-return," the OIS limited the investigation to the following specified issues bearing on the ultimate issue:

1. Is the methodology used by respondent in making cargo volume projections appropriate?
2. Are respondent's cargo volume projections adequate?
3. Has respondent properly calculated Account 940: Management Fees and Commissions-Affiliates?

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[2] Placed under investigation were the following Sea-Land tariffs:

(1) FMC-F No. 34, Supplement No. 15 (between U.S. Atlantic ports and ports in Puerto Rico)
(2) FMC-F No. 36, Supplement No. 12 (from U.S. South Atlantic ports to ports in Puerto Rico)
(3) FMC-F No. 37, Supplement No. 12 (from ports in Puerto Rico to U.S. South Atlantic ports)
(4) FMC-F No. 40, Supplement No. 11 (from U.S. Gulf ports to ports in Puerto Rico)
(5) FMC-F No. 41, Supplement No. 11 (from ports in Puerto Rico to U.S. Gulf ports)
(6) FMC-F No. 53, specified revised pages 25 through 52, inclusive, and original page 46-A (between San Juan, Puerto Rico, and Canadian ports with interchange at New Jersey—Intermodal Tariff)

Not included in the investigation was the general rate increase shown in FMC-F No. 27, Supplement 12 (between United States Atlantic and Gulf Ports and Virgin Islands Ports Via Transshipment Service).

4. Is respondent's rate of return on rate base in the North Atlantic, South Atlantic, Gulf/Puerto Rico Trades (excluding Virgin Islands) excessive?[3]

As pertinent, the OIS further ordered that Sea-Land be named the respondent, that Military Sealift Command (MSC) be named a protestant and that, pursuant to Rule 42 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.42, that Hearing Counsel be a party in the proceeding.

2. By Order on Reconsideration of Order of Investigation and Suspension, served February 13, 1980, the Commission amended the OIS. Among other things, as pertinent, the Commission placed the Virgin Islands Trade Tariff matter under investigation and eliminated the parenthetical phrase (excluding Virgin Islands) from specified Issue No. 4. Because the rates had already gone into effect, there could be no suspension.

C: *The Parties*

At a prehearing conference held January 22, 1980, Administrative Law Judge William Beasley Harris granted leave to intervene to the Government of the Virgin Islands (GVI)[4] and PRMA. As intervenors, they join Sea-Land, respondent, MSC, protestant, and Hearing Counsel as parties to the proceeding.

D: *The Offer of Settlement*

By Notice For Parties, etc., served February 20, 1980, Judge Harris directed the parties to accelerate their announced efforts to stipulate facts bearing on the proposed issues and to file proposed findings of fact on or before February 29, 1980.[5] Consistent with those instructions, the parties who were geographically proximate to the Commission's offices sought out Judge Harris' advice and assistance in meeting the terms of his order. Because Judge Harris was not then available and was expected to be away from the office for several days, Chief Administrative Law Judge John E. Cograve requested that I act in Judge Harris' behalf.[6]

During an informal conference commenced on February 21, 1980, and concluded on February 22, 1980, it became apparent that the scheduling of an

[3] During the course of the proceeding some suggestions were made to the effect that Issue No. 4 allowed the introduction of evidence concerning all factors bearing on rate base. I ruled to the contrary. In my judgment, Issue No. 4 is merely a restatement of the ultimate issue to be decided in the proceeding. "The statutory test of lawfulness [of a general rate increase] is whether the increased rates are just and reasonable; see 46 U.S.C. 817(a) and 845." *Sea-Land Service, Inc. (Sea-Land) Proposed Five Percent General Rate Increase in Six Puerto Rico and Virgin Islands Trades,* FMC Docket No. 79 47, Initial Decision served August 16, 1979, 19 SRR 669, Notice of administrative finality served September 19, 1979. I construe the proceeding as structured by the Commission's words of limitation to mean that the only alterations to Sea-Land's direct case presentation of rate of return on rate base projections to be allowed are those which may flow from the resolution of the first three numbered issues. Any other construction of Issue No. 4 would make the words of limitation meaningless.

[4] It may be assumed that because GVI had already become a party to this proceeding by Judge Harris' order, it was not necessary for the Commission, in its Order on Reconsideration, to name GVI as a protestant.

[5] The date was critical. Under section 3(b) of the Intercoastal Shipping Act, the hearing is required to be completed within 60 days from (and, including) the day on which the tariff rates would have gone (or did go) into effect. Here the tariff rates under investigation went into effect on January 1, 1980 (and the suspended portion would have become effective that day). Starting the count on January 1, 1980, makes February 29, 1980, the 60th day.

[6] Time constraints surrounding the Offer of Settlement caused a formal reassignment of the proceeding to me on February 28, 1980.

oral hearing was necessary. Present at the conference were Sea-Land, MSC and Hearing Counsel. They were given oral notice that a hearing would begin at 10:00 a.m. on Monday, February 25, 1980. GVI was orally notified by telephone. PRMA could not be reached by telephone and was notified telegraphically on February 22, 1980.

The parties who were present at the informal conference discussed the issues which would be addressed at the hearing. Sea-Land and Hearing Counsel had already filed their direct cases and both desired to supplement their cases, either by direct or rebuttal testimony. MSC wanted to proceed by way of cross examination only. It was during that conference that I made the ruling referred to in n. 3, *supra.*

I ruled that testimony relating to Sea-Land's rate of return on equity, replacement costs, and return on investment as computed by including interest payments as an expense item and by making an adjustment for the tax effects of those payments was immaterial to the issues delineated by the Commission and would not be received in evidence. Any other approach would have run counter to the Commission's statutory duty to explain the reasons underlying the need for the hearing and to designate the specific issues to be resolved.

The ruling significantly restricted the anticipated scope of the hearing as envisaged by the litigant conferees at the outset of the conference. Under its terms, each was required to forego particular desired areas of inquiry and proof. Each objected to that portion of the ruling adversely affecting a particular interest, but all agreed, nevertheless, to conduct further discussions within its framework. Thus, the offer of settlement and the replies filed by MSC, Hearing Counsel and GVI[7] subsume the validity of the ruling. However, I am preserving the right of any aggrieved party to seek leave to appeal should the offer of settlement ultimately fail to meet the Commission's approval.

The offer of settlement is essentially quite simple. It calls for a 21 percent general rate increase over the base rates which were in effect on December 31, 1979. All parties supporting the offer are agreed that under my ruling concerning the permissible scope of the hearing the 21 percent general rate increase would result in a rate of return on rate base after taxes within an area considered by the Commission's staff to be just and reasonable. The direct testimony of Thomas J. Stilling, a staff economist, concludes that Sea-Land should be permitted to earn in the range of 13.2 to 13.7 percent return on investment. A 21 percent general rate increase would result in a rate of return of 13.2 percent, at the low level of the range.[8]

[7] At the hearing GVI accepted the ruling on the same basis as the conferees.

[8] See Appendix A for calculations showing that a 21 percent general rate increase would result in a 13.2 percent rate of return. Moreover, Hearing Counsel notes that if certain corrected entries were permitted to be placed in evidence, a 21 percent general rate increase would result in a rate of return even lower than 13.2 percent. Hearing Counsel states:

> The Commission's staff also used an alternative approach to determine if a twenty-one percent general rate increase would be acceptable. This method used as a starting point the rate base and revenue figures that were not part of Sea-Land's direct case, but were the figures used by the Commission to compute the 19.48 percent projected rate of return in the Puerto Rico Trades in its Order of December 26, 1979. The figures used by the Commission differed from those figures in Sea-Land's direct case in that Sea-Land erroneously used net vessel operating expense as opposed to gross vessel operating expense in computing its working capital. The staff corrected the error before computing the rate of return Sea-Land had projected to earn with a twenty-five percent general rate increase and it was these figures which were later used in the Commission's Order. However, because of the ruling of the Presiding Officer that Sea-Land's direct case could only be amended by figures submitted in response to the first three issues, the Commission's staff utilized the second calculation as found in the Offer of Settlement

The remaining features of the offer of settlement deal with the mechanics of accomplishing the result. First, The Commission would need to dissolve the suspension portion of the OIS to permit Sea-Land to raise its individual rates in the Puerto Rican Trades to a point not to exceed 21 percent of the December 31, 1979, base rate. (Bunker fuel surcharges are not affected by this determination.) Second, Sea-Land would be permitted to file those necessary individual rate increases without any further requirement for justification. This would also mean that those rates would not be subject to suspension or investigation. The basis for this forbearance, of course, is that the record relied on in this proceeding shows that a 21 percent increase is just and reasonable.

Third, the Commission would grant Special Permission to Sea-Land to reduce its base rates as of January 1, 1980, in Tariff FMC–F No. 27 to a level not to exceed 21 percent over the base rates which were in effect on December 31, 1979. For practical reasons including manpower and equipment allocations and distribution lead time to avoid inadvertent mistakes the Special Permission should permit Sea-Land to file those reductions on five days notice. Sea-Land undertakes to file those reductions on five days notice within three working days of receipt of the final order approving the offer of settlement and granting the Special Permission provided that Sea-Land shall not be required to make such filing before March 10, 1980.

E: *The Record*

The record upon which the settlement was offered and agreed to by MSC, GVI and Hearing Counsel consists of the following:

1. The Direct Testimony of Nicholas J. Zito

   Appendix A (Historic Year)
   Appendix B (Projected Year)
2. Testimony of Roger A. Haas
3. Supplemental Appendix A (limited to Item No. 1.—Schedule VII—Adjustment to eliminate all FMC Account 940 expense not of an overhead nature)
4. Supplemental Appendix B (limited to Item No. 2—Schedule VII)[9]
5. Direct Testimony of John C. Coor, as amended.[10]
6. Direct Testimony of Thomas J. Stilling, as amended.[10]
7. Stipulation signed by all parties dealing with Issues no. 1 and 2.[11]

as its primary method for determining the effect of a twenty-one-percent general rate increase. As a secondary method, it used the corrected figures, computed the projected revenue and expense figures if Sea-Land were granted a twenty-one percent general rate increase, applied the effective tax rate and determined that the resulting rate of return was below the 13.2 percent rate of return the staff's economist had determined was reasonable.

[9] Hearing Counsel does not agree as to the accuracy of this Schedule but concedes that this lack of agreement will not affect the settlement. MSC does not agree that Supplemental Appendix B should be a part of the record, but MSC also recognizes that *it effects no significant change in the financial results.*

[10] Limited to exclude any testimony or data dealing with debt/equity ratio or interest.

[11] See Appendix B.

F: *Issues Nos. 1, 2 and 3*

Except as noted, all parties are agreed that, upon further analysis, the resolution of Issues Nos. 1, 2 and 3 would not significantly affect any of the calculations upon which the offer of settlement is based. Those parties agreed to the stipulation concerning Issues Nos. 1 and 2. New figures furnished by Sea-Land conerning Issue No. 3 decrease expenses by $79,043, a relatively small amount in terms of the overall rate base and income figures. This decrease would have only slight, if any, effect on the rate of return.

G: *Positions of the Parties*

While none of those parties is entirely satisfied with all of the rulings in this proceeding, all agree upon the result embodied in the offer of settlement. For example, Sea-Land maintains its position that the 25 percent general rate increase is just and reasonable, but it also recognizes that it should still make a profit after taxes on a 21 percent general rate increase.

GVI believes the evidence of record is sufficient to justify the offer of settlement and that the settlement itself is in the public interest. MSC also agrees that the record shows that an increase of 21 percent is just and reasonable. Hearing Counsel also considers the settlement to be in the public interest and in particular regard to Issues Nos. 1, 2 and 3 states as follows:

> . . . Therefore Hearing Counsel request [acceptance of] Sea-Land's offer of settlement, as a resolution of issues one, two and three would not affect the agreement of the parties with regard to issue four. It would be fruitless and costly for the parties to engage in litigation of issues that would have an insignificant effect on the ultimate rate of return which the parties have agreed Sea-Land may obtain. The public interest would not have benefitted by such an effort as the end result would not have significantly changed.

Finally, as noted earlier, the agreeing parties have joined in a motion for expedited consideration of approval of the settlement and issuance of an order of approval because all parties regard delay as a postponement of the benefits to be obtained under the settlement.

II: Discussion and Conclusion

The Commission has the authority to accept the proposed settlement in this proceeding. The Administrative Procedure Act, 5 U.S.C. § 554(c), directs the Commission to "give all interested parties opportunity for . . . the submission and consideration of . . . offers of settlement." The courts have approved the actions of other agencies which have permitted settlement of rate investigations. *Pennsylvania Gas and Water Co. v. Federal Power Commission,* 463 F.2d 1242 (D.C. Cir. 1972); *Cities of Lexington, etc., Kentucky v. Federal Power Commission,* 295 F.2d 109 (4th Cir. 1961). The Commission recently permitted parties to settle their differences in a rate investigation in *Foss Alaska Line, Inc. Proposed General Rate Increase Between Seattle, Washington and Points in Western Alaska,* 19 SRR 613 (1979), Notice of Administrative Finality served September 5, 1979. The settlement in this proceeding is

somewhat different than the settlement in the *Foss* case. In this case, irreconcilable differences remained but the cost of litigation of those issues would have been greater than the monetary amount involved. Therefore, the public interest was best served by settlement. In this case, all parties, except PRMA (to the extent noted), accept the reasonableness of the twenty-one percent general rate increase and, therefore, a difference of opinion on this issue does not exist. Thus, the record in this proceeding presents an even more compelling case for approval than the record in *Foss.*

A difference of opinion does exist on Issues Nos. 1, 2 and 3, although the public interest would not be served by the litigation of these issues.

While PRMA has not endorsed Sea-Land's offer of settlement it has not opposed it. Nevertheless, the Commission is able to approve an offer of settlement even though all parties do not agree to it. In *Pennsylvania Gas and Water Co. v. Federal Power Commission,* 463 F.2d 1242, 1248 (D.C. Cir. 1972), the Court noted that as long as the settlement was in the public interest an agency could approve it without unanimous consent. The offer of settlement is in the public interest which is the Commission's primary concern. The Commission's staff has determined that the settlement offer meets the guidelines for determining the acceptability of a rate increase as determined by the Commission's Order and my rulings in this proceeding, as well as by Commission precedent. PRMA has had an opportunity to participate in this proceeding but has not taken or was unable to take an active role, and has not set forth any substantive objections to the settlement for consideration. In *Pennsylvania Gas, supra,* at 1251, the Court found that the agency had met its responsibility to the party opposing the settlement as long as that party had ample opportunity to be heard, and its objections were considered.[12]

The Commission also has the authority to grant Sea-Land's request for special permission to roll back the rates in the Virgin Islands Trade without 30 days' notice as part of the settlement of this proceeding in lieu of requiring Sea-Land to file a special permission application pursuant to 46 C.F.R. §531.18. The Commission's rules require a carrier filing a special permission application to serve copies of the application upon competing carriers. 46 C.F.R. §531.18(e)(2). The reason for this provision is to put those competing carriers on notice. Competitors of Sea-Land were on notice of this proceeding and were on notice that it could result in a roll back of Sea-Land's rates in the Virgin Islands Trade. Therefore, to require Sea-Land to file a separate special permission application to effectuate notice is not necessary and would only lengthen the amount of time which would pass before a roll back could become effective.

Moreover, settlement of rate proceedings is consistent with the policy of the Administrative Conference of the United States, which by its Assembly action adopted June 7-8, 1978, recommended:[13]

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[12] In *Pennsylvania Gas,* the court upheld the right of a regulatory agency to approve a proposed settlement of a rate proceeding with less than unanimous consent (including opposition of the agency's staff). Reasoning further, the court stated that the particular agency concerned "*cannot refuse to consider* a proposal which appears, on its face at least, consistent with [its] duty [of protecting the ultimate consumer]." 463 F.2d at 1247-1252.

[13] 1978 Report, Administrative Conference of the United States, at 36.

Agencies charged with ratemaking responsibility should encourage the parties to controverted rate cases to settle them by agreement.

With the foregoing principles in mind, I find that the offer of settlement is in the public interest and merits approval.[14]

III: ORDER

It is ordered that:

1. Upon final approval of this order, the offer of settlement be approved.
2. Upon final approval of this order, the suspension portion of the Order of Investigation and Suspension be dissolved.
3. Upon final approval of this order, Sea-Land be permitted to raise its individual rates in the Puerto Rico Trade Tariffs to a point not to exceed 21 percent of the December 31, 1979, base rates through June 30, 1980, without any further requirement for justifying those rates. Those increases shall not be subject to suspension or investigation.
4. Upon final approval of this order, Sea-Land be granted Special Permission to reduce its base rates (as of January 1, 1980) in the Virgin Islands Trades Tariff to a level not to exceed 21 percent over the base rates which were in effect on December 31, 1979. Sea-Land shall file those reductions on 5 days' notice within 3 working days of the issuance of a final order approving its offer of settlement and granting Special Permission, provided that Sea-Land shall not be required to make such filing prior to March 10, 1980.
5. Upon final approval of this order, the motion to terminate this proceeding is granted.
6. Upon final approval of this order, the proceeding is discontinued.

(S) SEYMOUR GLANZER
Administrative Law Judge

March 3, 1980

[14] No Notice of Intent to make an environmental assessment in this proceeding was issued by the Commission. Thus, I find that there are no environmental issues present in this proceeding.

APPENDIX A

Calculation Showing that a 21 Percent Increase Will Result in a Rate of Return on Rate Base Not in Excess of 13.2 Percent

1. Sea-Land Rate Base is $9,039,251 (Zito App. B, Ex. A)
2. A 25% GRI would result in Gross Revenues of $21,481, 428 (Zito App. B, Ex. B)
3. With no increase (i.e. at the December 31, rate levels) Sea-Land would have received Gross Revenues of $17,185,142 (21,481,428/1.25)
4. The 25% General Rate Increase (GRI) results in added revenues of $4,296,286 (Line 2 minus Line 3)
5. A 1% increase of revenue = $171,851 (4,296,286/25)
6. A 21% increase of revenue would result in added revenue of $3,608,871 ($171,851 × 21)
7. A 21% GRI results in Gross Revenue of $20,794,013
8. A 21% GRI is needed to yield a 13.2 percent rate of return on rate base (3,608,871/20,794,013=21%)

APPENDIX B

Before the Federal Maritime Commission

DOCKET NO. 79-102

SEA-LAND SERVICE, INC.—PROPOSED TWENTY FIVE PERCENT GENERAL RATE INCREASE IN THE U.S. MAINLAND-PUERTO RICO/VIRGIN ISLANDS TRADES

STIPULATION OF HEARING COUNSEL AND SEA-LAND SERVICE, INC.

It is hereby stipulated and agreed for purposes of this investigation only by and between Sea-Land Service, Inc. (Sea-Land), through its counsel, and Hearing Counsel that the matters set forth below are undisputed and true and that this stipulation may be offered to verify such matters.

(1) In the Order of Investigation and Suspension by which it instituted the present investigation, the Commission noted the following:

> Container/miles in the historical period were 91,114,356 for a total of 64,968 loads in the Puerto Rican Service. In the projected period, container/miles become 83,877,860 based on 60,426 loads in the Puerto Rican Service. Therefore, there is a decrease of 4,542 loads and 7,238,496 container/miles in the service. The average miles per load decrease is 1,594 miles (7,238,496 divided by 4,542). The average miles per container (load) in the historical period is 1,402 and is 1,388 in the projected period. This represents an average increase of approximately 200 miles per container, and causes a much larger decrease in the Service than would result from either historical or projected average. The lower Service container mileage causes proportionately more vessel expense to be allocated to the trade. Vessel expense, in turn, is the basis of other expense allocations. These questions, with respect to average container/miles, are unanswerable without in-depth analysis of container/mile calculation.

(2) The data relied upon by the Commission in the language cited above is aggregate data drawn from the Puerto Rico Service. As such, this data reflects the carriage of container loads of cargo moving in the Canada, U.S. North Atlantic, U.S. South Atlantic and U.S. Gulf/Puerto Rico Trades and the U.S. Atlantic and Gulf/Virgin Islands Trade, as well as the carriage of "Other Cargo";

(3) A review of the aggregate data drawn from the Puerto Rico Service reveals an apparently large discrepancy between the average decrease in average miles per container carried in the Service and the average miles per container carried during the historical year and to be carried during the projected year in the Service;

(4) In each of the individual Puerto Rico Trades, and the Virgin Islands Trade, the average miles per container carried have remained constant from the historical to the projected year;

(5) The decrease in average miles per container carried in the Puerto Rico Service between the historical and the projected year is occasioned by changes in the numbers of container loads of cargo embarking at the various ports of loading and disembarking at the various ports of call in the Service and the differing mileages between these various ports of loading and ports of call;

(6) The apparently large discrepancy referred to in section three (3) above is solely a function of a review of the aggregate data drawn from the Puerto Rico Service as opposed to an analysis of data reflecting the individual trades encompassed therein;

(7) As indicated in section four (4) and five (5) above, an analysis of the data drawn from the individual Puerto Rico Trades and the Virgin Islands Trade establishes that the apparent discrepancy is a non-issue in the present investigation. Data relating to average miles per container carried in the Puerto Rico Service conforms to cargo projections filed in this investigation.

Respectfully submitted,

(S) DONALD J. BRUNNER
Attorney for Sea-Land Service, Inc.

(S) JOHN ROBERT EWERS
Director Bureau of Hearing Counsel

(S) C. DOUGLASS MILLER
Hearing Counsel

(S) POLLY HAIGHT FRAWLEY
Hearing Counsel

(S) CHARLES C. HUNTER
Hearing Counsel

February 25, 1980

APPENDIX C

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MRS. POLLY HAIGHT FRAWLEY
HEARING COUNSEL FEDERAL MARITIME COMMISSION
1100 "L" STREET N.W. WASHINGTON/DC

THIS REAFFIRMS OUR POSITION THAT SINCE WE WERE NOT ABLE TO BE PRESENT AT THE HEARING HELD ON FEB 25TH 1980 ON DOCKET NUM. 79-102 DUE TO PREVIOUS ENGAGEMENTS IN PUERTO RICO AS YOU WERE PREVIOUSLY ADVISED AND SINCE DUE TO ALLEGED STATUTES TIME LIMITATION WE WERE NOT PROVIDED WITH THE SUPPORTING PAPERS AND OTHER DATA PERTINENT TO THE AGREEMENT REACHED BY OTHER PARTIES ON THE MENTIONED DOCKET WE ARE NOT IN A POSITION TO ENDORSE OR APPROVE SUCH AN AGREEMENT FOR A 21-PERCENT INCREASE IN RATE IN A SEPARATE LETTER WE PLAN TO BRING TO THE ATTENTION OF THE COMMISSION MATTERS THAT WE CONSIDER OF THE UTMOST IMPORTANCE TO THESE AND FUTURE CASES THAT ALTHOUGH MAY BE NOT LEGALLY RELATED TO THE ISSUED INVOLVED IN THE CURRENT DOCKET ARE PERTINENT AND OF INTEREST TO THE FUNCTION OF THE COMMISSION AND TO FAIR APPLICATION AND MANAGEMENT OF THE LAWS THE COMMISSION ADMINISTERS THIS CABLE SUBSTITUTES THE PREVIOUS ONE IN THE SAME DOCKET

HECTOR JIMENEZ JUARBE
EXECUTIVE VICE PRESIDENT PUERTO RICO
MANUFACTURERS ASSOCIATION

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FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

(DOCKET NO. 79-63; GENERAL ORDER NO. 13; AMDT. 3)

PART 536—PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

EXEMPTIONS AND EXCLUSIONS

MARCH 17, 1980

ACTION: Final Rule

SUMMARY: This rule provides for exemption of all common carriers by water from tariff filing requirements of section 18(b) of the Shipping Act, 1916, as to the carriage of Canadian or United States origin cargo moving in bulk without mark or count in rail cars on a local port-to-port basis between ports in British Columbia, Canada and United States ports on Puget Sound.

EFFECTIVE DATE: March 25, 1980

SUPPLEMENTARY INFORMATION:

This proceeding was initiated by a Notice of Proposed Rulemaking published in the *Federal Register* on July 3, 1979, (44 Fed. Reg. 38913), in response to an application from Foss Launch & Tug Co., for waiver of tariff filing requirements provided in section 18(b), Shipping Act, 1916. Foss requested an extension of the present exemption set forth in 46 C.F.R. §536.1(a)(5) applicable to intermodal cargo in rail cars moving under joint through rates between British Columbia, Canada and ports on Puget Sound in order to include in the exemption the movement of rail cars containing bulk cargo loaded into such cars without mark or count carried on a local

port-to-port basis between North Vancouver, British Columbia, Canada and Seattle/Tacoma, Washington.

The proposed amendment to the above rule drafted to accommodate the Foss application drew comments from Sea-Land Service, Inc. This party alleged the exemption as contained in the proposed language would unintentionally include general cargo which could be moving on a port-to-port basis in the British Columbia, Canada/Alaskan trade. Recognizing this potential, the Commission has now determined that in lieu of amending the existing exemption in the manner proposed in this proceeding, it would be preferable for the sake of clarity to allow section 536.1(a)(5) to continue in its present form as it relates to exempting cargo moving on through joint rates and to add a new subparagraph (6) to provide for the exemption of cargo moving in bulk without mark or count in rail cars on a port-to-port rate basis.

This further exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory or be detrimental to commerce.

NOW, THEREFORE, IT IS ORDERED, Pursuant to section 4 of the Administrative Procedure Act, 5. U.S.C. §533; sections 18(b), 35 and 43, Shipping Act, 1916, 46 U.S.C. §§817(b), 833(a), and 841(a); that Title 46 C.F.R. Part 536.1 *Exemptions and exclusions* is amended effective upon publication in the *Federal Register* by the addition of a new subparagraph (a)(6) reading as follows:

§536.1 Exemptions and exclusions.

(a) * * *

(6) Transportation by water of cargo moving in bulk without mark or count in rail cars on a local port-to-port rate basis between ports in British Columbia, Canada and United States ports on Puget Sound, provided that the rates charged for any particular bulk type commodity on any one sailing will be identical for all shippers and provided that this exemption shall not apply to cargoes originating in or destined to foreign countries other than Canada; and further provided that the carrier will remain subject to all other provisions of the Shipping Act, 1916.

By the Commission

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHARTER IV—FEDERAL MARITIME COMMISSION

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

(General Order No. 38, Amendment No. 2 Docket No. 79-1)

PART 531—REGULATIONS GOVERNING THE PUBLISHING, FILING AND POSTING OF TARIFFS IN DOMESTIC OFFSHORE COMMERCE

March 18, 1980

ACTION: Final Rules

SUMMARY: Part 531 of Title 46 CFR which contains the regulations governing the form and manner of filing tariffs by common carriers by water in the domestic commerce of the United States has been revised. The changes are necessary in order to incorporate the provisions of Public Law 95-475, an amendment to the Intercoastal Shipping Act, 1933.

EFFECTIVE DATE: March 24, 1980

SUPPLEMENTAL INFORMATION:

This proceeding was initiated by a Notice of Proposed Rulemaking published in the *Federal Register* on January 5, 1979 (44 Fed. Reg. 1418-19). The Federal Maritime Commission proposed to revise its Regulations Governing the Publishing, Filing and Posting of Tariffs in Domestic Offshore Commerce in order to enable it 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.), and to correct a clerical error in the existing rules.

Comments received from the Government of the Virgin Islands (GVI) have been carefully reviewed and considered. The GVI's comments, which are discussed below, were confined to suggested changes to be made to the Commission's proposed amendment of section 531.10.

The GVI would include the requirement that the Attorney General (or other designated officials) of every State, Commonwealth, Possession, or Territory

which is affected by a general rate increase or decrease must receive the same exhibits, workpapers, statements of direct testimony, and underlying financial data that are required to accompany the tariff amendments effectuating such increase or decrease.

The GVI also requested that the proposed rules be amended to specify that the Commission shall receive within 15 days of the filing of a general increase or decrease in rates, proof that the exhibits, workpapers, statements of direct testimony, and underlying financial data have been served upon each of the designated officials. Said proof to consist of copies of United States Postal Service Return Receipts or a subscribed and verified statement containing the name and address of the official or officials served, the date served, and the manner of service.

The Commission has determined that these are matters which come within the purview of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.67). Rather than attempt to incorporate these provisions into section 531.10, the proposed rules have been modified to direct the tariff users to the applicable requirements.

The Commission has amended section 531.3(1) to incorporate the GVI's suggestion that failure by the carrier to comply with the applicable requirements (46 C.F.R. § 502.67 and/or 46 C.F.R. § 512) may result in the rejection of the tariff matter.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. § 553); section 43 of the Shipping Act, 1916 (46 U.S.C. § 841 (a)); and section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. § 844), Part 531 of Title 46, Code of Federal Regulations, is amended as set forth hereinafter.

Section 531.2 is amended by incorporating the following definitions to be designated 531.2(j) and 531.2(k):

"(j) *General Decrease*: any change in rates, fares, or charges which will (1) result in a decrease in not less than 50 percent of the total rate, fare, or charge items in the tariffs per trade of any carrier; and (2) directly result in a decrease in gross revenues of said carrier for the particular trade of not less than 3 percent.

"(k) *General Increase*: any change in rates, fares, or charges which will (1) result in an increase in not less than 50 percent of the total rate, fare, or charge items in the tariffs per trade of any carrier; and (2) directly result in an increase in gross revenues of said carrier for the particular trade of not less than 3 percent."

The definitions in section 531.2 presently designated as paragraphs (j) through (x), inclusive, are redesignated paragraphs (l) through (z), inclusive.

The reference in section 531.2(c) which reads "(see section 531.2(u))" is amended to read "(see section 531.2(w))."

Section 531.3(1) is amended by inserting after the first sentence:

"Tariff matter may be rejected for failure of the filing carrier to comply with the provisions of Rule 67 of the Commission's Rules of Practice and Procedure (46 CFR 502.67) and/or Part 512 of Title 46 Code of Federal Regulations."

The reference in section 531.6(m)(1) which reads "Section 531.1(o)" is amended to read "section 531.2(q)."

Section 531.10 is amended by:

(1) Revising the introductory sentence of paragraph (b) to read as follows:

"(b) Amendments establishing new or initial rates, or changing rates, fares, charges, rules, or other tariff provisions, which do not constitute a general increase or decrease in rates shall be posted and filed together with any supporting material required by 46 CFR 512 at least 30 days prior to their effective dates;"

(2) Inserting the following new paragraph (c):

"(c) Amendments changing rates, fares, charges, rules, or other tariff provisions, which constitute a general increase or decrease in rates, shall be posted and filed together with any supporting material required by 46 CFR 512 and 46 CFR 502.67 at least 60 days prior to their effective date."

(3) Redesignating paragraphs (c), (d), (e), and (f) as paragraphs (d), (e), (f), and (g).

Section 531.11(g)(3) is amended to read as follows:

"(3) Publish,in the upper right-hand corner, an effective date which conforms with section 531.10(b) and 531.10(c) of this Part."

Section 531.13(a) is amended to read as follows:

"(a) The Commission may suspend from use any rate, fare, charge, classification, regulation, or practice for a period of up to 180 days beyond the time it would otherwise have lawfully taken effect;"

The reference in section 531.13(c)(1) which reads "(see sections 531.10(c) and 531.11(h)(iii))" is amended to read "(see sections 531.10(d) and 531.11(g)(2)(iii) and (iv))."

By the Commission

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 C.F.R. 537. 5, Docket No. 79-60]

The Filing With the Commission of Cargo Statistics Compiled by Various Conferences of, and Rate Agreements Between, Common Carriers by Water in the Foreign Commerce

March 18, 1980

ACTION: Discontinuance of Proceeding

SUMMARY: The Commission instituted this proceeding by notice of proposed rulemaking published June 13, 1979 (44 Fed. Reg. 33913) and invited public comment whether the Commission would require the filing annually of cargo statistics by conferences and rate agreements, composed of common carriers by water engaged in the foreign commerce of the United States. In light of the comments received and because the Commission considers the proposal to increase the burden of regulation to conferences and rate agreements as well as the Commission itself, without sufficient corresponding regulatory benefit, the Commission has determined not to adopt a final rule at this time. Accordingly, this proceeding is hereby discontinued.

SUPPLEMENTARY INFORMATION: None

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-96

AMSTAR CORPORATION

v.

SEA-LAND SERVICE, INC.

NOTICE

March 19, 1980

Notice is given that no appeal has been filed to the February 12, 1980 notice of termination of 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

FEDERAL MARITIME COMMISSION

No. 79-96

AMSTAR CORPORATION

v.

SEA-LAND SERVICE, INC.

WITHDRAWAL OF COMPLAINT

Finalized March 19, 1980

The complainant respectfully asked in its complaint served November 20, 1979, that the rate on a shipment of sugar from San Juan, Puerto Rico, to Curacao, Netherlands Antilles, be found in violation of section 18(b)(5) of the Shipping Act, 1916, and asked for hearing in New York, N.Y. It appeared that the dispute concerned a difference between charges based on rates of $41 and $105.50 per ton, or a difference in charges of $2,903.66.

By notice to the parties dated December 17, 1979, and served December 18, 1979, the matter was set out in some detail, and it was stated in part "that it is doubtful that the relief sought by the complainant is within the authority of the Commission to grant." Also, it was suggested that should the complainant wish to provide further legal argument, etc., that the "Shortened Procedure" might be appropriate.

Both parties agreed to the Shortened Procedure, and dates were set for memoranda of facts and argument.

By letter dated February 8, 1980, the complainant, Amstar Corporation, states that in view of the opinion stated in the notice to the parties on December 17, 1979, and in view of the complainant's further review of the law, complainant has decided to withdraw its complaint and consents to the termination of this proceeding.

Accordingly, the request to withdraw the complaint is granted, and the proceeding hereby is terminated.

(S) CHARLES E. MORGAN
Administrative Law Judge

February 12, 1980

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-16

E. ALLEN BROWN—INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1246

ORDER PARTIALLY ADOPTING INITIAL DECISION

March 24, 1980

This proceeding was instituted by Order of Investigation and Hearing to determine whether E. Allen Brown, a Commission licensed independent ocean freight forwarder, violated section 510.23(f) of the Commission's rules and regulations[1] by failing to pay over to ocean common carriers monies advanced by shipper principals for freight and transportation[2] and, if so, whether his license should be revoked or suspended.[3]

Administrative Law Judge Norman D. Kline issued an Initial Decision finding that: (1) E. Allen Brown violated the pay over rule on over 100 occasions, some of which had not been paid over to ocean carriers at the time of the hearing; and (2) E. Allen Brown failed to fully respond to a lawful Commission inquiry. However, because the Presiding Officer determined that Mr. Brown is now attempting to satisfy the debts arising from these violations, he concluded that neither revocation nor suspension would serve the remedial purposes of the Shipping Act. In lieu of suspension or revocation, the Presiding Officer recommends a probationary period ending upon satisfaction of Mr. Brown's debts and the establishment of positive equity in his business.

The Commission's Bureau of Hearing Counsel filed Exceptions to the Initial Decision arguing that the issue of revocation or suspension of Mr. Brown's license would be mooted by the then impending cancellation of his freight forwarder surety bond, which was to become effective on December 23, 1979.[4]

[1] 46 C.F.R. §510.23(f).

[2] The rule requires these monies to be paid over within seven working days of receipt or within five working days after departure of the vessel, whichever is later.

[3] The Order also directed that a finding be made as to whether Mr. Brown's license should be revoked or suspended for failure to respond to lawful Commission inquires regarding these pay over violations (46 C.F.R. §510.9(b)) and because of changed circumstances which would render Mr. Brown unqualified to hold a license (46 C.F.R. §510.9(d)).

[4] Section 510.9(e) of the Commission's Rules provides for automatic revocation of a freight forwarder's license for failing to maintain a valid surety bond. 46 C.F.R. §510.9.

Hearing Counsel requested, however, that the Commission adopt the findings of fact of the Initial Decision.

DISCUSSION

E. Allen Brown's freight forwarder surety bond was in fact cancelled effective December 23, 1979. Therefore, the Commission will herein vacate that portion of the Initial Decision which imposes sanctions.

The findings of fact contained in the Initial Decision are well founded and no exception to any portion thereof has been filed. Therefore, the findings of fact are adopted.

THEREFORE, IT IS ORDERED, That the Exceptions of Hearing Counsel are granted to the extent indicated in this Order; and

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is, except to the extent modified by this Order, adopted by the Commission; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-16

E. Allen Brown—Independent Ocean Freight Forwarder License No. 1246

Partially Adopted March 24, 1980

Respondent E. Allen Brown has operated a freight forwarding business in Jacksonville, Florida, under a license issued by the Commission over ten years ago. A compliance check conducted in early 1978 showed over 100 instances in which Mr. Brown failed to pay over freight money to ocean carriers within the seven-day period prescribed by the Commission's General Order 4. Further evidence showed additional failures to pay over on time as well as indebtedness to certain carriers and shippers. In addition to the foregoing practices, Mr. Brown did not furnish all of the financial information requested by the Commission's staff. However, he did cease to handle shippers' money, as instructed by the staff. Hearing Counsel urge that he be found to be unfit and that his license be revoked for these past willful violations of the Commission's regulation. Mr. Brown, appearing without an attorney, admitted his past shortcomings and asked for a chance to continue in business so that he could pay off his debts. It is held that:

(1) Although Mr. Brown did commit violations of the regulation willfully as that term is understood in administrative law, the extreme sanction of revocation of his license would destroy his business and deprive him of the chance to make his business financially sound and pay his debts as he is doing and wishes to do.

(2) Case law and previous Commission decisions show that the Commission considers the Freight Forwarder Law to be remedial, not punitive in nature, and that the Commission will fashion reasonable remedies to fit particular facts after considering evidence of mitigation.

(3) The remedy which the Commission has previously fashioned in this type of case is to require Mr. Brown to submit financial reports periodically, showing current financial status and compliance with regulations. In addition he will be ordered to continue desisting from handling shippers' money. Failure to meet these conditions or evidence of new violations will result in automatic revocation of his license. This remedy will enable Mr. Brown to make good on his promises to pay his debts and restore his business to financial soundness. Revocation, on the other hand, will only result in stranding his creditors with unpaid debts as well as adding to the ranks of the unemployed.

E. Allen Brown, for himself.
John Robert Ewers and *Joseph B. Slunt,* as Hearing Counsel.

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

This is a proceeding instituted by Commission Order served March 14, 1979, to determine whether the license of Mr. E. Allen Brown, who operates as an independent ocean freight forwarder, should be revoked or suspended because Mr. Brown appeared to have engaged in certain conduct which violated particular provisions of the Commission's General Order 4, 46 C.F.R. § 510 et seq., which conduct also brought into question the fitness of Mr. Brown to continue operating as a forwarder.

As the Order states, Mr. E. Allen Brown, was issued his license on May 26, 1969, under section 44(b) of the Shipping Act, 1916, 46 U.S.C. § 841b and General Order 4. During a compliance check of the licensee conducted by a Commission investigator in early 1978, information was developed which indicated that Mr. Brown had apparently violated section 510.23(f) of General Order 4 on 107 separate occasions by failing to pay over to ocean carriers sums of money given to Mr. Brown by shippers for the payment of transportation charges within the time periods prescribed by that regulation (seven days after receipt from shipper or five days after sailing of vessel, whichever is later).

By certified letter dated July 31, 1978, Mr. Brown was advised by the Commission's Office of Freight Forwarders of the payover requirements of section 510.23(f) and instructed to furnish monthly statements relating to his outstanding accounts with ocean carriers and his financial condition. He was advised of the possible adverse consequences to his license if he failed to comply with these instructions or continued to violate the payover rule. He was furthermore directed to discontinue handling shippers' moneys for payment of ocean freight charges until the matters uncovered could be resolved and to submit an affidavit of his understanding of these instructions. Mr. Brown submitted the affidavit and some of the requested information by letter and telex dated August 18, 1978, but failed to provide the financial statement or to follow up with monthly information as instructed.

In view of the above situation the Commission began this investigation to determine whether Mr. Brown did indeed violate the payover rule (section 510.23(f)) and whether his license should be suspended or revoked because of his failure to respond to lawful inquiries, comply with lawful rules, regulations, or orders, or because of change of circumstances which demonstrate that he no longer qualifies as an independent ocean freight forwarder, or because he engaged in such conduct that the Commission should find him unfit or unable to carry on the business of forwarding. Section 510.9 of General Order 4 provides for suspension or revocation of licenses if the preceding events are found to have occurred. 46 C.F.R. §§ 510.9(b); 510(9)(d); 510(9)(e).

The Commission's Order established a procedure whereby the Commission's Bureau of Hearing Counsel would submit a memorandum of law and affidavits of facts on April 18, 1979. Respondent was instructed to submit his memorandum of law and affidavits on May 18, 1979. Thereafter the parties were to

[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 C.F.R. § 502.227).

submit statements identifying unresolved issues of fact and recommend appropriate procedures to resolve them.

From the inception of this proceeding it appears that Mr. Brown has not fully comprehended the procedural requirements despite the efforts of Hearing Counsel and myself to provide guidance. Furthermore, he has been unable to retain legal counsel and has continued to represent himself throughout the proceeding. Therefore, although Hearing Counsel submitted his memorandum and affidavits on April 18 as instructed, Mr. Brown merely sent a letter dated May 15, 1979, in lieu of memoranda or affidavits in which he furnished two financial statements, stated that he was attempting to resolve his financial and other difficulties, and requested further instructions as to what more was required.

Because of Mr. Brown's failure to furnish the materials as instructed, Hearing Counsel, after speaking with Mr. Brown, suggested that he be given more time to obtain counsel and thereafter to submit his procedural recommendations. I myself had written Mr. Brown on May 22, 1979, to advise him of the nature of the case against him and to recommend either retention of counsel or presentation of a defense if he wished to retain his license. Because of these events and the fact that Mr. Brown still maintained that he was attempting to obtain legal counsel, I granted additional time for him to do so and fixed a date for him or his counsel to furnish procedural recommendations. *See* Order to Submit Further Procedural Recommendations and Related Rulings, June 6, 1979.

Following the above rulings, Mr. Brown contacted me and requested that a prehearing conference be held although he was still unable to obtain legal counsel. In order to assist Mr. Brown in understanding his rights, I held an informal prehearing discussion by telephone with Mr. Brown and Hearing Counsel. It was explained to Mr. Brown that he could present facts in his own defense and present his own witnesses to support his position. Mr. Brown indicated that he wished to do so, and, considering the fact that knowledgeable persons would be located in the Jacksonville, Florida, area, I scheduled a hearing in Jacksonville, Florida, which was held on July 18, 1979. *See* Report of Telephonic Conference and Notice of Hearing, June 26, 1979, and Notice of Hearing Location, June 29, 1979. However, Mr. Brown appeared at the hearing without counsel and with no witnesses to testify in his behalf besides himself. Furthermore, Mr. Brown has filed no post-hearing brief or other pleading although given the right to do so by my last ruling. See Notice of Post-Hearing Briefing Schedule, July 23, 1979.

FINDINGS OF FACT

Mr. E. Allen Brown was issued a freight forwarding license on May 26, 1969. He was and is the sole proprietor of the business and is the "qualifying officer" under the Commission's regulation responsible for the supervision of the operations of the forwarding business.

On January 23, 1978, Mr. George B. Harry, a Commission investigator employed in the Commission's Savannah, Georgia, office visited Mr. Brown's

premises in Jacksonville, Florida, for the purpose of checking Mr. Brown's operations to determine if he was complying with his obligations as a licensee in accordance with the Commission's General Order 4, 46 C.F.R. § 510 *et seq.* Prior to that date Mr. Harry had received information from a former employee of Mr. Brown who apparently indicated that Mr. Brown's business was in poor financial condition.

Before Mr. Harry visited Mr. Brown, he requested Mr. Brown by telephone and letter dated January 16, 1978, that Mr. Brown prepare a financial statement which would show the financial condition of the business as of December 31, 1977. The statement was furnished.

Mr. Brown was advised that the compliance check of his business would center around the timeliness with which Mr. Brown had paid ocean freight money over to ocean carriers after receiving such money from shippers. Mr. Brown indicated that the company's bookkeeper, Mr. John Goldstick, handled the function of payment of ocean freight as well as company finances and would be the person who could furnish information as to these matters. Mr. Goldstick joined Mr. Brown and Mr. Harry at the compliance check meeting at the request of Mr. Brown and was asked to provide an accurate description of the firm's payment record to carriers. Mr. Goldstick was reminded of the requirement in the Commission's General Order 4 that freight be paid over to carriers within a five to seven day time period. However, Mr. Goldstick indicated that he had been unaware of these requirements up to that time. Instead, Mr. Goldstick believed that a 30-day period was a normal and standard business practice for credit and that in most cases ocean freight money was turned over to carriers within 30 days after receipt from the shipper.

Upon Mr. Harry's request, Mr. Brown and Mr. Goldstick permitted Mr. Harry to examine all freight forwarding files maintained by the firm during the calendar year 1977, and Mr. Goldstick provided explanatory information relating to the firm's bookkeeping system. Mr. Harry made a study based upon a random sampling of shipments which moved in export commerce during 1977. The following table illustrates the number of working days which the Brown firm held shippers' money before paying over to the carriers for 138 shipments:

Study Showing Time Shippers' Money Held Before Payover

7 days or less	—34
8–30 days	—61
31–60 days	—36
61 days or over	—7
Total	138

The number of days in the above table runs from the time the Brown firm received the money from the shippers to the time it turned the money over to the carriers. In each instance the freight was paid over well beyond the date of

the bill of lading and presumably beyond the date of sailing.[2] The above table shows that the Brown firm exceeded the permissible seven day limit (and presumably the five-day limit after date of sailing) prescribed by General Order 4 on 101 shipments out of 138 selected. Mr. Harry stated that he had no acceptable explanation for these apparent violations of G.O. 4 except for five of the seven shipments in which shippers' money was held for 61 days or more, for which payment was deliberately held up because of a rate dispute with the carrier.

As regards Mr. Brown's financial condition at the time of the compliance check, Mr. Brown was advised that the financial statement revealed a deficit in working capital. However, Mr. Brown indicated that he was in the process of liquidating certain personal assets, the proceeds of which would be put into the business. Therefore, Mr. Harry requested an update of his financial statement by a subsequent letter dated February 1, 1978.

The following table updates the earlier table and shows the status of Mr. Brown's accounts payable on 42 outstanding bills of lading as of February 10, 1978. The total ocean freight due at that time was $185,898.12. The table overlaps the preceding table.

Updated Study Showing Time Shippers' Money Held Before Payover as of February 10, 1978

7 days or less	−7
8–30 days	−17
31–60 days	−11
Over 61 days	−7
Total	42

As the table shows, some 35 out of 42 shipments involved apparent violations of the Commission's regulation governing payover.

Mr. Brown also furnished an updated financial statement on March 22, 1978, which I will discuss later.

As a result of a review of the information compiled by Mr. Harry, the Commission's Office of Freight Forwarders, through its Chief, Mr. Charles Clow, sent a letter dated July 31, 1978. Mr. Clow advised Mr. Brown that the compliance check had found at least 107 violations of the payover regulation (section 510.23(f)) and that adverse action affecting his license could follow if the same practices continued. Mr. Clow then instructed Mr. Brown to furnish the following information every month: (1) the amount of money currently due and payable by the firm to carriers and/or carriers' agents for ocean freight together with an itemization of the amount of time showing when the money was received and the length of time it was due; (2) a balance sheet prepared by a certified public accountant. Mr. Clow also instructed Mr. Brown that

[2] General Order 4 permits a forwarder to pay freight money to the carrier within 5 days after the vessel sails if that time is later than 7 days after the forwarder received the money from the shipper. However, the custom apparently is for the forwarder to bill and receive freight money from the shipper only after the vessel sails. Therefore, in the table and other tables, the time shown, which runs from forwarder's receipt of freight money until payment to carrier, began to run after the vessel sailed. Any money held over 7 days by the forwarder would thus also have run beyond 5 days after the vessel sailed. See Tr. 51-52.

Mr. Brown discontinue handling shippers' money by instructing them to pay the carriers directly until the problems uncovered could be resolved and to furnish an affidavit showing that Mr. Brown understood the various instructions contained in the letter.

By letter and telex dated August 18, 1978, Mr. Brown submitted the affidavit in which he stated that he "has read the mentioned letter from FMC and will make every effort to conscientiously and fully comply with its requirements and suggestions to remedy the deficiencies noted." Mr. Brown stated furthermore that he "will have all shippers for whom he acts as forwarder pay to the ocean carriers directly until the matters involved in the mentioned letter from FMC are resolved." However, Mr. Brown did not submit the financial statement. He stated that a scheduling problem prevented his certified public accountant from completing a balance sheet but that the accountant assured him that he would complete it as promptly as possible and forward it directly to Mr. Clow.

The information furnished in regard to outstanding freight charges received from shippers and payable to ocean carriers as of August 18, 1978, showed that Mr. Brown still owed $83,008 in freight charges to the carriers, of which $19,150 was held for over 30 days. The following table shows how long the money was being held by Mr. Brown:

Time Shippers' Money Held by Mr. Brown as of August 18, 1978

7 days or less	−4
8–30 days	−35
Over 30 days	−12
Total	51

Thus, on 47 out of 51 shipments Mr. Brown's firm was withholding shippers' money from the carrier for a period of time beyond that permitted by General Order 4.

Mr. Brown furnished no further information in response to the July 31, 1978, letter from Mr. Clow. As noted, the Commission began this proceeding by Order served March 14, 1979. By letter dated May 15, 1979, Mr. Brown sent me balance sheets (unaudited and without an opinion of the accountant) for December 31, 1978, and April 30, 1979. In that letter, Mr. Brown also stated that his certified public accountant had been hospitalized and thereafter was too busy during the income tax period to prepare the statements but that Mr. Brown had furnished him with the necessary monthly information. He also stated in his letter that his business "did suffer some financial difficulty during 1978, however since that time we have turned it around and are very optimistic with the current trend." He represented that "every effort is being expended to resolve this very difficult situation and I can assure you that I will continue to do so" and requested that if his letter and the balance sheets did not satisfy "your requirements that a listing of the specific requirements of the Commission be forwarded to me, and that a period of 30 days be granted in which to

satisfy these requirements." Letter to Norman D. Kline, Administrative Law Judge, from E. Allen Brown, dated May 15, 1979.

The only additional information which Mr. Brown has furnished regarding his firm's financial condition was furnished at the hearing held in Jacksonville, Florida, on July 18, 1979. At that time Mr. Brown submitted for the record drafts of balance sheets dated May 31 and June 30, 1979, and a profit and loss statement as of June 30, 1979. Both were unaudited. At the hearing Mr. Brown also offered to submit all information which he was still obliged to furnish under the July 31, 1978, letter but had not furnished.

The Firm's Financial Condition

Mr. Harry, the Commission's investigator, testified that at the time of the compliance check on January 23, 1978, Mr. Brown's financial statement revealed a deficit in working capital. A statement was submitted to Mr. Harry, dated February 28, 1978, in the form of a balance sheet. It showed that Mr. Brown had an equity in his forwarding business in the amount of $22,143. This was derived by subtracting liabilities from assets totaling $359,675. According to balance sheets dated December 31, 1978 and April 30, 1979, however, Mr. Brown's liabilities exceeded his assets so that the previous equity became a deficit of $27,495 and $21,009 for the two dates respectively. The last balance sheets submitted at the hearing prepared by Mr. Brown's bookkkeeper in draft form for May 31, 1979 and June 30, 1979, continued to show a deficit in his equity in the amount of $11,771.78 and $8,882.38 for the two dates respectively. However, it should be noted that the size of the firm's liabilities has shrunken considerably from $337,532 as of February 28, 1978, to $67,671.59 as of June 30, 1979, and that the deficit in equity has been diminishing.

The Status of Certain Unpaid Debts

According to Mr. Harry, at least two ocean carriers have had to recover freight money from one of Mr. Brown's shipper clients, the Glidden Co., which had given the money to Mr. Brown. On or about April 13, 1979, Mr. Brown's accounts with United States Lines were delinquent in the approximate amount of $8,000. Unable to recover from Mr. Brown, United States Lines requested Glidden to pay. Glidden honored the request for payment and remitted the full amount although advising United States Lines that a substantial portion of the $8,000 had already been paid to E. Allen Brown.

At some time before April, 1979, another carrier, Sea-Land Service, Inc., having become concerned over Brown's indebtedness to it,[3] arranged with the

[3] According to Mr. Harry, as of January 9, 1978, Mr. Brown owed Sea-Land $256,000 in freight. Of this amount, Sea-Land considered $151,000 "current," i.e., less than 30 days owed. $57,000 was 30 to 60 days old; $46,000 was 60 to 90 days old; $928 was over 90 days old. Tr. 110. This represented money which shippers owed the carrier and which they may or may not have paid Mr. Brown. Tr. 112. Therefore the figures do not show violations of the payover rule. They do give us an idea of how much money a forwarder such as Mr. Brown may handle between shippers and one large carrier. Tr. 111. They also indicate that at least one carrier seems to follow a relaxed credit policy with shippers. The $256,000 amount may be unusually large because it included a heavy December 1977 movement and post-strike shipments. Tr. 114. Also the figure was reduced considerably in later months. Tr. 114.

shipper, Glidden Co., for Glidden to pay Sea-Land $20,000 of the money owed to Sea-Land which Glidden had already paid Brown. Glidden did in fact pay Sea-Land $20,000. Sea-Land also came to an agreement with Mr. Brown under which Mr. Brown would pay Sea-Land at least $1,000 monthly until the debt was discharged. As of March 21, 1979, the balance due to Sea-Land was $23,993.60. As of July 16, 1979, this was reduced to $19,989.45, all relating to the Glidden account. Tr. 109.

It therefore appears that on or about March, 1979, Mr. Brown had failed to pay at least $52,000 in freight charges to the two carriers named although he had received this money from the shipper Glidden who intended that the money go to the carriers in payment. Furthermore, the shipper Glidden had to pay about $28,000 of this amount a second time.

Mr. Brown indicated, by a letter dated March 21, 1979, addressed to Sea-Land, that he would continue to honor the agreement with Sea-Land by making monthly payments in an effort to resolve the matter as promptly as possible. At the hearing, Mr. Brown testified that he was continuing to honor this obligation to Sea-Land and that he would work out an arrangement with Glidden. He indicated his desire to make good on these accounts but acknowledged that "it's a terrific load on me; it's a tremendous load." Tr. 29. Mr. Harry confirmed the fact that Mr. Brown has been paying Sea-Land regularly each month. Tr. 109.

Mr. Brown's Testimony and Defenses at the Hearing

Since Mr. Brown had no attorney representing him, he made his case at the hearing. Essentially, Mr. Brown did not dispute the fact that he had used shippers' money when he had failed to comply with the Commission's payover regulation and frankly admitted that financial difficulties motivated him to make use of shippers' money to pay business and personal expenses. However, he pleaded that these events took place in the past and that he was trying for some time now to make amends and to "turn his business around." He stated that other forwarders had left the Jacksonville area (there now being about seven, eight, or nine left) with consequent disruption and some degree of hardship on terminal operators but he asserted that he did not wish to walk out on his debts and leave people "holding the bag." Indeed, he testified that he believed that if he had not violated the payover requirements of G.O. 4, he would have had to go out of business. Tr. 42–43.

Mr. Brown testified about his financial difficulties. Apparently he had over-expanded his business, had too many employees and a Savannah office, and had to cut down the scale of his operations. From 12 or so employees he now has three devoted to the freight forwarding business and one to his customhouse broker business. He testified that his problems intensified as a result of a longshoremen strike during October to December 1977 when he needed money to pay overhead and employees' wages and was also struggling to reroute cargo and keep his business going. He claimed that the violations found by the Commission's investigator only represented 2–3 percent of his total billings and that he was under much pressure because of two or three IRS audits as well

as disgruntled former employees who, he believes, might have had something to do with the present investigation of his business. He states that the later tables of outstanding freight accounts merely show carry overs from the earlier period since he had not handled shippers' money since some time after Mr. Clow's letter of July 31, 1978, and that the primary reason for a showing of delinquent accounts is the carry over from the Sea-Land account which he is still paying off. He admits he still owes Sea-Land and Glidden but maintains that he wishes to pay them both off and will do something about the Glidden account after he finishes with Sea-Land.

Mr. Brown acknowledged that he did not send the monthly statements requested by Mr. Clow but explained that this failure was largely caused by illness and unavailability of his first accountant during tax time and misunderstandings as to who was to send what to Washington. Mr. Brown testified that he sent information to his accountant for preparation of the requested statements but found out later that the accountant had not been doing the job. As for the other requirement imposed by the July 31, 1978, letter from Mr. Clow, namely, that Mr. Brown no longer handle shippers' money until this matter could be resolved. Mr. Brown has apparently complied.

On cross-examination, Mr. Brown's frank answers served to reduce the impact of his direct testimony. For example, he recognized that although the violations of the payover rule shown by Mr. Harry might have amounted to only 2–3 percent of his total billings, he recognized that this was merely a random sampling taken from all his billings. (It is possible therefore that had every shipment been tabulated, other violations might have been uncovered.) His trouble with the accountants which extended over many months, according to Mr. Brown, might possibly reflect an honest misunderstanding but he conceded that as far as a statement of outstanding freight accounts was concerned, which he was also supposed to submit every month to the Commission's staff, this statement could be prepared right in his own office and, indeed, the last statement submitted for August 18, 1978, was prepared in his office.

Although Mr. Brown related many of his problems to the strike in late 1977, his later statement of August 18, 1978, showing continued delinquent accounts, shows shipments which were unrelated to that strike and carriers other than Sea-Land which he claims accounted for most of the carry over of delinquent accounts because of the Glidden shipments. He also didn't explain clearly why he was unable to pass on extra costs stemming from the strike if there was extra work, merely indicating that he made price quotations and apparently had to stick to them. Also he indicated that during the strike "there really wasn't all that much" extra work although it was "farther away, and it was more expensive . . . " Tr. 67.

Mr. Brown acknowledged that he had run into problems with Sea-Land in the past. Some time in 1972 or 1973, apparently, he owed Sea-Land maybe $20 or $25 thousand and had to pay it off over a period of some three months. He agreed to the requirement that he stop handling shippers' money but also testified that shippers had already begun to pay carriers directly for the shippers' own convenience even before Mr. Clow instructed him. Mr. Brown believes that many shippers prefer paying carriers directly anyway and has not

lost any business because he is no longer allowed to handle shippers' money.

Mr. Brown acknowledged that he was aware of the requirements of G.O. 4 and even testified that the seven-day payover rule is not beyond the capacity of small forwarders to meet. Tr. 90. But he maintained that 30 days is the accepted period for credit. His belief that his business was "turning around" is based upon the fact that he has been gradually reducing the negative equity account on his balance sheet which at last count, however, still showed a deficit of over $8,000. Tr. 35.

Mr. Brown had the vague feeling that he was the victim of an effort perhaps by competitors or former employees to harm his business and feels that if he can be left alone, he will put his business on the right path and pay off his debts.

Perhaps the best way to summarize Mr. Brown's position and plea to remain in business is to quote his exact words at the hearing. On pages 40 and 41 of the hearing transcript Mr. Brown stated:

> Well, the only thing I would like to say is that I would like to have the opportunity to work this situation out. Now, the circumstances that surrounded us are all behind us. The exhibits that everybody has are in most cases—you know—they're correct, and there were problems, definite problems. But, I didn't quit. And, I want to meet my obligations and I would like to have the opportunity to satisfy my people, and I'm willing and able to do it. I have a wife and family, and the expenses that I've incurred, living expenses for the last almost two years, have been borne almost solely by my wife. So, what expenses have been out of here have been obligations that I've accumulated over many years. My personal draw, through the thirtieth of June, was $8,000, and that's for insurance premiums and that sort of thing. So, there's no tendency on my part to run away with anything or rape the business with frills and that sort of thing. I've spent a lot of time trying to turn this thing around, and—you know—I just want to be able to finish it. I don't want to run away; I don't have any place to go, first of all, and I couldn't afford to get there if I did try to.

So said Mr. Brown, who appeared at the hearing without an attorney and without clients or other persons to testify in his behalf besides himself.

Discussion and Conclusions

As discussed earlier, the ultimate issue for determination is whether Mr. Brown's license should be suspended or revoked because of his failure to observe certain standards established by law and Commission regulation. To be precise, the Commission's Order required me to determine:

1. Whether E. Allen Brown has violated section 510.23(f) of General Order 4 by failing to promptly pay over to the oceangoing common carrier, or its agent, within seven days after receipt thereof, or within five working days after departure of the vessel from the port of loading, whichever is later, all sums advanced the licensee by its principal for freight and transportation charges;
2. Whether E. Allen Brown's independent ocean freight forwarder license should be revoked or suspended pursuant to:
   a. section 510.9(b) of General Order 4 for failure to comply with any lawful inquiries or to comply with any lawful rules, regulations, or orders of the Commission;

b. section 510.9(d) of General Order 4 for change of circumstances whereby the licensee no longer qualifies as an independent ocean freight forwarder;
c. section 510.9(e) of General Order 4 for conduct which renders the licensee unfit to carry on the business of forwarding.

Hearing Counsel urge that Mr. Brown's license be revoked. Hearing Counsel contend that Mr. Brown did willfully violate section 510.23(f) of General Order 4 (the payover rule) on at least 151 occasions and furthermore contends that these violations occurred after warnings and ample opportunity had been given to Mr. Brown to bring his operations into compliance with General Order 4. Moreover, Hearing Counsel assert that Mr. Brown failed to comply with a lawful inquiry "by the Commission." H.C. Memorandum of Law, April 18, 1979, at 9. Therefore, Hearing Counsel believe that Mr. Brown "no longer qualifies as an independent ocean freight forwarder." *Id.* at 9.

In support of their recommendation for the most drastic sanction possible, Hearing Counsel cite not only the violations of the payover rule but the inability of Mr. Brown to bring his business into compliance even after warnings regarding the payover rule. Thus, his violations of the Commission's regulations were "willful" within the meaning of administrative law.[4] Section 44(d) of the Shipping Act, 1916, of course provides that a license may be:

[s]uspended or revoked for willful failure to comply with any provision of this chapter or with any lawful order, rule, or regulation of the Commission promulgated thereunder.
46 U.S.C. §841b(d).

Hearing Counsel furthermore refer to previous Commission decisions which make clear that a licensed freight forwarder is a "fiduciary," that is, he occupies a position of trust with respect to his shipper and carrier clients, that he is expected to know, understand, and follow scrupulously the requirements established by law and the Commission regulations, and to have sufficient financial standing to secure a fidelity bond. See *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); *Independent Ocean Freight Forwarder Application—Lesco*

[4] The meaning of "willfulness" in administrative statutes has been interpreted in many cases. As Hearing Counsel state (H.C. Memorandum, at 5) violations have been held to be "willful" if the acts were intentional regardless of evil motives or if they were done with careless disregard of statutory requirements. In *Equality Plastics, Inc., et al,* 17 F.M.C. 217, 226 (1973), the Commission explained the meaning of the words "knowingly and willfully" appearing in section 16 First of the Act. The Commission cited an earlier case, *Misclassification of Tissue Paper as Newsprint Paper,* 4 F.M.B. 483, 486 (1954), which had stated:

> [T]he phrase "knowingly and willfully" means purposely or obstinately, or is designed to describe a carrier who intentionally disregards the statute or is *plainly indifferent* to its requirements. We agree that a persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a shipper or forwarder was acting knowingly and willfully in violation of the Act. (Emphasis added by the Commission.)

The Commission further explained the meaning of the term "plainly indifferent" by stating that it "means something more than casual indifference, and equates with a wanton disregard from which an inference can be drawn that the conduct was in fact purposeful; a standard somewhat analagous to the tort concept of "gross negligence." 17 F.M.C. at 226.

Another way of stating the standard is that "an action is willful if either (1) it was committed intentionally, without any regard to motive, or (2) it was done in disregard of lawful requirements. (Footnote citation omitted.) However, it has been held that gross neglect of a known duty will also constitute willfulness." 5 Mezines, Stein, and Gruff, *Administrative Law,* at 41-58 and 41-59, citing *Goodman v. Benson,* 286 F.2d 896 (7th Cir. 1961), and *United States v. Ill. Central Ry.,* 303 U.S. 239, 242-243 (1938). See also *George Steinberg & Son, Inc. v. Butz,* 491 F.2d 988, 994 (2d Cir. 1974) *cert. denied* 419 U.S. 830 (1974).

Packing Co., Inc., 19 F.M.C. 132, 136-137 (1976); *Aetna Forwarding Co., Inc.—Revocation of License*, 8 F.M.C. 545, 550-551 (1965).

Mr. Brown, on the other hand, as I have mentioned earlier, had no lawyer and made his defense at the hearing by frank admission of his shortcomings and difficulties but asked that he be allowed to pay off his debts and "turn his business around." He also attempted to explain the reasons why he fell into his predicament regarding failure to pay over freight in the time prescribed, misuse of shippers' money, inability to furnish requested information on time, and the unhealthy financial condition of his forwarding business. He also demonstrated that he was indeed paying back his major debt to Sea-Land and intended to make some arrangement with his other major creditor, Glidden, after he discharged his indebtedness to Sea-Land.

The most difficult problem in this case is not to make the findings that Mr. Brown violated the payover rule and used shippers' money for his own business or to find that he did not make monthly reports to the Office of Freight Forwarders as instructed in the letter of Mr. Clow. It is clear that he was and is delinquent in accounts with some carriers and shippers and that his business has had financial troubles. Rather the problem is what should be done to Mr. Brown's license. Should his forwarding business be destroyed by revocation of his license as Hearing Counsel urge or should he be allowed to continue under supervision by the Commission's staff so that he can pay back his debts and maintain his forwarding business as he requests? I have considered the cases cited by Hearing Counsel, evidence of record, as well as other cases and pertinent principles of law. I have also weighed in the balance such considerations as possible harm to the public if Mr. Brown continues to operate his forwarding business, harm to the public if he is forced to close down, and have considered less drastic remedies than total destruction by revocation. I conclude that on balance revocation would produce more harm than good, and that a reasonable alternative remedy is available which is consistent with Commission precedent and is neither punitive nor arbitrary. I conclude that the Commission ought to give Mr. Brown the chance to pay his debts and restore financial soundness to his business as he wishes to do and to continue to serve his shipper clients under the same conditions he presently observes by direction of the Commission's staff, namely, without handling their freight money. In addition he should furnish monthly financial reports requested by the staff and a statement of his plan to pay the Glidden debt on or before the date he finishes paying the Sea-Land debt. These reporting requirements should remain until he pays his debts and establishes a positive equity in his business. Failure to meet these conditions will result in automatic revocation. I now explain.

Governing Principles of Law

I start from the basic principle that Mr. Brown has held a license for ten years, that the law and the Commission recognize that persons holding licenses are entitled to certain considerations, that section 44 of the Act is a remedial, not a punitive statute, and that any regulatory agency ought to exercise its

discretionary powers in a fair and consistent manner and fashion appropriate remedies to fit particular circumstances.

Since Mr. Brown has held his license for ten years and has operated his forwarding business during that time, both the Administrative Procedure Act (APA) and the Commission have recognized that such persons are entitled to special consideration both because of the reliance on the license by the forwarder and his clients and because of a person's right to make a living. The APA shows this special concern by providing that except in cases of willful violation or public health, interest or safety, no agency may revoke a license without first giving the licensee a second chance to achieve compliance with all lawful regulations. 5 U.S.C. § 558(c). These provisions of law have been held to apply to agencies and to complement agency statutes. See *Pan-Atlantic Steamship Co. v. Atlantic Coastline R.R.,* 353 U.S. 436, 440 (1957); *Shuck v. S.E.C.,* 264 F.2d 358, 360 (D.C. Cir. 1958).[5]

It is true that in this case Mr. Brown's conduct was "willful" in the administrative law sense, i.e., done with careless disregard of his obligations. Consequently, the special "second chance" provisions of the APA would not literally protect him. However, my point is that the law does recognize a certain property right in licenses and is careful not to revoke them prematurely because of the harm that revocation might create because of the destruction of an ongoing business. Furthermore, the Commission has often taken care not to destroy businesses by revoking or denying licenses and has recognized that persons' livelihoods depend upon such businesses. See *Application for Freight Forwarding License, Del Mar Shipping Corporation,* 8 F.M.C. 493, 497 (1965); *License Application—Guy G. Sorrentino,* 15 F.M.C. 127, 139 (1972); *Dixie Forwarding Co. et al, Application for License,* 8 F.M.C. 167, 168 (1964); *York Forwarding Corp., J. B. Wood Shipping Co.,* 15 F.M.C. 114, 123 (1972). I will return to these cases in greater detail later. Consequently, when considering the proper remedy or sanction to be applied to Mr. Brown, I believe that I should bear in mind that the law generally and the Commission specifically refrain from revoking or denying licenses prematurely if the licensee can mend his or her affairs in recognition of the fact that we are dealing with an ongoing business on which the licensee as well as his customers and employees rely.

The next area of the law with which I must consider relates to the nature of the Freight Forwarding Law, section 44 of the Shipping Act, 1916, and the manner in which the Commission ought to apply sanctions or fashion remedies under that law.

In a recent decision the Commission reiterated basic principles that section 44 is a remedial, not a punitive statute, that sanctions to be employed must serve remedial not punitive purposes, and that they should be imposed carefully

[5] Although General Order 4 does not provide for application of the "second chance" doctrine to persons holding licenses, in practice the staff seems to be carrying out the spirit of that doctrine. In this case, for example, the Chief of the Office of Freight Forwarders warned Mr. Brown of his apparent violations, advised him of possible adverse consequences, and attempted to obtain monthly reports of his accounts and financial condition rather than recommend revocation of his license to the Commission prematurely. Even if Mr. Brown were not entitled to a second chance by operation of law because he committed "willful" violations, he was given a chance by the staff to demonstrate that he was bringing his business into compliance with the Commission's regulation.

after considering evidence of mitigation. In *Independent Ocean Freight Forwarder License E. L. Mobley, Inc.,* 19 SRR 39 (1979), the Commission decided to suspend one qualifying officer of the forwarding corporation for six months because of one incident of forgery and numerous violations of the payover rule. In fashioning this remedy, the Commission explained:

> 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. (Footnote case citation omitted.) Section 44 and its regulations are based on an underlying remedial public interest purpose (Footnote citation omitted.) and the sanctions imposed must serve such a purpose and not be punitive in character. (Footnote citation omitted.)
> 19 SRR at 41.

In making the above statements the Commission was following sound precedent. Thus, the courts as well as the Commission have recognized that evidence of mitigation should be considered when determining whether a license applicant should be found to be fit although implicated in violations of the Act in the past. See *License Application—Guy S. Sorrentino,* 15 F.M.C. 127, 139 (1972). Furthermore, in previous cases the Commission has expressed its belief that the Freight Forwarder Law, P.L. 87-254, was enacted as a remedial statute in order to correct abuses in the forwarding industry. See *Dixie Forwarding Co., Inc.—Application for License,* 8 F.M.C. 109, 117-118 (1964); *Hugo Zanelli d/b/a Hugo Zanelli & Co.,* 18 F.M.C. 60, 73-74 (1974), aff'd *sub nom. Zanelli v. Federal Maritime Commission,* 24 F.2d 1000 (5th Cir. 1975).

The principle that the Commission should not rush to extreme sanctions without considering all factors of mitigation in an effort to fashion a just and reasonable remedy is well supported by the courts. Although agencies are not required to impose sanctions in a perfectly even manner because of the wide latitude they are given by the courts as the expert bodies most skilled in devising means to carry out specific legislative purposes,[6] the agencies are nevertheless expected to consider less drastic alternative remedies and to base whatever remedy they select on facts and reasonable interpretations of law.

In *Gilbertville Trucking Co. v. United States,* 371 U.S. 115 (1962), a case cited by the Commission in the *Mobley* decision, the Supreme Court remanded a case to the I.C.C. which had employed the most extreme sanction possible to correct a violation of section 5(4) of the Interstate Commerce Act, 49 U.S.C. § 5(4). The I.C.C., in order to correct violations of that law resulting from joint activities of two common carriers, had ordered an owner of one of the carriers to divest himself of his stock in that carrier. The Court, however, found no discussion or consideration by the I.C.C. of less drastic remedies although there

[6] Consistency in administrative rulings, i.e., using the same sanctions for the same situations, is a valid objective and too wide a departure from recognized standards or sanctions may lead to court findings that the agency abused its discretion and acted in a punitive manner. See *National Labor Relations Board v. Mall Tool Co.,* 119 F.2d 700, 702 (7th Cir. 1941). However, modern case law holds that uniformity or evenness in application of sanctions is not necessarily required. Nevertheless, agencies must explain their departure from previous norms and if they depart too far from previously employed sanctions they may be held to have acted arbitrarily or capriciously. See *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade,* 412 U.S. 800, 808 (1973); *Cross v. United States,* cited below, 512 F.2d at 1217-1218 n. 8; 5 Mezines, Stein, and Gruff, *Administrative Law,* at 42-7 and 42-8. Of course, if the sanction appears to be too harsh and far out of proportion to the violation involved, the courts may find it completely inappropriate and throw it out. See *Power v. United States,* 531 F.2d 505 (Ct. Cl. 1976); *Albert v. Chafee,* 571 F.2d 1063 (9th Cir. 1977).

was evidence of mitigating circumstances. The Court held that tnere was no doubt that divestiture was a lawful sanction under the particular statute involved. However, the Court recognized that the I.C.C.'s power was "corrective, not punitive" and that the "justification for the remedy is the removal of the violation." 371 U.S. at 129, 130. The Court proceeded to discuss the means in which the powers to expunge violations should be exercised, stating:

> The use of equitable powers to expunge a statutory violation has been fully developed in the context of the antitrust laws and is, in many respects, applicable to §5(7). The "most drastic, but most effective" of these remedies is divestiture. And "[i]f the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result." . . . Our duty is to give "complete and efficacious effect to the prohibitions of the statute" with as little injury as possible to the interests of private parties or the general public. . . . As these cases indicate, *the choice of remedy is as important a decision as the initial construction of the statute and finding of a violation. The court or agency charged with this choice has a heavy responsibility to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objects just described.* . . . . (Emphasis added.)
> 371 U.S. at 130.

The Court went on to advise that its role was to "ascertain whether the Commission made an allowable judgment in its choice of the remedy" and emphasized that it wished to see evidence that a judgment as to remedies was made based upon "proper standards" and that mitigating evidence was considered. 371 U.S. at 130, 131.

The courts continually follow the doctrine that agencies should be careful in fashioning remedies which are reasonably related to the unlawful practices found to exist and state that they will not interfere if care is taken and if the particular remedy is justified by the facts and warranted in law. See, e.g., *Jacob Siegel Co. v. F.T.C.,* 327 U.S. 608, 611–613 (1946), a case remanded to the Federal Trade Commission which had employed the most drastic sanction possible (expunging the name of a product) to prevent deceptive advertising without explaining why less drastic remedies (such as qualifying statements in the advertising) would not have sufficed. See also *Cross v. United States,* 512 F.2d 1212 at 1217 *et seq.* (4th Cir. 1975, *en banc*) where in a long explanation the Court began by stating:

> Due process on the issue of sanction requires that the punishment follow rationally from the facts, be authorized by the statute and regulations, and aim toward fulfillment of the Act's purposes. (Footnotes omitted.)

The Court summarized the standard of reviewing administrative sanctions by stating that the Court would affirm them unless they were "arbitrary and capricious" which the Court interpreted to mean that the sanction was "unwarranted in law or without justification in fact." The Court stated that it would therefore not interfere with the administrative sanction employed unless the agency had abused its discretion by acting arbitrarily or capriciously. See also cases collected in 5 Mezines, Stein, and Gruff, *Administrative Law,* at 42–5 and 42–6; and cases cited in *Butz v. Glover Livestock Commission Co.,*

411 U.S. 182, 185–186 (1973). See also *Shuck v. S.E.C.*, 264 F.2d 358 (D.C. Cir. 1958), in which the Court stated:

> But this is not to say that the Commission can revoke in every case where an injunction is procured. We think its action must be fair and just under all the circumstances, and lacking in any element of an arbitrary or capricious nature, as well as being in the public interest.
> 264 F.2d at 362

What Remedy Would Follow Rationally From the Facts, be Authorized by Law and Aim Toward Fulfillment of the Purposes of the Freight Forwarder Act

Having discussed applicable principles of law, it now becomes necessary to select a remedy which will be justified by the facts, be warranted in law, and will give effect to the statute "with as little injury as possible to the interests of private parties or the general public." *Gilbertville Trucking Co. v. United States, supra,* 371 U.S. at 130.

There is no doubt on the evidence of record that Mr. Brown has committed violations of General Order 4. Reduced to their essence, however, Mr. Brown did two things: (1) he failed to pay over shippers' money to carriers on numerous occasions within the seven day period prescribed by the General Order and in certain instances has still not paid over money owed although in the process of doing so; and (2) he did not comply fully with the instructions contained in a letter from the staff. However, he did cease handling shippers' money in response to the letter and did furnish some of the financial statements requested. For these transgressions Hearing Counsel urge that he be found "unfit" and that his license be stripped, in effect destroying his forwarding business. The immediate problem I have with this extreme sanction is whether it makes sense and serves some purpose. Here is a man who owes Sea-Land substantial sums of money as well as the shipper Glidden in an amount not covered by his bond and who is attempting to pay off his debts. How then will Sea-Land and eventually Glidden be reimbursed if Mr. Brown's forwarding business is terminated? Furthermore, since Mr. Brown, as far as this record shows, has not been handling shippers' money since some time in August of 1978, how can shippers doing business with him possibly suffer harm concerning his use of shippers' money? Revocation of his license therefore resembles the old practice in nineteenth century England of casting debtors into prison where they had no chance of repaying their debts even if they wished to do so. Mr. Brown testified that he did not close up shop and leave the port so that other people would be left holding the bag, as have one or two other forwarders in Jacksonville, but he chose to stay and fight it out. If Hearing Counsel's sanction is adopted, the Commission will ensure that he quit the business and leave others to hold the bag and will help add people to the ranks of the unemployed since Mr. Brown employs three persons in his forwarding business.

The cases which Hearing Counsel cite to support this position are enlightening. In none of them did the Commission destroy an ongoing business which had been functioning for some time with a license properly issued and which

the licensee wished to continue operating himself, nor did any of these cases involve revocation merely because of violations of the payover rule and failure to answer questions fully from the Commission's staff. Thus, in *Harry Kaufman d/b/a International Shippers Co. of N.Y.—Independent Ocean Freight Forwarder,* 16 F.M.C. 256 (1973), Mr. Kaufman's license was revoked mainly because he had transferred his license to another person without approval of the Commission and had in effect sold his business to that person who operated the business without a license. But Mr. Kaufman did this because he wanted to retire and he did not actively participate in the business after he sold it to the unlicensed person. 16 F.M.C. at 266, 272, 273.

In *Independent Ocean Freight Forwarder License Application, James J. Boyle & Co.,* 10 F.M.C. 121 (1966), the Commission denied an application for a license to a person who had operated a forwarding business between July 1964 and July 31, 1965, without a license but had discontinued the business and had furthermore operated "through the use of guile and deception." 10 F.M.C. at 126.

In *Independent Ocean Freight Forwarder Application—Lesco Packing Co., Inc.,* 19 F.M.C. 132 (1976), the Commission denied a license to the applicant because its sole stockholder and chief executive officer had been guilty of a long history of violations of various laws including the Bills of Lading Act as well as section 44 of the Shipping Act.

In *Independent Ocean Freight Forwarder License Cleto Hernandez R. d/b/a/ Pan Inter,* 19 F.M.C. 104 (1976), the license of Mr. Hernandez was revoked for a number of reasons, namely, lack of independence from a shipper, failure to pay money given him by a consignee to a shipper, and failure to pay a carrier freight money. The facts showed that Mr. Hernandez was in reality an employee of a shipper and only a part-time freight forwarder and employed no one in his forwarding business. 19 F.M.C. at 106.

In *Aetna Forwarding Co., Inc.—Revocation of License,* 8 F.M.C. 545 (1965), also cited by Hearing Counsel, the forwarder's license was indeed revoked and part of the reason for revocation was the forwarder's failure to pay over freight money in substantial amounts. However, this forwarder had in fact ceased operating the business of forwarding and furthermore had no fidelity bond. 8 F.M.C. at 552. The lack of a bond or other security alone would automatically result in the loss of a license. 8 F.M.C. at 551.

To repeat, in none of the above cases was the Commission dealing with a forwarder like Mr. Brown, i.e., one operating a business with a license for 10 years who was guilty solely of violations of the payover rule and of failing to furnish all the information requested by the Commission's staff, but one who very much wished to continue in business in order to pay off his debts, which he had already begun to do. Perhaps the differences between Mr. Brown and the other forwarders discussed in the above cases is only a matter of degree and one could argue that Mr. Brown is really financially unstable and unfit to continue as a forwarder. However, these differences in degree and his willingness to make good are the type of facts which the Commission is supposed to consider when tailoring a just and reasonable remedy which will effectuate

the purposes of the freight Forwarder Law "with as little injury as possible to private parties or the general public."

A survey of other cases in which forwarders had violated the payover rule and other regulations demonstrates that the Commission has been adept in fashioning remedies more useful than revocation. In these cases furthermore the Commission has shown great concern not to destroy an ongoing business and in one case, despite numerous serious violations which initially caused the Commission to find the forwarder unfit, the Commission nevertheless issued the license upon the forwarder's representation that denial of a license would destroy a well established business built up over a number of years. *Dixie Forwarding Co. et al., Application for License,* 8 F.M.C. 167 (1964), reconsidering 8 F.M.C. 109 (1964).

In *Application for Freight Forwarder License, Del Mar Shipping Corporation,* 8 F.M.C. 493 (1965), the Commission adopted the Initial Decision which had recommended that the application be granted to an ongoing business provided that an exporter divest himself of his interest in the forwarder's business. This remedy was employed rather than absolute denial with the comment:

> Such divestiture presumably could result in the granting of Del Mar's application and the saving of the jobs of its nine employees, thereby preserving a freight-forwarding firm that has been in existence for a number of years prior to enactment of the present law.
> 8 F.M.C. at 497

In *License Application—Guy G. Sorrentino,* 15 F.M.C. 127 (1972), the Commission adopted another Initial Decision which had recommended that a license be granted to an applicant who had participated to some extent in violations of section 16 First of the Shipping Act, for which the corporation of which he was president had been convicted in a federal court. Nevertheless the Commission considered the fact that applicant had no other profession, had been engaged in the forwarding business for a long time, and had suffered quite enough because of his transgressions. The Commission adopted this language:

> However, on balance, the applicant's connection with the sixteen instances of misclassification herein pleaded does not appear to have been so culpable as forever to bar him, when all the circumstances are considered, from pursuing the trade which has occupied all of his mature life and which as a real matter is probably his only means of gaining a livelihood. . . . Applicant has a long history of useful and profitable service in the shipping industry and is technically well qualified to serve shippers, carriers, and the public. This long, fruitful history of creditable service in his profession, coupled with his frank admission of his fault, in addition to the fact that he had suffered substantial economic and professional loss by his voluntary self-exclusion from the freight forwarding profession for 11 months tends to mitigate the effects of his culpability. Applicant is cautioned, however, that the violations of law which he at least has condoned were serious and involved the essence of the high responsibility which he must assume as a licensed freight forwarder. . . . Any future violations by applicant of the Act or the Commission's applicable rules and regulations, such as those involved herein, would warrant action to revoke applicant's license.
> 15 F.M.C. at 138, 139.

In previous cases involving violations of the payover rule the Commission has shown its adeptness in fashioning remedies to fit the particular case and in only two of these cases, which involved a number of other violations and problems, did the Commission feel the need to exercise its most drastic sanction, i.e.,

revocation of the license. In these cases it is rare if ever that violations involve the payover rule alone. Invariably they involve payover violations plus such things as shipper connection, lack of a surety bond, failure to pay shippers as well as carriers, forgery, etc. In none of them were the payover violations coupled only with the failure to answer staff letters fully, as with Mr. Brown.

Cases Involving Violation of Payover Rule and Commission Flexibility in Fashioning Appropriate Sanctions

In *Aetna Forwarding Co., Inc.—Revocation of License,* 8 F.M.C. 545 (1965), and in *Independent Ocean Freight Forwarder License Cleto Hernandez R. d/b/a Pan Inter,* 19 F.M.C. 104 (1976), the Commission revoked the license. However, in *Aetna,* as noted, the forwarder had, in addition to violating the payover rule, canceled its surety bond and ceased operating his business while owing shippers some $40,000. In *Hernandez, d/b/a Pan Inter,* as mentioned earlier, Mr. Hernandez was in reality only a part-time forwarder, being employed most of the day by a shipper, in addition to violating the payover rule and failing to pay a shipper as well as carriers. He also had no employees in the forwarding business. 19 F.M.C. at 107. Neither of these cases involved viable ongoing independent businesses.

In *Florida-Panama Forwarders, Inc.,* 14 SRR 551 (1974), the only case of which I am aware involving nothing but a refusal to pay over freight to a carrier, the Commission discontinued the proceeding upon proof that the forwarder had made the payment. The case involved a peculiar set of facts in which the forwarder was withholding only $1,623.63 in freight in an effort to obtain payment by a company related to the carrier on a debt owed to another company in which the forwarder had an interest. No one recommended revocation of the license under these peculiar facts. Hearing Counsel had specifically stated that no purpose would be served by revocation. See Initial Decision, 13 SRR 655 at 658.

In *Independent Ocean Freight Forwarder License, E. L. Mobley, Inc., supra,* 19 SRR 39, the Commission, earlier this year, found that the forwarder's qualifying officer had violated the payover rule and in addition had committed an act of forgery in one instance under pressing circumstances. However, the Commission did not revoke the license of the business. Instead, after another person had become a qualifying officer, it merely suspended the guilty person for six months and required the forwarding business "to submit monthly financial accounting as to its full compliance with the payover rule for a period of one year." 19 SRR at 42. As mentioned before, the Commission expressly stated that it would fashion suitable remedies, would consider evidence of mitigation, and believed the freight forwarder law to be remedial, not punitive in character. The Commission fashioned this reasonable remedy although it found that the act of forgery "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." 19 SRR at 41. Note that the forwarder respondent in the *Mobley* case was a corporation, unlike Mr. Brown, and that another member of the Mobley family became a qualifying officer so

that the forwarding business could continue operations even while Mr. Mobley was suspended for six months. Note also that in the *Mobley* case, Hearing Counsel did not urge revocation but merely suspension because of mitigating factors among which was the fact that "there are others who depend upon the license of E. L. Mobley, Inc., for their livelihood." Initial Decision, 18 SRR at 1161. Should Mr. Brown, upon whose license at least three employees depend, not to mention his shipper accounts, be treated more severely merely because he did not choose to become a corporation or because he did not have family members ready to become qualifying officers in the event he slipped up on the rules and regulations?

Perhaps the outstanding example of Commission flexibility to adapt to the facts of any particular case is the case of *Dixie Forwarding Co. et al. Application for License, supra,* 8 F.M.C. 109, and on reconsideration, 8 F.M.C. 167, and relied upon by the Commission in *Mobley.* In that case, the Commission granted a license to an applicant who committed payover violations as did Mr. Brown but who did much more. Thus, the applicant failed to pay over funds to carriers because it wrote checks which "bounced," applicant deliberately provided dishonest financial statements to a Commission investigator, applicant falsely certified to carriers that it was licensed by the Commission in order to collect brokerage, and applicant operated its business without a license even during the hearing. This conduct seemed to constitute such convincing evidence of unfitness that the Commission refused to grant the license. The Commission stated its feelings as follows:

> The record in this proceeding clearly shows that the attitude of negligent indifference characterized virtually every facet of Grave's forwarding operations.
> 8 F.M.C. at 113.

> [H]is actions as spread across this record establish an attitude of at best complete indifference and at worst willful negligence regarding the duties and responsibilities imposed upon him by law.
> 8 F.M.C. at 115.

The Commission proceeded to describe the nature of a forwarder's profession as that of a "fiduciary," holding shippers' money and having access to shippers' confidential business secrets. 8 F.M.C. at 115. The Commission described the economic power which a forwarder has with respect to carriers and narrated the history of the freight forwarder law, P.L. 87–254, which was designed to correct malpractices in the forwarding industry. 8 F.M.C. at 115–118. Then the Commission concluded by stating:

> The business integrity of one who occupies the position of freight forwarder should be above reproach, and he should clearly demonstrate a complete awareness of and a willingness to accept the responsibilities that the preferred position imposes. Graves has shown an almost total lack of both. . . . Thus the philosophy of section 44 is such that the shipping public should be entitled to rely upon the responsibility and integrity as well as the technical ability of a freight forwarder. The record here, however, demonstrates that the members of the shipping public who do business with Graves do so at their own risk. We cannot conscientiously license such an applicant and thereby suggest to the shipping community that we have probed his conduct and found him "fully competent and qualified" to act in a fiduciary capacity.
> 8 F.M.C. at 118.

Note that applicant in the *Dixie* case did not merely fail to pay over or respond to a Commission investigator. Applicant wrote bad checks and delib-

erately misrepresented his financial statements when furnishing them to the investigator, among other deliberate actions. 8 F.M.C. at 110–115. Mr. Brown, on the other hand, failed to comply with the payover rule and failed to furnish all the financial statements requested by the staff. He did indeed misuse shippers' money in order to meet his own expenses. But he did not sign bad checks and never submitted a dishonest financial statement to the Commission's investigator, much less operate without a license or falsely certify to carriers that he was licensed as did Dixie. Yet the Commission, upon reconsideration, granted the license to Dixie notwithstanding the strong language condemning Dixie's past practices and requiring the highest standards of behavior for forwarders. 8 F.M.C. 167. The only reason the Commission advanced for its change of heart, furthermore, was the fact that the applicants (there were actually two applications filed by one person):

> [e]mphasize that their continued business activity depends almost entirely on their being licensed to engage in freight forwarding, and that the denial of such licenses would destroy a well-established business built up over a number of years.
> 8 F.M.C. at 167, 168.

However, the Commission acknowledged that applicants had promised to cooperate fully with the Commission and adhere scrupulously to the requirements of law and certain conditions imposed by the Commission, namely, that they would submit a certified audit of their financial status every six months for a period of two years. 8 F.M.C. at 168.

Having explored previous cases demonstrating the Commission's belief that the freight forwarder law is not punitive in nature and that it should be administered with reason and flexibility to fit the particular facts of any case, I now consider the facts of this case and what a reasonable remedy would be.

Fashioning a Reasonable Sanction to Fit Mr. Brown

As discussed above, Mr. Brown did indeed violate the payover rule and misuse shippers' money. He also failed to furnish all the information requested by the Commission's staff. Furthermore, his failure to comply with the payover rule and to furnish all the information in a timely fashion was willful in the administrative-law sense, i.e., it was done with careless disregard or was grossly negligent. On the other hand, the reasons for Mr. Brown's delinquency were honestly stated and his shortcomings admitted by him. His misuse of shippers' money relates to pressing financial difficulties in running his business during a strike period and thereafter but also relates to his own decision to expand the business. His failure to furnish all the information requested by the staff on time was careless but relates partially to a misunderstanding with his accountant. These are mitigating circumstances which lessen the degree of his culpability. He also has been paying back his major debt to Sea-Land and states that he will make a similar arrangement with a major shipper, Glidden, after finishing with Sea-Land. He did furnish financial statements at the hearing and before, and offered to make up for all the previous statements not furnished to the staff. As far as the record shows, furthermore, he did comply with the staff's instructions to discontinue handling shippers' money. Finally, he asked that he

be allowed to run his business and pay off his debts and stated that he had refused to close his business and leave others to hold the bag as apparently had one forwarder who recently closed down in Jacksonville, according to Mr. Brown.

Does Mr. Brown, then, deserve to have his license revoked and his business destroyed? Cannot the Commission fashion some less drastic remedy that will enable Mr. Brown to pay off his debts without harming any shippers or members of the public? I think the Commission has shown itself more than willing and able to devise a more reasonable solution than a death sentence, as the cases discussed above well illustrate. Furthermore, if the Commission revokes his license and terminates his forwarding business, how will Mr. Brown be able to pay off his debts and will not the Commission be ensuring that, contrary to his wishes, Mr. Brown will be forced to close down and leave others holding the bag? (His $30,000 surety bond does not cover all of his debts.)

Mr. Brown has not committed an act of forgery which involves "moral turpitude" as did Mr. Mobley and he certainly has not deliberately submitted false information to the Commission or the staff, or deliberately written bad checks and misrepresented that he held a license, all of which things Dixie did. Yet both the Mobley and Dixie companies were allowed to continue in business, albeit Mr. Mobley was personally suspended for six months and both companies had to furnish periodic financial reports.

Since Mr. Brown has not handled shippers' money for over a year now, shippers need not fear that he might misuse their money. Furthermore, I see no reason why the remedies employed in the *Dixie* and *Mobley* cases regarding reporting requirements cannot be employed in this case especially since the reports concerning his outstanding freight accounts should not show any delinquencies beyond those which arose when he was still handling shippers' money over a year ago. Periodic reporting as to his financial condition in the form of balance sheets should reveal whether he is really "turning around" his business by reducing the deficit in his equity account. Moreover, reports concerning the status of his outstanding debt to Sea-Land and, at some future date, a commitment to pay off the debt to Glidden should enable the Commission to monitor Mr. Brown's good faith. Failure to furnish these reports in timely fashion or indications in the reports that he is somehow again violating the payover or any other rule will be grounds for revocation without further hearing.[7] The Commission has stated that such a reporting requirement constitutes "[a] reasonable and previously recognized response to such circumstances. . . ." *Independent Ocean Freight Forwarder License, E. L. Mobley, Inc., supra,* 19 SRR at 42. I would therefore ratify the staff's action in instructing Mr. Brown not to handle shippers' money and to file monthly financial reports (balance sheets and freight accounts with shippers) in affidavit form. Furthermore, I would require Mr. Brown, on or before the date he finishes paying the Sea-Land debt, to submit his plan for paying the Glidden debt. If Mr. Brown fails to file these reports in timely fashion, or if they reveal new violations of

[7] See *York Forwarding Corp., J. B. Wood Shipping Co., Inc.*, 15 F.M.C. 114, 126 (1972), in which the Commission stated that failure of the forwarder to furnish the full report on the manner in which it complied with various conditions would result in revocation of the license without further proceedings.

any rule or regulation, the staff should notify the Commission, which would then issue an appropriate order revoking Mr. Brown's license.

The Question of Mr. Brown's Financial Stability

A word should be said about the question of Mr. Brown's financial situation as it affects his fitness as a forwarder. Hearing Counsel refer to his "negative working capital" together with other facts in arguing that he is no longer fit or able to continue the business of forwarding. Hearing Counsel's Memorandum of Law, 8.

The record shows that Mr. Brown, who once had a positive equity account on his balance sheet, has a negative account which he has been steadily reducing. As of June 30, 1979, he had apparently reduced it to $8,882.38. The conversion of his earlier positive equity into a deficit may have been attributable to the sudden liabilities arising out of the debt to Sea-Land. However, he does show a positive net income for the end of May and June, 1979, the last months of record for which there is any such evidence.

The financial soundness of a business is important to consider because if the business were shaky, there would be an incentive for the forwarder to misuse shippers' money to aid the business, as happened in this case with Mr. Brown. However, as noted, Mr. Brown has complied with the staff's instructions not to handle shippers' money since some time in August of 1978. However, there are other reasons why I do not believe that Mr. Brown's financial situation justifies the drastic sanction of revocation of his license.

First, I note that no one has claimed that Mr. Brown has been unable to procure a surety bond. Apparently the insurance company is not worried about his financial condition. Hearing Counsel cite *Independent Ocean Freight Forwarder License Application, James J. Boyle & Co.,* 10 F.M.C. 121, 127 (1966), in which the Commission referred to the financial standing of a forwarder. But in that case the Commission related financial standing to the ability to provide a fidelity bond ("limiting access to the profession to those fit, willing, and able, and of sufficient financial standing to be able to provide a fidelity bond," 10 F.M.C. at 127).

Next, in *Dixie, supra,* after refusing to accept Dixie's estimates of financial soundness and denying its license initially 8 F.M.C. at 114, 115, the Commission, as seen, granted the license on reconsideration notwithstanding lack of reliable evidence of "financial responsibility." Dixie had failed to submit requested current balance sheets and had even furnished a balance sheet falsely updated. Here Mr. Brown has submitted balance sheets at the hearing and before, although not every month as the staff requested, and no one has claimed that these balance sheets are phony.

Finally, how fair is it to revoke a license for failure to be "financially sound" or "responsible" when neither General Order 4 nor case law defines these terms? All that the General Order requires is that the forwarder obtain a surety bond in the amount of $30,000. 46 C.F.R. § 510.5(g). Failure to file a valid surety bond with the Commission results in automatic revocation of a license. 46 C.F.R. § 510.9, proviso paragraph. There is no mention of positive

equity account or negative equity account or how the balance sheet should look as between debt and equity. This is in contrast to regulations of other agencies such as the Securities and Exchange Commission which imposed specific net capital and aggregate indebtedness requirements and limitations on stock brokers. See *Shuck v. S.E.C.*, 264 F.2d 358, 359 (D.C. Cir. 1958). Mr. Brown wishes to pay off his debts and is in fact doing so with respect to Sea-Land. He also no longer handles shippers' money and is trying to restore a positive equity account to his business, which he is gradually achieving. Therefore, why should he be found to be financially irresponsible or unsound so that his license should be revoked especially when these terms are nowhere defined and when he has obtained the requisite surety bond?

A final case should be discussed because it illustrates the differences between Mr. Brown and a forwarder who is truly unfit and financially irresponsible. This is the recent case of *Fast International Forwarding Corporation—Independent Ocean Freight Forwarder Corporation and Possible Violations of Section 44, Shipping Act, 1916,* 19 SRR 339 (I.D. 1979) (F.M.C. Notice, June 11, 1979). In that case an application for a forwarding license was denied because the applicant was found to be unfit and undeserving of a license. But the record showed, in addition to payover violations, a whole series of violations of law, e.g., operating without a license, writing bad checks to carriers, borrowing another forwarder's license, lending a license which applicant did not even have, and misrepresenting facts to the Commission's staff. Most of these practices occurred after warnings from the staff. No one appeared at the hearing in support of applicant, not even the applicant and there was no evidence that applicant was contrite and would reform. She was clearly unfit and because of her history of writing bad checks as well as failure to pay over freight money, demonstrated financial irresponsibility.

But contrast the above forwarder with Mr. Brown, who has not written bad checks, nor misrepresented facts to the Commission's staff, nor lent his license illegally, and has admitted his past errors regarding payover and failure to furnish the staff all the information requested. But he has acknowledged his mistakes and wishes to redeem himself. Is it then fair to put Mr. Brown in the same category as *Fast International* by finding him unfit and financially irresponsible and revoking his license?

Ultimate Conclusions

Mr. E. Allen Brown has been a freight forwarder in Jacksonville, Florida, under a license issued by the Commission over ten years ago. In a compliance check conducted in early 1978 it was discovered that he had failed to pay over freight money to ocean carriers within the time period prescribed by General Order 4 over 100 times in 1977. Subsequent data which he submitted to the Commission's staff showed further instances of failure to pay over as required and also revealed that as a result of his misuse of certain shippers' money, he had incurred debts and obligations to at least two carriers and one major shipper. In addition to this failure to observe the requirements of the payover rule, Mr. Brown also failed to furnish all of the financial information which the

Commission's staff requested of him, although he did furnish some of the information and he did voluntarily comply with the staff's instructions that he no longer handle shippers' money. These failures were the result of careless disregard of the requirements imposed upon him by law and the Commission's regulation and were therefore "willful" as that term is understood in administrative law.

As a result of these practices, the Commission instituted this proceeding to determine whether Mr. Brown's license should be suspended or revoked. Hearing Counsel urge that he be found to be unfit to continue as a freight forwarder and that his license be revoked because of these willful violations. Mr. Brown, appearing in his own defense without benefit of attorneys, admitted his past shortcomings and asked for a chance to pay off his debts and restore his business to a sound financial footing. The record shows that he is paying off one of his major debts and he stated that he would deal with the other when he could finish with the first one. It also shows that he is gradually reducing a negative equity account in the business. No shippers or other clients appeared at the hearing either in his behalf or to complain about his past conduct or present indebtedness.

In determining what sanctions should be applied, case law and Commission decisions hold that Mr. Brown's status as a licensee with an ongoing business should be carefully considered, that section 44 of the Act (the Freight Forwarder Law) is remedial, not punitive in nature, and that the Commission ought to consider mitigating circumstances and fashion a remedy suitable to the particular facts, if possible, one that is less drastic than total extermination of his business by revocation of the license. In previous cases the Commission has shown itself particularly adept at devising just and reasonable remedies short of revocation. In those cases, furthermore, the forwarders involved committed more serious violations of law than mere violations of the payover rule and failure to furnish all information requested by the Commission's staff.

Based upon these principles of law and Commission precedent, and considering evidence of mitigation, I find that Hearing Counsel's recommendation for termination of Mr. Brown's forwarding business by revocation of his license to be too drastic. Furthermore, such a sanction would deprive Mr. Brown of the chance to pay off his debts as he is attempting to do and would ensure that other people would be left "holding the bag." The situation calls for application of a more reasonable remedy which has been used by the Commission several times in the past, most recently this year, namely, reporting and monitoring by the staff and the Commission to ensure that Mr. Brown is carrying out his stated intentions to make good.

Consequently, Mr. Brown should be placed in an indefinite period of probation until such time as he pays off his debts and establishes a positive equity in his business. He should be required to furnish financial statements (balance sheets and statement of freight-money accounts with shippers) every month in affidavit form, to continue to desist from handling shippers' freight money, and to submit a plan to pay his remaining debt to Glidden on or before the date he finishes paying his debt to Sea-Land. If he fails to do these things, or if the information submitted shows new violations of law or the Commission's regu-

lations, the staff should refer the matter to the Commission for automatic revocation of his license.

Since he is no longer handling shippers' freight money, there is no danger that they will suffer harm from misuse of their funds. Moreover, Mr. Brown will be given a fair chance to demonstrate that he will carry out his statements made at the hearing that he would "turn his business around" and ultimately pay off his debts if he were only allowed to do so.

(S) NORMAN D. KLINE
Administrative Law Judge

WASHINGTON, D.C.
October 17, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-57

RUFFIN, INC.

v.

COSTA ARMATORIA S.P.A. AND
ITALIA DI NAVIGAZIONE

NOTICE

March 25, 1980

Notice is given that no appeal has been filed to the February 15, 1980, 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, review will not be undertaken.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-57

RUFFIN, INC.

v.

COSTA ARMATORIA S.P.A. AND
ITALIA DI NAVIGAZIONE

Finalized March 25, 1980

Shipment of fertilizer improperly classified as Soil Compacting Chemicals and Soil Stabilizers in violation of the Shipping Act, 1916.
Reparation awarded.

Abraham A. Diamond and *Margaret Muller Wilson* for complainant.
Michael D. Martocci for respondents.

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

In November of 1977, complainant, Ruffin, Inc., tendered to respondents, Costa Armatoria S.p.A. and Italia Di Navigazione, a shipment described on the bill of lading as:

Rayplex Iron, Zinc, Manganese and Magnesium Powder: Soil Conditioners, Rayplex Trace Mineral Soil Micronutrients.[2]

At the time of the shipment, respondents were operating as common carriers by water in a joint venture under the name of Italia/Costa Line Joint Service. Complainant was assessed freight charges of $14,739.00 based on a measurement of 3,866 cubic feet. The rate of $52.50 W/M was based on Italia/Costa's Freight Tariff No. 1 using the commodity description, "Soil Compacting Chemicals and Soil Stabilizers."[3] Complainant paid the $14,739.00. In June of

[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 C.F.R. §502.227).

[2] The shipment was made up of four Rayplex products—"Rayplex Zinc," "Rayplex Iron," "Rayplex Manganese" and "Rayplex Magnesium."

[3] The rate was increased by $10.00 effective October 18, 1977, because of a general increase announced by a letter of notice to shippers. The actual tariff page shows a rate of $142.50.

1976 complainant filed a corrected export declaration reclassifying the shipment as Fertilizer N.O.S. which Ruffin argues is the correct classification and the one which respondent should have applied to the shipment. The Fertilizer N.O.S. was $132.99 per 2240 lbs. and at 83,0855 lbs. the freight charge would have been $4,896.08. Complainant asks reparation of $9,472.13 plus costs and interest.

Discussion and Conclusion

The issue presented is whether Ruffin's shipment should have been classified and freighted as Fertilizer N.O.S. rather than Soil Compacting Chemicals and Soil Stabilizers. Certain defenses raised by respondent can be disposed of before reaching the merits of the controversy.

First, Italia/Costa contends that Ruffin, as an "expert sophisticated shipper" is bound by its initial description of the cargo. The Commission has long held that what was actually shipped and not the description on the bill of lading determines the proper rate to be charged. *Union Carbide Inter-America v. Norton Line*, 14 F.M.C. 263 (1971). Respondents also contend that Ruffin's failure to file a claim with them within the six-month period prescribed in their tariff bars Ruffin's complaint here. This argument was finally laid to rest in *Kraft Foods v. Moore McCormack Lines,* 19 F.M.C. 407 (1976). A tariff prescribed time limitation cannot in any way alter or diminish the two-year statute of limitations set forth in section 22 of the Act. There remains only the question of whether Ruffin has sustained the heavy burden of proof necessary to establish its claim.

Ruffin relies on two affidavits and some advertising literature to show that "Rayplex" is a fertilizer compound.[4]

The advertising material submitted by Ruffin describes one product Rayplex magnesium as a "water soluble polyflavanoid magnesium (PFMG) fertilizer compound" which is recommended for correction of magnesium deficiencies in alkaline soils having a pH of 7.8 or higher. It is said to be effective on certain field crops and on deciduous fruit trees.[5]

James M. Davron is the export manager of Ruffin and has had 10 years experience in marketing Ruffin's "micronutrient fertilizers throughout the world outside the United States." Mr. Davron states that the bill of lading description was wrong insofar as it described the shipment as "soil conditioners." The rest of the description was correct. Mr. Davron describes the product as follows:

> Rayplex . . . products are chelated micronutrient fertilizers. As the word "micronutrient" implies these products add minerals such as iron, zinc, manganese and magnesium either directly to plants through foliar spraying (spraying of the leaves) or are combined with other

[4] This material is admitted into evidence. The affidavit of Albin D. Lengyel is designated Exhibit 1; the affidavit of James M. Davron is designated Exhibit 2; and the advertising material is designated Exhibit 3. The bill of lading and tariff pages, etc., attached to the complaint are already in the record. The bill of lading and tariff pages attached to respondents' memorandum of law is admitted into evidence as Exhibit No. 4; the corrected declaration is admitted as Exhibit 5 and the affidavit of Leonard J. Maltese is admitted as Exhibit 6.

[5] Also included is literature on Rayplex Zinc, Rayplex iron and Rayplex manganese all of which are described as "fertilizers" with various specified attributes.

fertilizers and applied to the soil to provide metal salts to depleted plants and soils. Rayplex . . . is available in powder and in granular forms. [Its] sole function is to provide micronutrient metals in a form that can be taken up by plants.

Albin D. Lengyel is the owner of Lengyel's Agricultural Consulting Service "which provides agricultural consultation to farmers in sixteen (16) states and about six (6) foreign countries."[6] In his business Mr. Lengyel provides consultation and plant analysis and specializes in the use of soil nutrients, providing recommendations on the use of fertilizers. Mr. Lengyel concludes that Rayplex is a fertilizer—in his view "the sole use of the Rayplex ingredient is as a fertilizer or fertilizer material." Lengyel begins with the Association of American Plant Food Control Officials' definition of fertilizer:

Any substance containing one or more recognized plant nutrients which is used for its plant nutrient content and which is designed for use or determined to have value in promoting plant growth.

The Association defines "fertilizer material" as:

Any substance or mixture of substances, intended to be used for promoting or stimulating the growth of plants; increasing the productiveness, improving the quality of crops or producing any chemical or physical change in the soil.

Without going into unnecessary detail Mr. Lengyel's argument proceeds generally as follows. Rayplex iron, zinc manganese and magnesium can be designated collectively as plant nutrients. These are known in the agricultural as Liguin, Chelated micronutrients or minerals. These nutrients are spray-dried to make powders which then may be applied either directly to the soil or when dissolved in water to the foliage. The Rayplex products are most efficient when used by foliar application and when Mr. Lengyel recommends Rayplex products, he prescribes foliar application in about 94% of the cases. Rayplex products have a number of uses and solve a variety of problems, e.g. Rayplex zinc is used where the soil is deficient in zinc which is essential to normal -nitrogen metabolism and consequent good vegetative growth. Rayplex Iron and Rayplex Manganese supply these essential nutrients to plants such as milo, grain, sorghum, azalea and pyracantha which will die if there is an iron or manganese deficiency. Finally Rayplex magnesium is used to prevent a magnesium imbalance which can result in death at the seedling stage and in stunted growth at a later stage. It is Mr. Lengyel's position that these examples amply illustrate that the Rayplex nutrients clearly come within the definition of fertilizer and fertilizer material.

Mr. Lengyel also disagrees with respondents' argument that the Rayplex products can be considered "Soil Compacting Chemicals and Soil Stabilizers." He points out that while the Association does not define these terms they are generally understood by agronomists as referring to "a substance which is used to make soil firm, stable, set, unalterable, impermeable, etc." An example of a Soil Compacting Chemical is Attopulgite Clay which is used for sealing ponds so that the water will not leak through the dirt. Anydrous Ammonia and

[6] Mr. Lengyel's education and experience consists of: B.S. in Soil and Plant Chemistry & Horticulture, Purdue University; Graduate Studies in plant nutrition, plant biochemistry and plant pathology at the University of Maryland; Fertilizer Chemist, Swift & Co., 1954–58; Chief Chemist, Research Agronomist for Agrochemical Corp. 1958–64; nutritional agricultural consultant from 1965 and opened his business in 1967.

Calcium Carbonate can under various circumstances cause soil compaction.

Mr. Lengyel goes on to point out that iron, manganese, magnesium and zinc (the Rayplex nutrients) would have the exact opposite effect. These mineral sulfates would make the soil more airable more permeable to air and water and subject to the consequent loss of water. Rayplex is water soluble where as the most important characteristics of soil stabilizers and soil compacting chemicals is that they are not water soluble. Mr. Lengyel is unaware of "any reference at any place in the literature, under AAFPCO classification or any other text, where Rayplex nutrients are referred to or classified as either soil compacting chemicals or as a soil stablizer."

Respondents have offered the affidavit of Leonard J. Maltese, Director of Stillwell & Gladding a testing and consulting firm located in New York City. Mr. Maltese has a Master's Degree in Chemicals and has worked with chemicals including fertilizers since 1951. It is Mr. Maltese's opinion that he is "qualified to offer . . . advice to shipowners, surveyors, underwriters, etc., with respect to the classification and handling of cargoes of a chemical nature." Because I do not wish to misinterpret or wrongly summarize Mr. Maltese's affidavit I have set forth the substantive provisions in the entirety.

2. We all know the definition of a fertilizer and many substances are today used in these formulations. With the exception of organic waste products, some constituents of fertilizers in concentrated forms can be hazardous materials to ship—for example, ammonia gas. We cannot expect a ship to carry ammonia gas or nitrates or phosphoric acid and allow them to be labelled as fertilizers. Urea, gibberellic acid, auxins and others cannot be labelled fertilizers in pure form. Neither can chelates of metals be classified as fertilizers—for chelates have many other uses in industry, even in medicine for removing undesirable substances from the blood and urine, for example.

3. Only waste products or formulated plant food products applied in abundance should be classified as fertilizers. The bags should state in large letters "Plant Food" or "Fertilizer" for Coast Guard identification, if necessary. Any substance which will later be incorporated into or diluted into a plant nutrient comes under the category of chemicals with a secondary description regarding flammability, toxicity, incompatibility, explosiveness, etc. The Rayplex complexes advertise that "Elemental Sulfur is converted" which could mean to people reading that circular that these substances are oxidizing agents and that this should be explored further for safety purposes in shipping. If it is an oxidizing agent, precautions for storage and handling should appear on the containers.

4. I consider the Rayplex chelates in concentrated form not to be classified as fertilizers but as chemicals belonging to the organometallic groups.

On the basis of this record it is clear that the proper classification for the shipment in question was Fertilizer N.O.S. The whole text of the classification reads:

Fertilizers Viz:
Crushed Mineral Rock, with less than 2%—Apply Clay, Ground Magnesium Ammonium Phosphate (Magamp) Non-Hazardous . . .
NOS (Not Ammonium Nitrate, which takes Dangerous Cargo Rate) (Caution)

The classification used by respondents reads simply "Soil Compacting Chemicals and Soil Stabilizers" with no further language of example or explanation.

Based on the record before me I conclude that complainant has sustained its burden of proof and has established that the shipment in question was manufactured as fertilizer, sold as fertilizer, was intended for use as fertilizer and

should have been classified as fertilizer. Respondent has violated section 18(b)(3) of the Shipping Act (46 U.S.C. §818(3)).

Respondent is awarded reparation in the amount of $9,472.13.

(S) JOHN E. COGRAVE
Administrative Law Judge

WASHINGTON, D. C.
February 12, 1980

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-100

UNITED AERO MARINE SERVICE, INC.

v.

PACIFIC WESTBOUND CONFERENCE, ET AL.

NOTICE

March 25, 1980

Notice is given that no appeal has been filed to the February 14, 1980, dismissal of complaint 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

FEDERAL MARITIME COMMISSION

No. 79-100

UNITED AERO MARINE SERVICES, INC.

v.

PACIFIC WESTBOUND CONFERENCE, ET AL.

DISMISSAL OF COMPLAINT

Finalized March 25, 1980

Respondents have moved to dismiss this proceeding because of complainant's failure to allege a cause of action upon which relief can be granted; or as respondents put it "the complainant's failure to allege any facts upon which the Commission could conclude that there has been a violation of the Shipping Act, 1916." The complaint with quotation marks omitted is set forth below:

Complainant, UNITED AERO MARINE SERVICES, INC., for its formal complaint, alleges as follows:

1. The complainant is a corporation organized and existing under the laws of the State of New York, engaged in the business of forwarding freight, and having a principal place of business at 160 Broadway, New York, New York.

2. On information and belief, respondent PACIFIC WESTBOUND CONFERENCE is a conference having a principal place of business at 320 California Avenue, San Francisco, California, and is duly existing pursuant to the terms of 46 U.S.C. §814, and as such is subject to the provisions of the Shipping Act of 1916, as amended.

3. On information and belief each of the remaining respondents is a carrier who is a participant of the PACIFIC WESTBOUND CONFERENCE, and as such is subject to the provisions of the Shipping Act of 1916, as amended.

4. In or about February through May 1978, complainant shipped certain construction material, including "Steel Shapes, Fabricated, in Bundles" ("Steel Shapes"), destined to the Hsieh-Ho Power Station United No. 3 of the Taiwan Power Company, which shipments were subject to tariff rates set by respondent Conference.

5. In or about February, 1978, the respondent Conference, at the request of the complainant herein, caused to be published special project rates for Item No. 982 4008-00. Said item being known as "Steel Shapes". The special

project rates for Item No. 982-4008.00 were published in Pacific Westbound Intermodal Freight Tariff No. 8, FMC-15 (FMC). Said Tariff specifically relates to the shipments referred to in Paragraph 4, *supra*.

6. Steel Shapes, however, were inadvertently eliminated from the special project rate during the period March 20, 1978 to May 3, 1978, although immediately after the respondent PACIFIC WESTBOUND CONFERENCE received a complaint from the complainant herein they were restored after May 3, 1978.

7. That the Pacific Westbound Conference has been attempting to enforce the higher tariff for the period March 20, 1978 to May 3, 1978. That the complainant has refused the pay the higher tariff for this period on the grounds that the omission of Item No. 982-4008-00 for the period March 20, 1978 to May 3, 1978 was a clerical error on the part of the Pacific Westbound Conference.

8. By reason of the facts stated in the foregoing paragraphs complainant has been subjected to the payment of rates for transportation which were when exacted and still are (1) unduly or unreasonably preferential, prejudicial, or disadvantageous in violation of 42 U.S.C. §816; and (3) unjust and unreasonable in violation of 46 U.S.C. §817; or

9. The agreement, modification or cancellation is unjustly discriminatory or unfair as between carriers, etc., contrary to the provisions of 46 U.S.C. §814.

WHEREFORE, complainant prays that respondents be required to answer the charges herein; that after due hearing and investigation an order be made commanding said respondents to cease and desist from the aforesaid violations of said act, as amended, and establish and put in force and apply in the future such other rates as the Commission may determine to be lawful; and that such other and further order or orders be made as the Commission determines to be proper.

There is no construction of this complaint no matter how liberal which would produce a set of circumstances upon which the Commission could grant the complainant the "relief" it has requested. Complainant's cause is actually grounded upon what it sees as the following "facts."

In February of 1978 complainant requested the conference to set a special rate on "Steel Shapes" to be used in the construction of a power station inTaiwan. The conference granted the request and the special rate was published in its Tariff No. 15. The rate was omitted from the tariff during the period March 20, 1978 to May 3, 1978, but was reinstated when the omission was called to the attention of the conference. Again granting the complaint its most liberal construction, the actions by the conference are said to violate sections 15, 16 and 18 of the Shipping Act.

The conference's tariff on file with the Commission, of which official notice is taken reveals what actually happened in this case.

In March of 1977 the conference established project rates for the Taiwan Power Company. The project for which the rates were established was the construction of Units 1 and 2 for the Hsieh-Ho Steam Power Station in Keelung. *See* Exhibit A attached to Motion to Dismiss. Effective February 10,

1978, the company amended the project rates to include United No. 3.[1] On February 16 the conference published and filed a revision of the rate on Steel Shapes which specifically stated that the rates would expire March 10, 1978. *See* Exhibit C attached to motion. At the request of the complainant the conference reinstated the rate effective May 3, 1978.

On the basis of the pleadings before me it would appear that during the period in question respondent charged complainant those rates which were published and filed with the Commission, as complainant was required to do by the law. *United States v. Seatrain Lines, Inc.*, 370 F. Supp. 483 (S.D.N.Y. 1973).[2] Thus, unless the rates charged are discriminatory, prejudicial or otherwise unlawful under the Act there has been no violation and no ground upon which to sustain the complaint.

The complaint alleges that the "rates exacted" were and still are unduly or unreasonably preferential, prejudicial or disadvantageous in violation of section 16 of the Act (46 C.F.R. §815). However, an allegation essential to sustaining a violation of that section is not anywhere in the complaint. There is no allegation that any other shipper enjoyed the rates which were "denied" complainant or that any other shipper was preferred or enjoyed an advantage because of the omission from the tariff of the rates in question. In short there is no allegation of the competitive relationship necessary to the establishment of a violation of section 16 where the allegation is that ocean freight rates are the reason for the violation. *Mediterranean Freight Conference—Rates on Household Goods*, 11 F.M.C. 202 (1967).[3]

The complaint alleges that the rates charged are "unjust and unreasonble in violation of 46 U.S.C. §817." While the citation to the U. S. Code is to the entire section 18 of the Shipping Act, subsection 18(a) does not apply to shipments in foreign commerce. Subsection (b)(5) of section 18 condemns only rates which are so "unreasonably high or low as to be detrimental to the commerce of the United States." The difference in language of the two sections is crucial in that it distinguishes the differences in the degree of regulation the Commission exercises over the offshore domestic trades as compared with foreign trades. But nowhere in the complaint is there even a suggestion of how the rates "exacted" were detrimental to the commerce of the United States. In fact the complaint does not even state what rates were assessed during the period March 20, 1978 to May 3, 1978. The complaint simply does not contain enough to sustain the allegation that respondent has somehow violated section 18(b)(5).

[1] Respondents say the amendment was at the request of the complainant. This does not appear in the tariff.

[2] There is no allegation in the complaint that a rate charged by complainant was not properly published and filed with the Commission.

[3] The tariff pages which contain the special rate bear the requirement that the rates are available only if the bill of lading was "claused as follows: All materials included in the bill of lading are for the construction, erection and/or installation of the Taiwan Power Company Hsieh-Ho Steam Power Station Unit No. 1, 2 & 3, Kielung." Thus the reasonable presumption is that there were no other shippers of steel shapes for the Taiwan Power Company Project. And even if they were it is difficult to see what sort of competition would have existed between them which could have been effected by the actions of respondent as set out in the complaint.

Respondents take the assertion that the omission was "inadvertent" and due to "clerical error" as an attempt to transform the complaint into a special docket application for relief under section 18(b)(3). However, as respondents point out as an application for special docket relief the action is time-barred. The shipments in question, if any, had to be made during the period March 20, 1978 to May 3, 1978, since by the complaint itself this was the period when the special rate was not in effect. The complaint was not filed until November 19, 1979, clearly beyond the 180 day period specified in section 18(b)(3).

Finally the relief requested is either not compatible with the allegations of the complaint or makes no sense. The complainant would have the Commission order respondent to "cease and desist from the aforesaid violations." The complaint itself states that the special rates were reinstated on May 3, 1978, and has been in effect since then so that the violation cannot be the continued assessment of the rate which was in effect during the period in issue. Much the same is true of the request that the Commission "put in force and apply in the future such other rates as the Commission may determine to be lawful." Just what rates these could possibly be defies the imagination. The rates which complainant sought to have reinstated are still in effect so that it could not be those rates which the complainant would have the Commission supplant with "lawful" rates for the future. Indeed there is not a single allegation in the complaint that even hints that the current rates are in any way improper or even undesirable. If the cease and desist portion of the prayer for relief is directed at what would appear to be the continued attempts by the conference to collect the rates in effect during the period in question then the complaint offers not the slightest ground that would support even a limited presumption that the rates assessed were unlawful. First the complaint does not even state what those rates were; second, there is no assertion that the rates were not properly published and filed; and third if the prayer is directed to the allegation that the rates were prejudicial, the essential allegation of the preferred shipper is absent.[4]

The motion of respondent should be granted unless there is some reason for allowing complainant an opportunity to amend its complaint. Here there is none. Complainant did not avail itself of the opportunity afforded it to reply to the motion to dismiss and there is no reason to think that it would or could cure the deficiencies in the complaint by a motion to amend it.

An earlier motion to dismiss the proceeding as to it on the ground that during the period in question Waterman (1) did not participate in the establishing and filing of PWC rates, and (2) did not carry any cargo in the U.S. West Coast/Far East Trade. Since Waterman did not participate in the trade the proceeding should be dismissed as to it. However, in view of the foregoing it is unnecessary to rule individually on the Waterman motion.

The motion to dismiss the proceeding is granted.

(S) JOHN E. COGRAVE
Administrative Law Judge

February 14, 1980

[4] The plea that "such other and further order or orders be made as the Commission determines to be proper" is an example of pleading "boilerplate" so dear to lawyers and laymen who use form books and for the purposes of this motion is irrelevant. I include laymen because it is not apparent or clear from the complaint that it was drawn by an attorney. Indeed the signature is an illegible scrawl and carries beneath it no indication of the maker of the scrawl.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-99

H. K. INTERNATIONAL FORWARDING, INC.
INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION

NOTICE

March 27, 1980

Notice is given that no appeal has been filed to the February 21, 1980, order approving settlement 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

FEDERAL MARITIME COMMISSION

No. 79-99

H. K. INTERNATIONAL FORWARDING, INC.
INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION

ORDER APPROVING SETTLEMENT

Finalized March 27, 1980

H. K. International Forwarding, Inc., has filed with the Commission an application for a license as an independent ocean freight forwarder. During the course of the Commission's investigation of the applicant, it appeared that the firm had engaged in ocean freight forwarding activities without holding a license issued by the Commission although a warning from the Commission about unlicensed forwarding activities had previously been sent to the applicant.

Section 44(b) of the Shipping Act, 1916, requires that applicants be found "fit, willing and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules and regulations of the Commission issued thereunder . . . otherwise such application shall be denied."

Inasmuch as the applicant's conduct appeared to reflect adversely upon its qualifications to be licensed, the Commission notified H. K. International Forwarding, Inc., of its intent to deny the application unless the applicant requested a hearing on the grounds that such a denial was unwarranted. In a letter dated September 24, 1979, legal counsel for the applicant requested that the firm be given an opportunity to show at a hearing that such a denial was unwarranted.

Thereupon the Commission, by order served December 7, 1979, instituted this proceeding to determine:

1. Whether H. K. International Forwarding, Inc. has violated section 44(a), Shipping Act, 1916, by engaging in unlicensed forwarding activities;
2. Whether civil penalties should be assessed against H. K. International Forwarding, Inc., pursuant to 46 U.S.C. §831(e), for violations of the Shipping Act, 1916, and, if so, the amount of any such penalty which should be imposed taking into consideration factors in possible mitigation of such a penalty;

3. Whether, in light of the evidence adduced pursuant to the foregoing issue, together with any other evidence adduced, H. K. International Forwarding, Inc., and its corporate officers, possess the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, to be licensed as an independent ocean freight forwarder.

Section 10 of the Shipping Act Amendments of 1979 (Public Law 96-25 enacted June 19, 1979) provides as pertinent:

Section 32 of the Shipping Act, 1916, is amended by inserting at the end thereof the following new subsections:

(d) . . .

(e) Notwithstanding any other provision of law, the Commission shall have authority to assess or compromise all civil penalties provided in this Act. . . . (46 U.S.C. § 821)

To implement the provisions of P.L. 96-25 the Commission on July 5, 1979, published interim revisions to General Order 30. In explaining the revisions the Commission stated:

New § 505.3 reflects Pub. L. 96-25's provision for assessment of penalties decided after a formal hearing under section 22 which is instituted for the purpose of assessing such penalties. . . .

This section also requires Hearing Counsel, in assessment proceedings as contemplated in the legislative history of Pub. L. 96-25, to exercise prosecution responsibilities including the power to negotiate settlements and enter into stipulations in formal hearings.

Further, it is contemplated that any proposed settlement in a formal Commission hearing, including agreed-to-penalties, shall be submitted to the presiding officer for approval at any stage of the proceedings and must be embodied in a final Commission order before it can become effective.

In publishing its final rule revising General Order 30, on November 27, 1979, the Commission noted:

[i]t is contemplated that both the issue of whether violations have been committed as well as the assessment of penalties for such violations may be encompassed in a single proceeding.

* * *

[a] "compromise" proceeding as defined in § 505.2(c) is the informal process, while the "assessment" proceeding is a formal docket. (See § 505.2(a)) Settlements can be reached in either process with General Counsel or Hearing Counsel, as the case may be. . . .

The Commission intends no extraordinary impediment to settlements . . . Hearing Counsel as party to the stipulation or settlement, will not be approving agreements but rather will be joining with respondents in submitting agreements for approval.

[t]he rules do not specify whether the presiding officer can amend, modify or simply reject a settlement. Such powers are implied in the requirement that the presiding officer approve such a settlement. (44 *Federal Register* pp. 67660 and 67661)

Pursuant to these newly published procedures respondent's counsel and the Bureau of Hearing Counsel have negotiated the settlement[1] now before me for approval.

As a condition of, and pursuant to the settlement submitted, the respondent will not contest that the conduct which the Commission's order describes on page 1 thereof constitutes unauthorized freight forwarding by acting to assist in and arrange for the dispatch and documentation of a number of shipments by ocean common carrier on behalf of shippers and/or forwarders, or in conjunction with licensed freight forwarders, but without respondent itself

[1] Appendix A.

having been issued a freight forwarding license; nevertheless, in not contesting the allegations and by the submission of the settlement, the terms of which are set out below, it is expressly understood and agreed that this submission is not to be construed as an admission of guilt by respondent, its officers, directors or employees to the alleged violations set forth in the Commission's order.[2]

Accordingly, in settlement of all civil penalties under the Act arising from violations set forth in the Commission's order that may have occurred between August 1, 1978 and December 7, 1979, the respondent has tendered to the Federal Maritime Commission the sum of ten thousand dollars ($10,000.00); payment of said amount to be made in regular installments after the execution of a promissory note, a copy of which is attached as Appendix B to this order and incorporated herein.

And as a further condition of the settlement the respondent agrees to withdraw its application for a license as an independent ocean freight forwarder now pending before the Commission and agrees not to submit an application for a license as an independent ocean freight forwarder within six months from the date of the acceptance of the settlement by the Commission.

And, approval of the terms and conditions set forth herein by the Presiding Administrative Law Judge and the Commission shall constitute a stipulated settlement of the violations and civil penalty issues in this proceeding and shall forever bar the commencement or institution of any assessment proceeding or other claims for the recovery of civil penalties from respondent arising from the alleged violations set forth and described herein that occurred between August 1, 1978 and December 7, 1979.

As stated in revised General Order 30 (46 C.F.R. §505.1, 44 *Federal Register* 67661, November 27, 1979):

[t]he criteria for compromise, settlement, or assessment may include, but need not be limited to, those which are set forth in 4 CFR Part 101-105.

As pertinent to this settlement and the administrative process involved, the concepts embodied in those criteria warrant the approval of the instant settlement giving due consideration to:

a.) The probabilities of prevailing upon the legal questions involving and the litigation costs involved (4 C.F.R. §103.3)

and

b.) whether the settlement adequately serves the agency's enforcement policy in terms of deterrence and securing compliance both present and future. (4 C.F.R. §103.5)

Hearing Counsel in recommending this settlement have asserted the following facts:

1. In January of 1978 and July of 1978, representatives of H. K. International Forwarding, Inc. (HKIF) contacted the Gulf District Office of the FMC to request information and forms for applying for an independent ocean freight forwarder's license. Statham Affidavit, paras. 2 and 3.

[2] 46 C.F.R. §505, Appendix A.

2. On both occasions, the forms sent to HKIF were accompanied by a letter (Exhibit GG) warning that the company not carry on the business of forwarding before receiving a license from the Commission. The letter also warned that forwarding without a license risked both penalties and prejudice to the issuance of a license. Statham Affidavit, para. 4.

3. Mr. John L. Walker, Assistant Vice President of HKIF, admitted that the company carried on the business of forwarding a month after receiving the warning letter. Kellogg Affidavit, paras. 3, 4 and 6.

4. Documents given by Mr. Walker to Commission Investigator Kellogg show that HKIF carried on the business of forwarding relative to at least 29 ocean shipments between August 1978 and April 1979. Kellogg Affidavit, paras. 4, 10, 12, 14.

5. The documents provided by Mr. Walker to Investigator Kellogg reveal that HKIF performed a full range of forwarder services, including making arrangements with ocean common carriers and that HKIF also invoiced shippers in its own name. Kellogg Affidavit, paras. 7, 9, 10, 12, 14.

6. On April 4, 1979, Investigator Kellogg warned Mr. Walker of HKIF not to carry on the business of forwarding before receiving a license and that penalties could be assessed for violation. Kellogg Affidavit, para. 15.

7. On April 17, 1979, the Commission's Office of Freight Forwarders sent HKIF a letter, Exhibit HH, acknowledging receipt of its application for a license and warning that section 44, Shipping Act, 1916, prohibited the carrying on of the business of forwarding without a license. It further warned that forwarding without a license risked penalties and prejudice to the issuance of a license. Klapouchy Affidavit, para. 4.

8. Between April 1979 and October 1979, HKIF continued to perform freight forwarder services. Kellogg Affidavit, paras. 4, 8; Ausderan Affidavit, para. 4.

Review of the documents compiled by Hearing Counsel reveals that respondent did, prior to receipt of the October 10, 1978, form letter warning from the Commission, assist three of its air freight clients to forward 5 ocean shipments and collected a handling charge of $50.00 on each of those 5 shipments.[3] As recited in the affidavit of Investigator Kellogg, respondent's Vice-President, Mr. John Walker, in April of 1979 produced the documents on these 5 shipments and "none of these five showed any FMC license number whatever." Investigator Kellogg also relates Mr. Walker's prior mistaken belief that such assistance could be rendered as long as brokerage was not collected from the ocean carrier.

The actions of HKIF relate to 16 shipments on which repondent was requested by a licensed freight forwarder in California to assist in routing these shipments through Houston. The need for this assistance arose because of a Houston Port Authority system which prohibits the transport of lading on any shipment moving through Houston's public facilities without a guarantee that facility charges will be paid and the shipment not abandoned in transit. Respondent had qualified its packing and crating operation to satisfy the Port Authority requirement. The California forwarder did not have a Houston Port

[3] Hearing Counsel Exs. C, D, E, F, and G.

account. Respondent did invoice the California forwarder for handling charges on these 16 shipments. A charge of $17.50 was collected from the forwarder on 13 shipments,[4] a charge of $43.50 on one shipment,[5] and a charge of $25.00 on 2 shipments.[6]

It should be noted that in none of these instances was respondent in direct contact with or holding itself out to the shipper as a freight forwarder. Respondent received its instructions from the licensed California forwarder requesting the assistance and invoiced for that assistance back to that licensed forwarder.

As summarized on Hearing Counsel's Exhibit B, the individual Bills of Lading on these shipments clearly showed the responsible forwarder as CIS of California with HKIF purporting to act only as port agent for that licensed forwarder.

The eight remaining shipments under investigation occurred between January 28, 1979 and April 10, 1979.[7] Respondent referred these shipments (originated by 5 of its air freight customers) to licensed forwarders in Houston and did assist those licensed forwarders on these 8 shipments. For this assistance respondent recovered $25.00 on two of these shipments, nothing on one shipment, and $50.00 on 5 shipments.

The amount of handling charges collected by respondent for all 29 of the challenged shipments totalled $1,021.00, primarily representing out-of-pocket expenses.

In determining the appropriateness of the settlement the following factors in mitigation have been taken into consideration:

1.) Respondent's officers fully co-operated with the FMC field investigation of the application.
2.) After receipt of the October 10, 1978, form letter warning, respondent engaged in activities only "as agent for" or on behalf of licensed ocean freight forwarders.
3.) Respondent has agreed to terminate the activity under investigation without requring further litigation.
4.) There are no allegations that respondent failed to discharge any position of trust or responsibility with respect to the shipments under investigation.
5.) There are no allegations of fraud, deceit, financial misappropriations or other conduct which might constitute moral turpitude.

In the final analysis the issue is whether the settlement adequately serves the Commission's enforcement policy in terms of deterrence and recurring compliance both present and future.

The Commission has stated that:

Section 44 and its regulations are based on an underlying remedial public interest purpose and the sanctions imposed must serve such a purpose and . . . not be punitive in character. (Footnotes omitted)

Independent Ocean Freight Forwarder License—E. L. Mobley, Inc., FMC Dkt.

[4] Hearing Counsel Exs. J, K, L, M, N, O, P, Q, R, S, T, V, and W.

[5] Hearing Counsel Ex. U.

[6] Hearing Counsel Exs. H and I.

[7] Hearing Counsel Exs.

77-26, Commission Order, March 12, 1979, 19 SRR 39 at 41.

Hearing Counsel state that their principal reason for agreeing to the proposed settlement is their conviction that the monetary value is fitting and appropriate to the conduct alleged in light of past Commission practice. On October 31, 1979, the Commission accepted $10,000 in settlement of claims for violations alleged in Docket No. 78-34, *Concordia International Forwarding Corporation—Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916,* 18 SRR 1364 (1978). There the settlement was treated outside of the proceeding, as it preceded the grant of assessment authority to the Commission by P.L. 96-25. The $10,000 settlement was found acceptable and appropriate to the allegation of "93 or more" violations of section 44 of the Shipping Act. The instant proceeding involves the allegation of 29 violations of section 44. Given that respondent here is charged with fewer than one third as many violations as were involved in Docket No. 78-34, the proposed settlement of $10,000 is not inappropriately low. The same conclusion may be reached by reference to respondent's fees for the subject shipments. Those fees totalled $1,021.00. Thus, the proposed settlement more than deprives respondent of any profit it may have made and is sufficiently punitive to be a deterrent.

The activities of HKIF also are unlike the situation in *Harry Kaufman Independent Ocean Freight Forwarder,* 16 F.M.C. 256 (1973). We are not dealing with allegations of deliberate and willful misrepresentations by an applicant or the undisclosed transfer of a forwarding license to the control of an individual whose own license had been revoked after federal prosecution for violations of the Bills of Lading Act.

Similarly, *Lesco Packing Co. Inc.,* 19 F.M.C. 132 (1976), poses no impediment to approval of the settlement in this case. *Lesco* was a sequel to the *Harry Kaufman* case involving the same individual whose license had been revoked after criminal prosecution for violations of the Bills of Lading Act.

NKIF's activities are far less reprehensible than in *Independent Ocean Freight Forwarder Application—Guy G. Sorrentino,* 15 F.M.C. 127 (1972), where Sorrento Shipping, Inc., was convicted of 16 counts of violating section 15 of the Shipping Act by false cargo descriptions (over a two year period). No such activity is involved herein.

Accordingly, in consideration of the nature of the activities engaged in by respondent, the mitigating factors relating thereto and the belief that the settlement adequately serves the Commission's enforcement policy in terms of deterrence and the sanctions thereby imposed serve a remedial public interest the settlement offer is accepted and approved.

So ordered.

One other matter remains to be considered. One of the issues set forth in the Commission's order of December 7, 1979, was whether the applicant should be licensed. By the terms of the settlement offer HKIF has withdrawn its application for a license. Hence, the respondent's fitness to be licensed is not now before the Commission. Accordingly, a determination of fitness is not now appropriate and none is made.

(S) STANLEY M. LEVY
Administrative Law Judge

February 21, 1980

APPENDIX A

FEDERAL MARITIME COMMISSION

FMC DOCKET 79-99

H. K. INTERNATIONAL FORWARDING, INC.
INDEPENDENT OCEAN FREIGHT FORWARDER
LICENSE APPLICATION, INVESTIGATION

Stipulation and Proposed Settlement of Civil Penalties

This stipulation and proposed settlement is entered into between the Bureau of Hearing Counsel and H.K. International Forwarding, Inc., hereinafter referred to as Respondent, the only parties ("The Parties") to this proceeding. This stipulation and settlement is submitted to the Presiding Officer for approval under 46 C.F.R. §§ 502.162 and 505.3 to be included in the Final Order in this proceeding, if approved.

Whereas, by Order dated December 7, 1979, the Commission has instituted an investigation of Respondent's pending application for a license as an independent ocean freight forwarder to include a determination of whether civil penalties should be assessed for possible violations of Section 44 of the Act;

Whereas, the Order of Investigation recites that the Respondent had apparently engaged in ocean freight forwarding activities without holding a license issued by the Commission although a warning from the Commission about unlicensed forwarding activities had previously been sent to the Respondent;

Whereas, the Respondent will not contest that the conduct which the December 7, 1979 Order describes on page 1 thereof constitutes unauthorized freight forwarding by acting to assist in and arrange for the dispatch and documentation of a number of shipments by ocean common carrier on behalf of shippers and/or forwarders or in conjunction with licensed freight forwarders, but without Respondent itself having been issued a freight forwarding license;

Whereas, the parties are desirous of expeditiously settling the matter according to the terms and conditions of this agreement and wish to avoid the delays and expense which would accompany further agency litigation concerning these claims;

Whereas, Pub. L. 92-416 and 96-25 authorize the Commission to assess, collect, compromise and settle certain designated civil penalties arising under the Shipping Act, 1916, including the civil penalties which could arise from the conduct set forth and described above;

Whereas, the Respondent has terminated the practices which are described above, and has instituted and indicated its willingness and commitment to

maintain measures designed to eliminate, discourage, and prevent these practices by Respondent or its officers, employees and agents unless and until Respondent shall have been granted a freight forwarding license;

Whereas, Respondent will withdraw its pending application without prejudice to a new application being submitted by Respondent corporation or its undersigned qualifying officer not less than six months after the approval by the Commission of this stipulation.

Now, Therefore, in consideration of the premises herein, and in settlement of all civil penalties under the Act arising from violations set forth and described herein, that may have occurred between August 1, 1978 and December 7, 1979, the undersigned Respondent herewith tenders to the Federal Maritime Commission the sum of Ten Thousand dollars ($10,000.00); payment of said amount to be made in regular installments after the execution of a promissory note, a copy of which is attached to this agreement and incorporated herein. Upon the following stipulation and terms of settlement:

1.) Upon the approval of the terms and conditions set forth herein by the Presiding Administrative Law Judge and the Commission, this instrument shall constitute a stipulated settlement of the violations and civil penalty issues in this proceeding and shall forever bar the commencement or institution of any assessment proceeding or other claims for the recovery of civil penalties from Respondent arising from the alleged violations set forth and described herein that occurred between August 1, 1978 and December 7, 1979.

2.) The undersigned voluntarily signs this instrument and states that no promises or representations have been made to the Respondent other than the agreements and consideration herein expressed.

3.) It is expressly understood and agreed that this Agreement is not to be construed as an admission of guilt by Respondent its officers, directors or employees to the alleged violations set forth above.

H. K. International Forwarding, Inc.
Dated: 2/12/80
(S) JOHN L. WALKER
Assistant Vice-President

Federal Maritime Commission
Bureau of Hearing Counsel
Dated: 2/15/80
(S) J. ROBERT EWERS, ESQ.
Director

APPENDIX B

PROMISSORY NOTE CONTAINING AGREEMENT FOR JUDGMENT

For value received, H.K. INTERNATIONAL FORWARDING, INC. of Houston, Texas, promises to pay to the Federal Maritime Commission (the Commission) the principal sum of Ten Thousand Dollars ($10,000.00) to be paid at the offices of the Commission in Washington, D.C., by bank cashier's or certified check in the following installments:

semi-annual payments of $1,428.00 each with the first payment due on or before March 31, 1980 and subsequent installments on the principal amount due at six month intervals thereafter to wit:

September 30, 1980
March 31, 1981
September 30, 1981
March 31, 1982
September 30, 1982
March 31, 1983.

In addition to the principal amount payable hereunder, interest on the unpaid balance thereof shall be paid with each installment. Such interest shall accrue from the date of this Promissory Note and be computed at the rate of twelve percent (12%) per annum.

If any payment of principal or interest shall remain unpaid for a period of 10 days after becoming due and payable, the entire unpaid principal amount of the Promissory Note, together with interest thereon, shall become immediately due and payable at the option of the Commission without demand or notice, being hereby expressly waived.

If a default shall occur in the payment of principal or interest under this Promissory Note, H.K. INTERNATIONAL FORWARDING, INC. does hereby authorize and empower any U.S. Attorney, any of his assistants or any attorney of any court of record, Federal or State, to appear for it, and to enter and confess judgment against for the entire unpaid principal amount of this Promissory Note, together with interest, in any court of record, Federal or State; to waive the issuance and service of process upon H.K. INTERNATIONAL FORWARDING, INC. in any suit on this Promissory Note; to waive any venue requirement in such suit, to release all errors which may intervene in entering upon such judgment or in issuing any execution thereon; and to consent to immediate execution on said judgment. H.K. INTERNATIONAL FORWARDING, INC. hereby ratifies and confirms all that said attorney may do by virtue hereof.

This Promissory Note may be prepaid in whole or in part by H.K. INTERNATIONAL FORWARDING, INC. by bank cashier's or certified check at any time, provided that accrued interest on the principal amount prepaid shall be paid at the time of the prepayment.

H.K. INTERNATIONAL FORWARDING, INC.

2000 South Post Oak Road
Suite 1870
Houston, Texas 77056

(S) JOHN L. WALKER
Assistant Vice-President

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-91

PAN OCEAN BULK CARRIERS, LTD.—INVESTIGATION OF RATES ON NEO-BULK COMMODITIES IN THE TRADE BETWEEN THE UNITED STATES AND SOUTH KOREA

NOTICE

March 27, 1980

Notice is given that no appeal has been filed to the February 21, 1980, discontinuance of 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.

The recommendation of Hearing Counsel that the Commission examine Respondent's new rates for the carriage of neo-bulk commodities in the United States/South Korea trade will be handled as a separate matter.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-91

PAN OCEAN BULK CARRIERS, LTD.—INVESTIGATION OF RATES ON NEO-BULK COMMODITIES IN THE TRADE BETWEEN THE UNITED STATES AND SOUTH KOREA

MOTION FOR DISCONTINUANCE OF PROCEEDING GRANTED

Finalized March 27, 1980

Respondent Pan Ocean Bulk Carrier, Ltd. has filed a motion requesting that this proceeding be discontinued. Pan Ocean states that the two parties involved in the controversy which ultimately led to the commencement of the proceeding by the Commission have entered into a settlement agreement, that the litigation before the Court which referred a portion of the controversy to the Commission has terminated, that the Court has withdrawn its request for the assistance of the Commission, and that continuation of the proceeding would involve considerable time and expense, all of which would serve no useful purpose.

The only other party to the proceeding, the Commission's Bureau of Hearing Counsel, a party to every Commission investigation under the Commission's rules (46 C.F.R. § 502.42), have filed a reply, which, while not opposing discontinuance, requests that I refer to the Commission Hearing Counsel's recommendation that the Commission instruct its staff to examine Pan Ocean's current rates for the carriage of the commodities involved in the proceeding regardless of the termination of the court action. I find that Pan Ocean has shown good reason for discontinuance of this proceeding and am granting the motion. As for Hearing Counsel's recommendations, I will confine myself to a few remarks below.

As Hearing Counsel accurately state in their detailed history of this case, this proceeding was begun by the Commission which served its Order of Investigation on October 9, 1979. This Order was served at the request of United States District Judge Harry Pregerson before whom Retla Steamship Company, a carrier formerly competing with Pan Ocean in the Korean trade, had filed a complaint alleging that Pan Ocean had attempted to monopolize the carriage of so-called "neo-bulk" commodities between the United States and South Korea and had engaged in various other unlawful activities in restraint

of trade resulting in Retla's departure from the trade, all of which activities were allegedly violative of the Sherman and Clayton Acts, for which Retla sought injunctive relief and treble damages. Included in Retla's allegations were the assertions that Pan Ocean had maintained non-compensatory rates and had engaged in predatory pricing practices. Upon motion by Pan Ocean, and with the advice of the Commission which had filed an *amicus curiae* brief, Judge Pregerson referred a single question to the Commission for its determination, namely, whether Pan Ocean's rates on these "neo-bulk" commodities charged since April 1978 and still in use at the time of the Commission's Order, were so unreasonably low as to be detrimental to the commerce of the United States within the meaning of section 18(b)(5) of the Shipping Act, 1916. The Commission responded to Judge Pregerson's referral by issuing its Order which was confined to the issue stated. The Commission also limited the proceeding to findings under section 18(b)(5) in the nature of a declaratory order only, i.e., without specifying that the Commission wished to consider whether it should actually disapprove these rates and order new rates as section 18(b)(5) ordinarily provides. The Commission established tight time schedules and provided for the issuance of its findings approximately eight months after the Order was served.

Following the issuance of the Commission's Order, the parties served extensive discovery requests and two prehearing conferences were held to deal with them and to plan for the rapid development of the evidentiary record. At the prehearing conference, Pan Ocean agreed to present a special cost study in support of its rates to be prepared by a reputable accounting firm. Provisions were made to exchange discovery materials, written direct and rebuttal cases, to depose expert witnesses, and to commence hearings by March 25, 1980. Certain matters required referral to the Commission, relating to overseas discovery rulings and amendment of the Commission's Order to allow the agreed-upon time schedule to go into effect. After these prehearing conferences had concluded, however, Retla and Pan Ocean, seeking a less costly way to resolve their differences, entered into a settlement agreement contingent upon payment of a certain sum by Pan Ocean to Retla to be effectuated on January 14, 1980. When Pan Ocean honored its agreement and paid the sum, the agreement became effective.[1] Thereafter, Retla withdrew as an intervenor in the Commission proceeding and the parties filed their settlement with the District Court which dismissed Retla's action on January 23, 1980, with prejudice. On the same day, Judge Pregerson informed the Commission by letter

[1] The Settlement Agreement has been furnished to the Commission with the request that it be held confidential, a request I am honoring. It seems to be a conventional type of settlement agreement embodying mutual releases by which both Retla and Pan Ocean relinquish any further claims arising out of the events described in Retla's complaint filed with the District Court, and in which a certain consideration is paid to the complainant. For a similar type of settlement, see the agreement attached as Appendix A to the ruling dismissing the complaint in Docket No. 79-11, *Del Monte Corporation v. Matson Navigation Company*, "Settlement Approved; Complaint Dismissed," November 20, 1979 (Judge Glanzer), 19 SRR 1037. There are no restrictive or anticompetitive provisions in the Settlement Agreement which might have required that the agreement be approved by the Commission under section 15 of the Act, and consequently there appears to be no reason why it need be processed under that law. Docket No. 79-17, *Farrell Lines Incorporated v. Associated Container Transportation (Australia) Ltd. et al.*, Discontinuance of Proceeding, August 10, 1979, 19 SRR 629. For different types of settlement agreements which contained restrictive, anticompetitive provisions and consequently required approval under section 15, see, e.g., *Massachusetts Port Authority v. Container Marine Lines*, 11 SRR 37, 40 (1969); *American Export Isbrandtsen Lines, Inc.*, 14 F.M.C. 82, 89 (1970); Docket No. 76-22, *Lakes and Rivers Transfer Corporation v. Indiana Port Commission* and Docket No. 76-59, *Agreements Nos. T-3310 and T-3311*, Order, May 22, 1979, 19 SRR 330.

addressed to Mr. Edward G. Gruis, Deputy General Counsel, of the settlement and related matters. Judge Pregerson advised the Commission as follows:

In light of the foregoing the reason for my requesting the assistance of the FMC to make factual determination in connection with the pending lawsuit no longer exists and I withdraw my request to the Commission to conduct investigation and issue a declaratory order on the question of the propriety of Pan Ocean's rates under section 18(b)(5) of the Shipping Act. (Letter of January 23, 1980, page 2.)

DISCUSSION AND CONCLUSIONS

The only question for me to determine is whether this proceeding should be discontinued. The general principle of law governing such question is that a proceeding should be discontinued when it can no longer serve a regulatory purpose. Normally, when the subject matter of the proceeding ceases to exist, as in the present case, a proceeding will be discontinued on the grounds that it has become moot and can therefore no longer serve a useful purpose. See, e.g., Docket No. 79-85, *Trailer Marine Transport Corporation—Proposed Reduced Rates on Sugar Cane & Refined Sugar N.O.S.*, Discontinuance of Proceeding, October 25, 1979; Docket No. 77-49 *United States Lines, Inc.; General Increase in Rates in the U.S. Mainland/Guam Trade* and Docket No. 77-51, *Matson Navigation Company; General Increase in Rates in the U.S. Mainland/Guam Trade,* Motions to Dismiss Granted, September 15, 1978; *The Port Commission of the City of Beaumont et al. v. Seatrain Lines, Inc.*, 3 F.M.B. 581, 582 (1951); *Kerr Steamship Company, Inc. v. Isthmian Steamship Company et al.*, 2 U.S.M.C. 93, 94 (1939); *Rates, Hong Kong-United States, Trade,* 11 F.M.C. 168, 173 (1967).

In unusual circumstances, such as when the practice is likely to resume or there is a need for enunciation of guidelines or rights of outside parties are involved, or if much time and expense in litigation has already been consumed, or for some other valid purpose, a proceeding need not be discontinued even when the activities under investigation have terminated. See Docket Nos. 73-17, 74-40, *Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc.—Proposed Rules on Containers, etc.,* Order on Reconsideration, 20 F.M.C. 788 (1978); *Refrigerated Express Lines (A/Asia) Pty., Ltd., et al. v. Columbus Line, Inc., et al.*, 17 SRR 81, 85 (1977), and the collection of cases cited therein.

In the present case the precise reason for the investigation no longer exists, i.e., Judge Pregerson has withdrawn his request for the Commission's assistance. Furthermore, as Hearing Counsel point out in their reply to the motion, the very rates which were under investigation have been canceled, Pan Ocean having increased them in early 1980. Moreover, since section 18(b)(5) appears to apply only to rates actually on file with the Commission and also appears to have no retroactive effect,[2] it is obvious that the present proceeding and the

[2] The Commission has recently emphasized that section 18(b)(5) is prospective in nature and that penalties apply only after the Commission has found rates to be too high or too low and thereafter the carrier continues to charge such rates. See Docket No. 79-15, *Westinghouse Electric Corporation v. Sea-Land Service, Inc.*, Order, November 20, 1979, 19 SRR 1056. The Commission relied upon several cases in addition to *Federal Maritime Commission v. Caragher*, 364 F.2d 709, 717 (2d Cir. 1966) and *Valley Evaporating Co. v. Grace Line, Inc.*, 14 F.M.C. 16, 26-27 (1970), which Hearing Counsel cited in their reply to the motion.

Commission's Order under which it began have been outstripped by events. It is readily apparent, therefore, that no useful purpose could be served by continuing a proceeding which Judge Pregerson no longer requests in order to issue a declaratory ruling on rates which no longer exist. For the reasons expressed above, therefore, the motion to discontinue is granted. There remain only a few remarks concerning Hearing Counsel's request that I refer to the Commission their recommendation that the Commission direct the staff to examine respondent's new rates.

Hearing Counsel believe that the Commission has a responsibility to look into the question of Pan Ocean's current rates irrespective of the settlement between Retla and Pan Ocean and the termination of the court action. Hearing Counsel believe that the settlement between these two carriers does not remedy the charges made by Retla regarding Pan Ocean's previous rates. Hearing Counsel seem to acknowledge that there may be no retroactive application of section 18(b)(5) to Pan Ocean's canceled rates under investigation but nevertheless believe that the staff ought to be instructed by the Commission to examine Pan Ocean's new rates "[g]iven the nature of Retla's allegations, irrespective of the status of the court proceeding. . . ."

As to the merits of Hearing Counsel's request, I agree with Chief Judge Cograve in an analogous situation in which he dismissed two proceedings and in which Hearing Counsel had requested that he refer their recommendation to the Commission that the Commission instruct the staff to examine the matter further. Judge Cograve believed that the decision to instruct the staff was one "singularly within the province of the Commission" and that "no recommendation from me seems either desirable or appropriate." See Docket No. 74-28, *International Paper Co. v. Lykes Bros. Steamship Co.* 20 F.M.C. 117 (1977); Docket No. 74-39, *Petition of Lykes Bros. Steamship Co., Inc. for Declaratory Order,* Motion to Dismiss Granted, July 5, 1977, at 3. 20 F.M.C. 117 (1977). I therefore do nothing more than refer Hearing Counsel's recommendation to the Commission as requested.

(S) NORMAN D. KLINE
Administrative Law Judge

February 21, 1980

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-92

MATSON NAVIGATION COMPANY—PROPOSED 6.66 PERCENT BUNKER SURCHARGE INCREASE IN TARIFFS FMC-F NOS. 164, 165, 166 AND 167

Matson Navigation Company is found to have imposed a bunker surcharge that is unjust and unreasonable in that it will provide the carrier with an amount in excess of the increased fuel costs associated with cargo moving under the tariffs which include the proposed surcharge.

Only those fuel costs associated with cargo moving under a carrier's tariffs containing a bunker surcharge should be used in computing such a surcharge.

Any fuel costs, tonnage and revenue figures not associated with cargo moving under a carrier's tariffs must be excluded from the calculation of the level of bunker surcharge to be applied to such tariffs.

Because bulk sugar and molasses do not move under tariffs FMC-F Nos. 164, 165, 166 and 167, an allocation of fuel costs should be made between that cargo and cargo moving under such tariffs.

Because certain cargo designated "nontrade cargo" for bunker surcharge calculations in this proceeding does not move under Tariffs FMC-F Nos. 164, 165, 166 and 167, an allocation of fuel costs should be made between that cargo and cargo moving under such tariffs.

Based upon methodology found appropriate in this proceeding, the correct amount of the bunker surcharge applicable to tariffs FMC-F No. 164, 165, 166 and 167 is found to be 6.48 percent.

David F. Anderson and *Peter P. Wilson* for Matson Navigation Company.
Dale N. Gillings for Oscar Mayer & Co., Inc.
Wayne Minami and *Charleen M. Aina* for the State of Hawaii.
J. Robert Ewers, C. Douglass Miller and *Charles C. Hunter* for the Bureau of Hearing Counsel.

REPORT AND ORDER

March 28, 1980

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

This proceeding was instituted by Commission Order served October 15, 1979 to investigate the lawfulness of certain amendments filed by Matson Navigation Company, Inc. to its Tariffs FMC-F Nos. 164, 165, 166 and 167. These revisions resulted in the imposition of a 6.66 percent bunker surcharge on all cargo, except sugar and molasses, carried by Matson in the United States Pacific Coast/Hawaii Trade (Hawaii Trade), effective October 1, 1979. The

6.66 percent bunker surcharge represents a net increase of .76 percent over the 5.90 percent surcharge which was previously applicable. Although scheduled to expire within 120 days from the effective date, pursuant to the requirements of Domestic Circular Letter No. 1-79, this surcharge was superseded by a subsequent surcharge in the amount of 5.67 percent, effective January 14, 1980.[1] Protests to Matson's proposed bunker surcharge were filed by the State of Hawaii and Oscar Mayer & Co., Inc., both of whom were named as Protestants in this proceeding.

The Order of Investigation and Hearing limited the proceeding to the following three issues:

(1) Is the proposed surcharge unjust, unreasonable or otherwise unlawful in that it will provide Matson with an amount in excess of its increased fuel costs?
(2) Should fuel costs be allocated between general cargo and sugar/molasses on the basis of measurement tons carried?
(3) Should an allocation be made between trade and nontrade cargo carried between the West Coast and Hawaii?

In order to avoid duplicative litigation, the Commission, in its Order of Investigation, ordered that the otherwise applicable procedural schedule be held in abeyance pending the issuance of final Commission decisions in Docket No. 79-55—*Matson Navigation Company—Proposed Bunker Surcharge in the Hawaii Trade,* 19 S.R.R. 1065 (November 23, 1979) and Docket No. 79-84—*Matson Navigation Company Proposed 5.90 Percent Bunker Surcharge Increase in Tariffs FMC-F Nos. 164, 165, 166 and 167,* 19 S.R.R. 1600 (1980).

At a prehearing conference held before Administrative Law Judge William Beasley Harris on January 23, 1980, it was agreed that the final decision of the Commission in Docket No. 79-55, *supra,* would govern the resolution of the issue, noted as (2) above, specified by the Commission in its Order of Investigation.[2] It was also agreed that an evidentiary hearing was not necessary to resolve the remaining issues in the proceeding.[3] Prehearing statements were filed by Matson, Hearing Counsel and Hawaii although only Matson and Hearing Counsel appeared by counsel at the prehearing conference. On January 31, 1980, the Presiding Officer served a procedural schedule which required Opening Briefs to be served by March 14, 1980 and Reply Briefs by March 28, 1980.

On February 26, 1980, the Commission served an Order, *sua sponte,* in which it noted that a final decision in this proceeding must be served by March 28, 1980 under the requirements of the Intercoastal Shipping Act, 1933, as amended (46 U.S.C. §845, *et seq.*), and directed, in light of the procedural schedule ordered by the Presiding Officer and the procedural developments in Docket Nos. 79-55 and 79-84, that the record of the proceeding

[1] Matson's reduced 5.67 percent surcharge is under investigation in Docket No. 80 4 *Matson Navigation Company—Proposed 5.67 Percent Surcharge in the Hawaii Trade.* 20 S.R.R. 32 (1980).

[2] Transcript of Prehearing Conference, at 8-9, 25.

[3] *Id.* at 16-17, 29 30.

be certified to the Commission for decision. The Order also provided for the filing of one round of simultaneous briefs by all parties on or before March 11, 1980.

Direct Testimony and exhibits were filed by Matson and Hearing Counsel. Rebuttal testimony and exhibits were filed by Matson, Hearing Counsel and Hawaii. Oscar Mayer petitioned and was permitted to remain a party to the proceeding and to file a brief without filing testimony and exhibits. Briefs with appended exhibits were filed by Matson and Hearing Counsel. Briefs without exhibits but containing new surcharge calculations and other substantive matter were filed by Hawaii and Oscar Mayer. Discovery matter has also been included in the record of this proceeding. The foregoing represents the entire record upon which the Commission has based its decision.

POSITION OF THE PARTIES

Matson adheres to its original position that its 6.66 percent bunker surcharge is just and reasonable, although it admits that in light of the findings of the Commission in Docket No. 79-55 the proper level of bunker surcharge, had Matson followed this methodology in filing its tariff amendments, would have been 6.52 percent. It states that the 6.66 percent surcharge should be found to be just and reasonable because the methodology prescribed in Docket No. 79-55 did not become effective until after Matson had filed the instant surcharge and that its methodology errors can be remedied by application of Line 7 of Form FMC-274 in subsequently filed surcharges. It is further alleged that Matson states that its 5.67 percent reduced bunker surcharge which superseded this surcharge reflects use of this procedure.

Matson has not contested in this proceeding the validity of the findings of Docket No. 79-55 regarding the necessity of making an allocation of fuel costs between general cargo moving under the subject tariffs and bulk sugar and molasses which move under tariffs containing fuel escalation clauses. However, Matson urges that it should not be required to allocate fuel costs between trade and nontrade cargoes in calculating the amount of surcharge applicable to the subject tariffs. It adheres to its position stated in Docket No. 79-84 that nontrade cargoes constitute less than 5 percent of the service and that the 5 percent allocation exemption contained in Commission General Order No. 11 (G.O. 11) should be carried forward and be made applicable to bunker surcharge calculations under Form FMC-274.

Matson contests the argument of Hearing Counsel that the nontrade cargo in the service exceeds 5 percent. First, Matson contends that the calculations of Hearing Counsel are based upon an expanded definition of nontrade cargo never before asserted by the Commission and not noted as an issue in this proceeding in the Order of Investigation and never raised by Hearing Counsel until the submission of its rebuttal testimony. Furthermore, Matson notes that on the identical issue in Docket No. 79-84, Hearing Counsel stipulated that nontrade cargo constituted only Marshall Islands, mail and Interstate Commerce Commission regulated cargoes and did not include transshipment cargoes which Hearing Counsel now asserts are also nontrade cargo. Although

contesting the trade/nontrade allocation requirement, Matson has calculated the surcharge in this case at 6.50 percent if the bulk sugar and molasses allocation is made and only mail and ICC cargoes are found to be nontrade cargoes and excluded from the surcharge calculation. Matson also submits calculations that indicate that if the Marshall Islands and transshipment cargoes are also allocated out of the surcharge calculation the proper level of surcharge is 6.48 percent. These latter calculations were based upon data proffered in response to Interrogatories propounded by Hearing Counsel and originally filed with Matson's brief.

The State of Hawaii takes the position that the 6.66 percent surcharge proposed by Matson is unreasonable in light of the Commission's decision in Docket No. 79–55. Moreover, it argues that the Commission decided in Docket No. 79–84 that conceptually an allocation of fuel costs must be made between trade/nontrade cargo and refused to decide whether a 5 percent "G.O. 11" allocation exemption will be allowed in bunker surcharge calculations. It notes that the evidence adduced in this case indicates that Matson's nontrade cargo exceeds 5 percent and therefore even without deciding an exemption question the allocation must be made here. Accordingly, Hawaii's position is that the only issue to be decided is the computation of the correct surcharge that should have been charged from October 1, 1979 through January 14, 1980. In this regard, Hawaii alleges that data submitted by Matson in Docket No. 80–4 as to its actual operating experience during this period should be incorporated into the record of this proceeding for determination of the correct surcharge. Moreover, Hawaii urges that in computing the "correct" surcharge in this case the Commission must utilize Line 7 of Form FMC-274 and deduct from Matson's stated fuel needs the overrecoveries determined in preceding bunker surcharge cases. Finally, it is stated that if such a methodology is followed the correct surcharge in this case is 6.22 percent.

Oscar Mayer basically agrees with Hawaii on the substantive issues in the proceeding. However, it notes that the "trade/nontrade" designation of the allocation issue is misleading and that the more accurate designation would be an allocation between cargo moving under the tariffs to which the surcharge is applied and all other cargo carried by Matson. It also notes that the fact that such "other cargo" also is subject to similar fuel cost recovery devices does not justify a failure to make such an allocation but on the contrary indicates that Matson in fact is enjoying a double recovery of fuel costs. It also notes that Hawaii's calculations of the correct surcharge do not include all of the actual operating data Matson has filed in response to Hearing Counsel's initial discovery requests and submits that the correct surcharge should be found to be 5.86 percent.

Hearing Counsel, as all other parties to the proceeding, submits that the question of allocation of general cargo/sugar and molasses fuel costs has been decided by the Commission in Docket No. 79–55, and that, accordingly, the 6.66 percent surcharge imposed by Matson is unjust and unreasonable in that it will provide the carrier an amount of recovery in excess of its fuel costs.

Hearing Counsel also alleges that an allocation must be made between what has been designated "trade/nontrade" cargo in this proceeding. Hearing Coun-

sel asserts that when a carrier imposes a bunker surcharge on specific tariffs its computations can only include the increased fuel costs directly resulting from the movement of cargo pursuant to such tariffs and cannot include the cost of fuel resulting from the movement of cargo under different tariffs. In this regard it is alleged that Matson's G.O. 11 exemption argument is simply inapposite, in that it relates to overall revenues and rate-of-return calculations and not fuel cost pass throughs. The Commission allegedly found in Docket No. 79-84 that the G.O. 11 exemption simply does not apply to these proceedings. It is also noted that sugar and molasses are technically "trade cargo" but because they were not subject to the tariffs that included the surcharge they could not be included in the calculations. To exempt nontrade cargo from such an exclusionary rule would allegedly be inconsistent. Moreover, it is argued that even if the G.O. 11 exemption is applied in this case Matson's nontrade cargo exceeds 5 percent and, in any event, must be excluded from the computation of the surcharge.

Hearing Counsel asserts that nontrade cargo includes cargo moving under tariffs on file with the ICC, mail cargo, and foreign cargo comprised of cargo destined for the Marshall Islands and cargo moving under transshipment agreements on file with the Commission. Hearing Counsel submits that the Commission must apply such allocation methodology here in determining the justness of this bunker surcharge and should not consider whether Matson's action in a subsequent surcharge justifies the surcharge imposed in this proceeding.

Noting that the Commission in its Order of Clarification in Docket No. 79-55 found that shippers' reparations rights are affected by the decisions in these surcharge cases, Hearing Counsel urges that the "correct" surcharge be calculated. In this regard it is also urged that the Commission retroactively apply the methodology found appropriate in Docket No. 79-55 even though this was not cited as an issue to be resolved in this proceeding. However, Hearing Counsel asserts that because Matson has not provided the data necessary to compute the proper surcharge with the allocations urged in this case its surcharge should be found to be unreasonable in its entirety due to Matson's failure to sustain its burden of proof. Hearing Counsel submits that the position of Hawaii regarding the use of actual operating data be rejected as it was in Docket No. 79-55. Hearing Counsel does proffer alternative data should the Commission fail to reject the surcharge entirely. This data is based upon figures that do not exclude transshipment cargo, and though admittedly erroneous, allegedly more accurately reflect the correct level of surcharge. This alternative calculation proffered by Hearing Counsel sets the proper surcharge at 6.44 percent.

Discussion and Conclusions

There appears to be no dispute among the parties that the methodology prescribed in Docket No. 79-55 must be carried forward to this proceeding. No

party has collaterally challenged the findings of that proceeding. The Commission finds no basis on this record to disturb those findings, and, accordingly, will apply that methodology here.

The first matter to be addressed is the "trade/nontrade" allocations. The Commission determined in Docket No. 79-55 that a measurement ton allocation of fuel costs must be made between general cargo moving under the tariffs subject to the fuel surcharge and bulk sugar and molasses moving under tariffs containing different fuel escalation clauses. This decision was based upon the cost of service principles in applying a pure cost pass through recovery mechanism.[4] Stated differently, cargo moving under a carrier's tariffs containing a bunker surcharge provision can only be required to bear those increased fuel costs associated with the movement of that cargo. There is no question that the disputed "nontrade" cargo in this proceeding, *i.e.,* ICC cargo, mail, Marshall Islands and transshipment cargo, does not move under the subject tariffs containing the disputed bunker surcharge.[5] Therefore, Matson must allocate out the fuel costs associated with the movement of such cargo in computing the bunker surcharge that will be levied on cargo moving under such tariffs. Accordingly, having defined what fuel costs can be included in this bunker surcharge calculation the Commission refrains from addressing any collateral issues in this regard.

As to the question of whether Matson is entitled to any exemption with respect to these allocations, the Commission is not persuaded that such an exemption is appropriate. The Commission decided in Docket No. 79-84 that while some exemption might be appropriate, the G.O. 11 five percent exemption would not be carried over to bunker surcharge proceedings.[6] Matson did not furnish sufficient evidence in that proceding upon which the Commission could determine what level of exemption was appropriate. Likewise, Matson has simply not convinced the Commission that any level of exemption is appropriate in this proceeding.

The final matter that must be addressed is the computation of the proper level of surcharge that should have been established by Matson given the methodology prescribed in this proceeding. It is clear, based upon the prior decisions of the Commission concerning bunker surcharge calculations, that the calculations of the State of Hawaii and Oscar Mayer must be rejected. The use of actual operating data obtained subsequent to the institution of a bunker surcharge investigation was specifically rejected in Docket No. 79-55[7] and that discussion need not be repeated here.

This leaves the Commission with the data submitted by Hearing Counsel and the data submitted by Matson. The calculations made by Hearing Counsel are admittedly based upon incomplete data in that they do not include an allocation of transshipment cargo[8] either in projections or in line 7 overrecovery

[4] Docket 79 55, *supra,* slip opinion at 8.

[5] Direct Testimony of Christopher A. Kane, and attached Exhibits.

[6] Docket 79 84, *supra,* slip opinion at 9.

[7] Docket 79 55, *supra*, slip opinion at 5-6.

[8] Hearing Counsel's Brief at 25.

calculations and do not, therefore, fully reflect the methodology prescribed by the Commission. For this reason, the Commission does not accept the data and calculations submitted by Hearing Counsel.

The Commission will employ the projection data submitted by Matson with its brief. However, we do not accept Matson's proffered amount of $91,725 representing overrecovery of fuel costs through July, 1979. This amount does not reflect application of the methodology prescribed in Docket No. 79-55 nor the required ICC cargo, mail and transshipment cargo allocations. Had such allocations been made the overrecovery figure used in Matson's brief would have been greater, resulting in lower net fuel costs to be recovered and thereby reducing the level of the surcharge below the 6.52 percent calculated by Matson. The Commission is of the opinion that alternative data submitted by Matson more accurately allocate nontrade fuel costs and more precisely reflect the methodology prescribed to date because at least ICC cargo and mail are excluded. Therefore, the figure of $110,758 set forth on page 20 of Matson's brief will be used in calculating the proper level of surcharge in this proceeding, and, on this basis the Commission finds that the proper surcharge that should have been implemented by Matson is 6.48 percent.

Using this figure Matson's proposed 6.66 percent bunker surcharge is found to be unjust and unreasonable to the extent it exceeds 6.48 percent, that is, by .18 percent. This results in a projected overrecovery in this case of $88,806.[9]

In reaching this result the Commission is aware that the other parties to the proceeding have not had an opportunity to respond to or comment on the projection data first proffered by Matson with its brief and used herein to calculate the just and reasonable surcharge. However, inasmuch as the surcharge is no longer in effect and that any actual overrecovery will be remedied by the application of Line 7 of Form FMC-274 in future bunker surcharges, the Commission does not view the lack of such opportunity as prohibiting the issuance of a final decision in compliance with the provisions of P.L. 95-475.[10]

The Commission is able on the basis of this record to resolve all of the issues posed in the Order of Investigation. The allocation issues have been resolved and on the ultimate issue of the justness and reasonableness of the proposed 6.66 percent surcharge, even Matson has admitted that this figure is too high. The surcharge is unreasonable to the extent it exceeds 6.48 percent. Due process will be afforded all parties if a final decision is issued at this time. Any party that believes that Matson's projection data are erroneous may seek reconsideration of the Commission's decision.

[9] This amount is determined by multiplying the estimated revenue subject to the surcharge ($56,064,600) by the implemented surcharge, and from this product ($3,733,902) substracting the product of the estimated revenue multiplied by the reasonable surcharge ($3,632,986), and multiplying the remainder ($100,916), which represents the total overrecovery had the surcharge remained in effect the full 120-day period, by the pro rata portion of the overcharge applicable to the 160 days the surcharge was in effect ($100,916 × 106/120=$88,806). This calculation can be verified by multiplying the estimated revenue by the difference between the implemented and reasonable surcharges (.18 percent) and applying the effective period ratio to the product ($56,064,600 × .0018 × 106/120=$88,806).

[10] Absent extraordinary circumstances, the Commission is mandated by P.L. 95-475 to issue a decision in this proceeding by March 28, 1980.

THERFORE, IT IS ORDERED, That the 6.66 percent bunker surcharge filed by Matson Navigation Company and placed under investigation in this proceeding is unjust and unreasonable and is disapproved to the extent it exceeds 6.48 percent.

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

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV

FEDERAL MARITIME COMMISSION

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[GENERAL ORDER 20; AMDT.6; DOCKET NO. 79-93]

PART 540—SECURITY FOR THE PROTECTION OF THE PUBLIC

SUBPART A—PROOF OF FINANCIAL RESPONSIBILITY, BONDING AND CERTIFICATION OF FINANCIAL RESPONSIBILITY FOR INDEMNIFICATION OF PASSENGERS FOR NONPERFORMANCE OF TRANSPORTATION

March 31, 1980

ACTION: Final Rule

SUMMARY: This amends the Commission's regulations to increase the maximum amount of insurance, escrow account, guaranty and surety bond required of holders of a Certificate (Performance) from $5,000,000 to $10,000,000.

EFFECTIVE DATE: February 20, 1981

SUPPLEMENTAL INFORMATION:

This proceeding was instituted by notice of proposed rulemaking published in the *Federal Register* on October 31, 1979, (44 Fed. Reg. 62546-62547) to: (1) amend section 540.9(j) of the Commission's regulations (46 C.F.R. § 540.9(j)) by increasing the maximum amount of insurance, escrow account, guaranty and surety bond required of an applicant (certificant) from $5,000,000 to $10,000,000, as evidence of financial responsibility; and (2) effect corresponding revisions to Form FMC-131, Application For Certificate of Financial Responsibility. This amendment will not alter the existing requirements with respect to a self-insurer who must demonstrate financial responsibility by maintenance of working capital and net worth each

in an amount no less than 110 percent of highest unearned passenger revenue within the preceding two fiscal years.

In its notice the Commission explained its belief that the maximum amount of coverage by insurance, escrow account, guaranty or surety bond should be increased to $10,000,000 based upon the inflationary impact since 1967 when the $5,000,000 maximum was established, the decline in the value of the dollar, the rise in the consumer price index, the increase in price of fuel oil and the increase in wages, all resulting in the doubling of most fares.

Comments were received from (1) The International Committee of Passenger Lines (ICPL) whose membership is made up of 16 major foreign flag passenger operators which operate some 55 passenger vessels subject to the Commission's regulations; (2) The Liverpool and London Steam Ship Protection and Indemnity Association, Limited, The Standard Steamship Owners' Protection and Indemnity Association Limited, The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Limited, Sveriges Angfartygs Assurans Forening, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited and The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg) (referred to herein as "the Associations") who are insurance associations composed of shipowners and operators who mutually insure one another against various liabilities arising out of the operation of their vessels and who are part of a group of protection and indemnity associations which collectively insure approximately 85% of the world's ocean-going vessel tonnage; and (3) The Steamship Mutual Underwriting Association (Bermuda) Limited (Steamship Mutual Bermuda) which is also an insurance association.

Positions of the Commentators

It is the position of ICPL that (1) the $5,000,000 ceiling is still adequate to protect against all reasonably foreseeable risks on nonperformance; (2) that the proposed increase will result in unnecessary costs which must ultimately be borne by cruise passengers; and (3) that, in any event, should the proposed increase be adopted, the effective date of the new regulation should be postponed for a 12-month period. ICPL argues that there have been only two publicized instances in which it has been necessary to resort to guaranties filed with the Commission and in both instances the $5,000,000 guaranty was more than adequate and proved to be approximately 5 times more than was ultimately required for full restitution; that apart from these two isolated instances, the cruise lines have achieved a remarkable record of satisfying their performance obligations to more than ten million passengers transported over the past 13 years since General Order 20 has been in effect; that since there is nothing to substantiate that the existing $5,000,000 maximum coverage will be inadequate to deal with any reasonably foreseeable future nonperformance, ICPL members consider the Commission's proposed increase as unnecessary and unwise; that if the increase is put into effect, many passenger vessel operators now using guaranties are likely to resort to other permissible methods of establishing their financial responsibility in an amount less than $10,000,000

resulting in increased administrative expenses on the part of the lines themselves and additional supervision expenses on the part of the Commission in order to insure compliance with the Commission's regulations; and that from any standpoint such extra outlays are excessive and without any commensurate benefit to the traveling public at all.

For the reasons put forward by ICPL, the Associations join in ICPL's comments both as to the lack of need for the rule change and the existence of a need for a substantial "lead time" before its effective date if the Commission should decide to adopt it, such as an effective date 12 months following adoption of the change. The Associations argue that adoption of the rule change would necessitate a substantial expenditure of time and effort, not only on the part of the passenger vessel owners and operators but on the part of the Associations, in negotiating terms whereon the Associations would be prepared to issue guaranties on behalf of their members for increased amounts. If in any instance negotiations were to fail, steps would have to be taken by the member concerned to arrange for some other form of evidence of financial responsibility which would require the approval of the Commission and necessitate steps to terminate the existing guaranty of the Association concerned; and that these problems are aggravated by the distances involved with the Associations located in Europe and Bermuda, their members scattered over the world, and the Commission in Washington.

Steamship Mutual Bermuda opposes the proposed increase in the guaranty "ceiling" on the grounds that it is unnecessary and that it will result in a substantial increase in the cost of doing business for cruise operators, which increase will ultimately be borne by passengers. However, in the event that the proposed increase is adopted, the Association requests that its implementation be delayed for at least one year. Steamship Mutual Bermuda states that delaying implementation is necessary because of the financial arrangements behind each guaranty; that cruise operators submitting guaranties to the Commission are required to post counter-security with the Association amounting to cash or its equivalent, such as bank guaranties or letters of credit; that a doubling of the guaranty requirement to $10,000,000 will necessitate a substantial rearrangement of the member-operator's finances; and since company budgets and cash flow projections from cruises are prepared at least a year in advance a sudden implementation of the guaranty increase could cause hardship, particularly for small operators.

DISCUSSION

The Commission has given serious consideration to the comments received realizing that the increase in the maximum to $10,000,000 could increase the cost of operations of some applicants (certificants). The Commission is also well aware of the commendable record to date of the cruise lines in satisfying their performance obligations, a fact that it hopes will not be lost on guarantors and sureties.

However, since 1967 when the $5,000,000 maximum was established, the inflationary impact has been severe and continues. In January, 1980, a 1967

dollar was worth 42.9 cents and the Consumer Price Index reached 233.2. The price of fuel oil has increased approximately 8 times since 1967 and wages have more than doubled. The inflationary spiral and rising fuel costs have resulted in at least a doubling of most fares, which continue to rise to meet increased operating costs. Unearned passenger revenue of many owners and charterers has increased substantially and should continue to increase as they add vessels to their fleets, increase the number of available accommodations of their present vessels and raise their fares to meet increased costs.

Accordingly, the Commission continues of the belief that the increase of the maximum amount of coverage to $10,000,000 with respect to insurance, escrow account, guaranty and surety bond is warranted. None of the comentators claim that $10,000,000 of unearned passenger revenue is unattainable. Consequently, it is the position of the Commission that a maximum of $10,000,000 is fair and reasonable and necessary to provide greater protection to the passenger public.

It should be noted that this is a maximum, not a minimum requirement. Most applicants (certificants) presently qualifying for their Certificate (Performance) by submitting less than the present $5,000,000 maximum will not be affected, except, of course, as their unearned passenger revenue experience requires changes in the amount of coverage. Consequently, we do not believe implementation of the increase will cause any real hardship for small operators.

With the maximum increased to $10,000,000 those cruise lines presently submitting less than the present maximum of $5,000,000 will continue to report unearned passenger revenue. The cruise lines affected will be those whose unearned passenger revenue presently and in the future will exceed $5,000,000. The Commission anticipates that fewer cruise lines will submit the $10,000,000 maximum than now furnish the $5,000,000 maximum resulting in an increased number of certificants reporting unearned passenger revenue. While this will increase both the workload of the certificants and of the Commission and its staff, the increase should not be overwhelming for either.

All commentators request that should the Commission, after considering their positions and arguments, decide to increase the maximum to $10,000,000, that implementation of the increase be delayed at least one year. As justification for such delay in implementation, the commentators variously state that cruise programs, cash flow projections and budgets are estimated at least 12 to 18 months in advance; that time is required to negotiate terms with the P & I Associations to issue guaranties for increased amounts; that additional time may be needed to arrange for some other form of evidence of financial responsibility; and that sudden implementation of the increase could cause hardship.

The Commission is of the opinion that a delay in implementation is justified since many applicants (certificants) now providing $5,000,000 may not wish to increase the amount of the evidence of financial responsibiltity to $10,000,000. This will require the reporting of unearned passenger revenue to the Commission, determining the amount of coverage required and considering possible changes in the method of establishing financial responsibility. All of these matters require Commission approval. The delay in implementation will also

permit the cruise lines and the Commission staff to explore any new method of establishing financial responsibility.

The Commission considers the request for delay of implementation reasonable and sets the effective date of this final rule as February 20, 1981, to conform to the policy year of the P & I Associations which write most of the guaranties.

The Commission has considered all filed comments and arguments submitted in this rulemaking proceeding. Accordingly, pursuant to section 3 of Public Law 89-777 (46 U.S.C. § 817e); and section 4 of the Administrative Procedure Act (5 U.S.C. § 553), the Federal Maritime Commission hereby amends section 540.9(j) of the Commission's General Order 20 (46 C.F.R. § 540.9(j)) and Application for Certificate of Financial Responsibility (Form FMC-131) to read as follows:

1. Section 540.9(j) is revised to read as follows:

§ 540.9 MISCELLANEOUS

(j) The amount of (1) insurance as specified in § 540.5(a), (2) the escrow account as specified in § 540.5(b), (3) the guaranty as specified in § 504.5(c), or (4) the surety bond as specified in § 540.6 shall not be required to exceed 10 million dollars (U.S.).

2. Introductory paragraph of "Part II—Performance" of the Application Form FMC-131 is revised to read as follows:

Answer items 8-15 if applying for Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance. If you are filing evidence of insurance, escrow account, guaranty or surety bond under Subpart A of 46 CFR Part 540 and providing at least ten (10) million dollars (U.S.) of coverage, you need not answer questions 10-15.

3. Item 8 of the Application Form FMC-131 is revised to read as follows:

8. If you are providing at least ten (10) million dollars (U.S.) of coverage, state type of evidence and name and address of applicant's insurer, escrow agent, guarantor or surety (as appropriate).

By Order of the Federal Maritime Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-10

RATES OF FAR EASTERN SHIPPING COMPANY

The second and third factors set forth in section 18(c)(2) of the Shipping Act are those most appropriate in determining the justness or reasonableness of a controlled carrier's individual commodity rates.

Any rate of a controlled carrier which expires, or is superceded, deleted or withdrawn subsequent to the initiation of a proceeding to determine its justness or reasonableness remains at issue and, if not justified, must be disapproved.

The fact that a particular commodity moves via other carriers in a trade will, absent special circumstances, negate any claim that a controlled carrier's lower rate for the commodity is necessary to assure its movement.

Rate comparisons conducted pursuant to section 18(c)(2)(ii) should include not only the applicable freight rate, as stated in the carriers' respective tariffs, but also any differences in surcharges, accessorial charges and tariff rules which may affect the total transportation charge to the shipper.

Rate comparisons pursuant to section 18(c)(2)(ii) should employ rates in effect on the date of the order instituting a proceeding.

A controlled carrier's individual commodity rate can never be the same or similar to a Military Sealift Command cargo N.O.S. rate of another carrier.

Though the similarity between a controlled carrier's rate and the rate of another carrier is not conclusive proof of its justness or reasonableness, such a comparison will be accorded significant weight in the absence of evidence relating to any other appropriate factor.

Steven B. Chameides and *John F. Dorsey* for Far Eastern Shipping Company.
Charles F. Warren and *George A. Quadrino* for Philippines North America Conference and its member lines.
William F. Sheehan for American President Lines, Ltd.
Edward M. Shea and *Paul J. McElligott* for Sea-Land Service, Inc.
Thomas E. Kimball and *Richard C. Jones* for Pacific Westbound Conference.
Alan J. Jacobson, Paul J. Kaller, and *John Robert Ewers* for Bureau of Hearing Counsel.

REPORT AND ORDER

April 1, 1980

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

This proceeding was initiated on March 2, 1979, by Order of Suspension and to Show Cause, to determine the justness and reasonableness of 305 freight rates of the Far Eastern Shipping Company (FESCO) pursuant to section 18(c) of the Shipping Act, 1916 (46 U.S.C. §817(c)).[1] The Order also limited this proceeding to the submission of memoranda of law, affidavits of fact and supporting documentary material and waived use of the Commission's discovery procedures. American President Lines, Ltd. (APL), Sea-Land Service, Inc., Philippines North America Conference (PNAC), and Pacific Westbound Conference were granted leave to intervene.

Following FESCO's initial response and rebuttal, the replies of the intervenors, and oral argument, the Commission issued an Order dated October 16, 1979, permitting FESCO to amend its prior submissions. As a result, FESCO has filed an additional response and rebuttals in support thereof. Replies to FESCO's additional response were submitted by APL, Sea-Land, PNAC, and the Commission's Bureau of Hearing Counsel. In addition, FESCO has petitioned the Commission to grant its previous request for discovery and evidentiary hearing. Sea-Land, APL, and Hearing Counsel have responded to this petition.[2]

Section 18(c)(2) of the Shipping Act, 1916 sets forth four appropriate, but not limiting, factors which the Commission may consider in determining whether rates of a controlled carrier are just and reasonable.[3] In its initial response, FESCO primarily addressed the first of these factors in an attempt to show that its subject rates were at or above a level which is fully compen-

* Commissioner Leslie Kanuk will issue a separate opinion.

[1] The rates in question were specified in Appendix A to the Order of Suspension and to Show Cause which is appended hereto as Attachment A. These 305 freight rates apply to 118 different commodities and are contained in four FESCO tariffs—FMC-20, FMC-23, FMC-24, and FMC-28.

[2] The Commission's Order of October 16, 1979 stated that FESCO's requests for discovery and evidentiary hearing would be held in abeyance pending further proceedings. Order at 2, n.4. Those requests will *now* be denied. The Order to Show Cause which instituted this proceeding waived the Commission's normal discovery procedures except upon special permission. This Order further required that: "any request for an evidentiary hearing must be accompanied by a statement setting forth in detail the facts to be proven, their relevance to the issues in this proceeding, and why such material could not be submitted through affidavit. . . ." Order to Show Cause, at 6. FESCO has failed to satisfy this basic requirement. Moreover, FESCO's discovery requests are immaterial to the factors which are appropriate to the Commission's decision *in this particular case.*

[3] Section 18(c)(2) states in part:

For the purpose of this subsection, in determining whether rates . . . by a controlled carrier are just and reasonable, the Commission may take into account appropriate factors, including, but not limited to, whether:

(i) the rates . . . which have been filed . . . are below a level which is fully compensatory to the controlled carrier based upon that carrier's actual costs or upon its constructive costs, which are hereby defined as the costs of another carrier, other than a controlled carrier, operating similar vessels and equipment in the same or a similar trade;
(ii) the rates . . . are the same as or similar to those filed or assessed by other carriers in the same trade;
(iii) the rates . . . are required to assure movement of particular cargo in the trade; or
(iv) the rates . . . are required to maintain acceptable continuity, level, or quality of common carrier service to or from affected ports.

satory. However, the Commission's October 16, 1979 Order rejected such an approach because the rates in question are individual commodity rates and not FESCO's entire rate structure in a particular trade. The Order concluded, therefore, that the first 18(c)(2) factor is inappropriate for this proceeding and noted that the second and third factors were those most relevant to the Commission's determination.[4]

POSITION OF THE PARTIES

FESCO prefaces its additional response with the comment that the Commission's treatment of the first 18(c)(2) factor was unlawful, but then proceeds to avail itself of the opportunity to supplement its previous response by more fully addressing the second and third 18(c)(2) factors. FESCO contends that once it establishes that its rates are the same or similar to rates of another carrier in the same trade, FESCO's rates are conclusively just and reasonable. In Appendix K to its additional response, FESCO lists, by tariff and commodity item number, 92 FESCO freight rates which it claims exceed the present rates of one or more carriers or are within 10% of a conference rate.[5] FESCO also argues that some of its rates are required to assure the movement of particular cargo (the third factor) by referring to three attached letters from United States importers of Philippine goods (Appendix L) and to some previously filed letters contained in Appendix F.

In replying to FESCO's additional response, Intervenors and Hearing Counsel state that:

1. FESCO has failed to address a significant number of rates made subject to this proceeding, and these unaddressed rates must therefore be disapproved;
2. Most of FESCO's rate comparisons are inappropriate because FESCO compares its specific commodity rates with other carriers' Military Sealift Command cargo N.O.S. rates;
3. FESCO has disregarded important differences in surcharges, accessorial charges, and tariff rules in making its rate comparisons;
4. Even if some of FESCO's rates are the same or similar to those of other carriers, they are not conclusively just and reasonable because other factors may be more appropriate;
5. The fact that the various importers which have filed letters in support of FESCO's low rates also acknowledge that they book cargo on conference

[4] The Order further noted that section 18(c)(2)(i) did not provide a controlled carrier the option of demonstrating that its rates are compensatory either by presenting its actual costs or by constructing its costs. The Commission determined that the constructive cost provision of section 18(c)(2)(i) is available only to it as a means of verifying the actual costs which a controlled carrier may present or, in the absence of cost data provided by a controlled carrier, in instances in which the Commission believed the cost criterion to be relevant. Order of October 16, 1979, at 4, 5. However, even assuming that the first 18(c)(2) factor is appopriate for this proceeding and FESCO is permitted the option of constructing its costs, FESCO's constructive costs analysis is of no value because of its reliance on non-controlled carriers' Military Sealift Command (MSC) rates, *See* Order of October 16, 1979, at 6, n.9. Moreover, the Commission could not find on this record that the non-controlled carriers referred to by FESCO in its attempt to construct its costs operate "similar vessels and equipment in the same or a similar trade," a necessary prerequisite to any *constructive* cost analysis.

[5] FESCO's rebuttal filed January 22, 1980, included a 93rd commodity comparison which it claims was inadvertently omitted from its additional response.

carriers, completely belies FESCO's assertion that a few of its rates are necessary to assure the movement of cargo; and

6. FESCO has, in certain instances, improperly compared its rates as of the date of the Order to Show Cause (March 2, 1979) with present rates of other carriers in the same trade

DISCUSSION

The ultimate issue before the Commission is whether FESCO has demonstrated that its 305 freight rates made subject to this proceeding are just and reasonable. Appendix A to the Order to Show Cause listed the 305 freight rates, on 118 commodities contained in four FESCO tariffs. In its initial response, FESCO asserted that a significant number of these rates ". . . have expired, been superceded or deleted, or are being withdrawn," and that the issue of their reasonableness was consequently moot.[6] Response of FESCO, at 1, 2. These rates are listed in Appendix A to FESCO's response. FESCO claims, therefore, that only the 208 freight rates listed in Appendix H to its response remain at issue in this proceeding.

A review of FESCO's tariffs indicates that only 7 of these 97 allegedly moot rates expired or were deleted prior to the issuance of the Order to Show Cause on March 2, 1979.[7] To the extent that the remaining 90 rates expired, were superseded, deleted, or withdrawn, they did so subsequent to March 2, 1979 and all 90 remain at issue in this proceeding. Rate actions occurring subsequent to the initiation of a proceeding will not necessarily divest the Commission of jurisdiction to assess the justness and reasonableness of a rate. Any rate which expires or is superceded, deleted or withdrawn subsequent to the initiation of an investigation could easily be reinstituted by a controlled carrier at a later date. Therefore, unless the Commission rules on its reasonableness, the purposes of the Ocean Shipping Act might be frustrated.

A controlled carrier can, of course, choose to delete or withdraw any rate which is made subject to a proceeding under the Act. It can further elect to present no justification concerning a rate. However, in the absence of justification, the Commission has no alternative but to disapprove the rate. Accordingly, those FESCO rates which expired, were superceded, or deleted or withdrawn subsequent to March 2, 1979 will be disapproved.

Additionally, the Order to Show Cause stated that:

> [a]ny changes or amendments in the commodity rates as shown in Appendix A filed during the sixty days' notice period will be included in this proceeding and subject to the foregoing. Order at 5.

Several of FESCO's rates were changed or amended during this period as FESCO filed interim rates. These rates are also listed in Attachment A.

[6] FESCO's initial response also asserted that the portion of tariff FMC-23 which related to the carriage of goods from the Philippines to U.S. East Coast ports was withdrawn because it discontinued its service in that trade in 1978. These rates to Atlantic ports were cancelled on May 2, 1979.

[7] These rates relate to: FMC-20, items 220 (automobiles, truck and trailer parts) and 2540 (drugs and medicines); FMC-24, item 10330 (ingots); and FMC-28, items 3900 (nylon yarn), 4365 (printed matter, N.O.S.), and 6254 (veneer). Because they expired or were deleted prior to the Order, they will be dismissed from this proceeding as moot.

However, FESCO has addressed only the rates listed in Appendix A to the Order to Show Cause in its presentation. Because these changed or amended rates have not been justified, they must likewise be disapproved.

Only 93 of the 208 rates which FESCO claims are at issue have been compared to other rates (Appendix K to FESCO's additional response). Three additional rates have been addressed pursuant to the third 18(c)(2) factor (Appendix G to FESCO's initial response). FESCO has, therefore, failed to demonstrate that the 112 remaining rates (208–96) are just and reasonable, and these rates also will be disapproved.

In an attempt to show that certain of its rates are necessary to assure the movement of particular cargo, FESCO has submitted letters and documents from shippers, trade associations and importers. Appendices F and L contain submissions relating to the movement of three commodities from the Philippines to the United States West Coast—FMC–23, items 408 (furniture), 570 (handicrafts), and 1070 (woven articles). In addition, Appendix G contains documents relating to FESCO's rates on organs and pianos from the United States to Australia—FMC–20, item 1915 and FMC–28, item 4000. These unsworn documents are not supported by any additional data; nor do they adequately address the alleged need for a particular FESCO rate. The Commission finds them unpersuasive and of little value to the Commission in resolving the ultimate issue in this case.

Moreover, the third 18(c)(2) factor will usually come into play only when a particular commodity is not moving via other carriers in the trade. *See Hearings on H.R. 9998 Before the Subcommittee on Merchant Marine of the House Committee on Merchant Marine and Fisheries,* 95th Cong., 2nd Sess. 159 (1978). FESCO has not shown that any of the commodities do not move via other carriers. In fact, several of the Philippine shippers who endorse FESCO's rates are signatories to the PNAC Uniform Merchants' Contract and assumably ship some of their exports via conference carriers. Cargo statistics provided by PNAC tend to support this assumption by indicating that the commodities shipped by these Philippine exporters were among the major moving commodities carried by conference members in 1977 and 1978. *See* Reply of PNAC, at 12, Table I. More importantly, however, some of the letters submitted in support of FESCO also indicate that those exporters and importers ship not only with FESCO but also via conference carriers.

FESCO's comparison of 93 of its rates simply consists of matching the freight rate in its tariff with the freight rates for the same commodity in tariffs of other carriers. No attempt has been made to consider rates in the context of the total transportation charge to the shipper. Sea-Land, APL, and PNAC each note that differences in bunker surcharges, currency surcharges, accessorial charges and tariff rules may affect the total transportation charge and have, in comparing certain rates, included such charges in their considerations.[8] In response, FESCO narrowly interprets the Order to Show Cause as applying

[8] One intervenor has also suggested that certain charges prescribed by FESCO's tariffs are not in fact assessed to shippers by FESCO. *See* APL's Reply to Additional Response of FESCO, Affidavit of Thomas T. Morris, at 3, n.1. Such conduct, if true, could violate sections 17 and 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §§816 and 817(b)(3)), but, because of the discussion which follows, is not relevant to this proceeding.

only to "rates" and not to any other "charges, classifications, rules or regulations."

FESCO is correct in stating that the Commission has never raised any question about the justness and reasonableness of FESCO's charges, classifications, rules or regulations. However, this does not lead to the conclusion that the Commission is precluded from considering such matters in assessing FESCO's rates. Even though such charges are assumed to be just and reasonable for this particular proceeding, they are still relevant to the overall transportation charge and are, therefore, "appropriate factors" which the Commission may take into account. *See* 46 U.S.C. §817(c)(2). The Commission will consequently consider any differences which may affect the total transportation charge in this proceeding and in all future proceedings under the Ocean Shipping Act of 1978.[9]

For some of its rate comparisons FESCO has compared its March 2, 1979 suspended rates with other carriers' present rates. FESCO implies that in so doing it is subjecting its rates to scrutiny in "the present inflationary environment." FESCO asserts, moreover, that such an approach is particularly appropriate because any rates found unjust and unreasonable will be unlawful from that date forward.[10] PNAC submits, however, that at least with respect to the Philippine trades, the rates of the non-controlled carriers have declined significantly in the past year primarily in response to FESCO's low rates (including its replacement rates). PNAC argues, therefore, that any present temporary similarity between rates should not justify FESCO's low rates. It further points out that the logical corollary of FESCO's position would require competing carriers to maintain the rate spread in effect on the date of the Order throughout the proceeding, to their obvious detriment.

Though neither the Ocean Shipping Act nor its legislative history specifically addresses the question of what time frame a controlled carrier should use when conducting comparisons with other carriers' rates, the Commission is of the opinion that the rates in existence at the time an Order institutes a proceeding are those most appropriate for any rate comparison. For it was on that date that the determination was made that the rates of the controlled carrier "may be unjust and unreasonable." The burden then devolved upon the controlled carrier to justify those challenged rates under the circumstances which existed then, not events which occurred subsequently.[11] For the purposes of this proceeding, therefore, the Commission will consider only FESCO rate

[9] At a minimum, any controlled carrier seeking to rely upon a rate comparison to justify a challenged rate should provide, for *each rate compared*: (1) the applicable tariff pages, (2) an explanation of any adjustments made in the rates to effect a comparison, and (3) all relevant charges which affect the total transportation charge. If any comparison necessitates the conversion of a per container rate to a weight/measure rate, or *vice versa*, representative bills of lading for the particular commodity should also be provided.

[10] The Commission notes, however, FESCO's previous statement that:

APL's suggestion that FESCO's calculations should use the bunker surcharge which has since become effective seems *inconsistent* with the commencement date of the proceeding. Rebuttal of FESCO, at 9.

[11] This does not mean that the Commission will remain oblivious to rate activity in a trade during the course of a proceeding—such activity could be another "appropriate factor" for its consideration. The Commission will, however, closely scrutinize the reasons for any significant decreases *in other carriers'* rates, including the fact that they may have been lowered to remain competitive with a controlled carrier's lower replacement rates while awaiting resolution of the proceeding.

comparisons which employ rates of other carriers which were in effect on March 2, 1979.

As mentioned above, FESCO has compared 93 of its rates to the rates of other carriers in the same trade in an attempt to show that they are the same or similar.[12] The majority involve comparisons between FESCO's individual commodity rates and MSC rates of other carriers, especially with respect to rates contained in FESCO tariffs FMC-23 and FMC-24.[13]

MSC rates apply to the transportation by water of U.S. Department of Defense cargoes. There are generally only three MSC rates quoted for any particular trade—cargo N.O.S., reefer, and vehicles. The latter two are not material to this proceeding. The cargo N.O.S. rate is, in effect, a freight-all-kinds rate for military cargo—one rate regardless of the commodity. It is against this one cargo N.O.S. rate that FESCO compares many of its *individual* commodity rates. The Commission finds such comparisons inappropriate and of no value in assessing the effects of FESCO's specific rates on rates for those same commodities carried by other carriers in a trade. A specific commodity rate is not the "same or similar" to a cargo N.O.S. rate for purposes of section 18(c)(2)(ii). Any comparisons solely employing MSC rates will, therefore, be disregarded.

The similarity between a controlled carrier's rate and the rate of another carrier in the same trade is not conclusive proof that the rate is just and reasonable. However, it is one of the four appropriate factors which Congress enumerated in the Ocean Shipping Act. Therefore, absent any proof offered concerning other factors by a controlled carrier or developed by other parties or the Commission, this factor should be given significant weight. The Commission will, therefore, determine the justness and reasonableness of FESCO's remaining subject rates by relying primarily on the second 18(c)(2) factor.

Attachment B lists FESCO rate comparisons employing other carrier's rates which were effective on March 2, 1979.[14] A review of this list reveals that several of FESCO's rates are indeed the same as or similar to those filed or assessed by other carriers in the same trade.

For example, in tariff FMC-20, nine of FESCO's local per-container rates are the same as or higher than rates charged by Karlander Kangaroo Line, even without considering the fact that FESCO's rates are subject to an additional 3 percent currency adjustment factor. In FMC-23, the FESCO local rates on plywood are higher than rates of the Maritime Company of the Philippines, even when these latter rates are corrected to the same basis (per 40 cubic feet). Although FESCO's overland common point (OCP) rate on footwear is 6 percent lower than that of Zim Israel Navigation Company and its local rate on handicrafts 4.6 percent lower than the conference rate, in the absence of any specific evidence that these differences in rates are causing trade

[12] In two earlier submissions, FESCO also proferred some rate comparisons—Appendices E and J. However, Appendix K appears to be FESCO's sole remaining justification concerning the second 18(c)(2) factor.

[13] FESCO's two earlier rate comparisons (Appendices E and J) did not employ MSC rates. There, FESCO compared its rate on a specific commodity to the rate on the same commodity of an independent carrier in the same trade.

[14] While Appendix K appears to be FESCO's only extant rate comparison (*see* note 11 *supra*), this list also includes several rate comparisons contained in Appendix J to FESCO's initial submission.

disruptions, the Commission finds these rates "similar" to those of other carriers.[15] The three rates shown for tariff FMC-24 are all higher than comparable rates. Finally, in tariff FMC-28 the three FESCO per-container rates are equal to or higher than rates of Karlander. However, the rate/measurement rate comparisons between FESCO and Seatrain require an adjustment to Seatrain's rates since they are stated on the basis of a weight ton of 1,000 kilograms and a measurement ton of 1 cubic meter. Seatrain's equivalent rates are thus between 1.8 and 10 percent higher than FESCO's. Again, the Commission finds these rates "similar" for purposes of this proceeding, in the absence of evidence of any disruptive effects of these rates on the trade.

The Commission concludes, therefore, that the FESCO rates shown in Attachment B are just and reasonable. However, those rates mentioned above which FESCO has failed to demonstrate are just and reasonable will be disapproved by the Commission pursuant to section 18(c)(1) (46 U.S.C. § 817(c)(1)).

Any rate replacing a disapproved rate which is lower than the lowest rate of a national flag carrier in the trade for the same commodity, when considered in light of any differences in applicable transportation charges, will likewise be subject to suspension and disapproval, unless the controlled carrier can demonstrate that a lower rate is necessary to assure the movement of the commodity or to effectively compete with some other carrier.[16]

THEREFORE, IT IS ORDERED, That the Petition of Far Eastern Shipping Company that the Commission Grant FESCO's Previous Request for Discovery and Evidentiary Hearing is denied; and

IT IS FURTHER ORDERED, That all rates of Far Eastern Shipping Company as set forth in Attachment A are hereby disapproved, except for those rates set forth in Attachment B and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

[15] Whether a lower FESCO rate is the same or similar to another carrier's rate will always depend upon the particular facts of a case. The Commission notes, however, that even FESCO concedes that a freight cost differential of as little as 1 percent can have a significant impact on importers and exporters of certain commodities. Additional Response of FESCO, at 7.

[16] Because the disapproval of many of these rates is based solely on a failure of proof, the Commission recognizes that in certain instances, a replacement rate may actually be lower than the disapproved rate but still meet this standard.

ATTACHMENT A[1]

Far Eastern Shipping Company Tariff FMC–20

From: Pacific Coast Ports in the United States and Ports in Hawaii
To: Ports in Australia and New Zealand

Tariff Item No.	Commodity	Rate Basis	Local	OCP
70	Agricultural Implements, Machinery & Parts	W/M	111.00 [122.00]	107.00 [119.50]
190	Automobiles, Passenger	W/M	128.00 [149.00]	109.00 [125.25]
195	Automobiles	W/M	89.00 [89.75]	
215	Automobile Cushions			
	In 20 Foot CY/CY containers	PC/20	2200.00	
	In 40 ft. CY/CY containers	PC/40	3800.00	
		W/M	101.00	
220	Automobiles Truck and Trailer Parts N.O.S.	W/M	101.00 [113.75]	
	Special Rate; In 20 ft. CY/CY containers only incl. Terminal Receiving Charges	PC/20	1800.00	1800.00
320	Batteries and Parts, N.O.S. In CY/CY containers only	W/M	166.00 [177.75]	
		PC/20	2400.00 [2450.00]	
		PC/40	5500.00 [5550.00]	
360	Boxboard, Cardboard, Chipboard, Paperboard, Woodpulp Board	W/M	130.00 [138.00]	
372	Tabulating Machines Card Stock	LT	99.00 [110.25]	
390	Boats, Yachts, Air Cushioned Vehicles & Jet Skis	W/M	75.00 [100.25]	
400	Books & Pamphlets	W/M	143.00 [163.50]	124.00 [140.00]
	Books & Pamphlets, Religious. In 40 ft. CY/CY containers	PC/40	4000.00 [4050.00]	
		PC/20	2150.00 [2550.00]	
482	Camping Equipment	W/M	102.00 [113.00]	
488	Canned Apricots			
	Special Rate:			
	In 20 Ft. CY/CY containers	PC/20	2140.00 [2200.00]	
655	Charcoal Briquettes	W/M	101.00 [101.25]	
660	Chemicals, N.O.S.			
	Value exceeding $750.00 per 2000 #	W/M	172.00 [174.00]	

Far Eastern Shipping Company Tariff FMC-20—Continued

From: Pacific Coast Ports in the United States and Ports in Hawaii
To: Ports in Australia and New Zealand

Tariff Item No.	Commodity	Rate Basis	Local	OCP
	Chemicals, N.O.S., Non-Hazardous Value does not exceed $750.00 per 2000 #	W/M	164.00 [174.00]	
680	Clay, Common	W/M	85.00 [91.75]	
740	Compound, Cleaning	W/M	152.00 [189.00]	
831	Raw Materials, specifically Designed or Manufactured for the Manufacture of Disposable Diapers	W/M	114.00 [118.50]	
832-A	Dispensers, Metal Towel, In CY/CY Containers	W/M	119.00 [120.00]	
		PC/40	4000.00 [4050.00]	
890	Engines, Internal Combustion	W/M	108.00 [115.25]	95.00 [106.25]
900	Engines, Marine In CY/CY containers only (Overland)	PC/20		1800.00 [2200.00]
	(Overland)	PC/40		3600.00 [4200.00]
1072	Freon Gas, in shipper owned tank trailers	#W	132.00 [151.50]	
1075	Freight All Kinds			
	In twenty foot containers	PT 20	1850.00	
	In forty foot containers	PT 40	3600.00	
	In Shipper owned 20 foot CY/CY containers	PT 20	1500.00	
1090	Fruit, Dried	W/M	114.00 [126.50]	
1115	Garage Door opening equipment/systems	W/M	135.00 [136.00]	
	In CY/CY 20 ft. containers	PC/20	2800.00 [2810.00]	
1170	Glass Fiber	W/M	129.00 [137.50]	
1232	Helium, Liquid in shipper provided containers or shipper provided tank trailers. Not subject to heavy lift or long length charges	W/M	115.00 [128.25]	
		PC/40	5700.00 [6030.00]	
1237	Herbicides	W	144.00 [153.50]	

Far Eastern Shipping Company Tariff FMC–20—Continued

From: Pacific Coast Ports in the United States and Ports in Hawaii
To: Ports in Australia and New Zealand

Tariff Item No.	Commodity	Rate Basis	Local	OCP
1241	Houses Knocked Down	W/M	126.00 [134.75]	
		PC/20	2289.00	
		PC/40	4578.00	
1260	Insecticides, Fungicides, Herbicides, Pesticides and Rodenticides	W/M	152.00 [157.75]	145.00 [150.00]
1270	Insulation, Fiber Glass: Plastic Sheets and Boards	W/M	120.00 [127.50]	
1610	Machinery and Machines	W/M	117.00 [123.00]	109.00 [115.00]
1624	Machinery			
	Portable Aluminum Lifting Equipment CY/CY only	PC/20	2600.00 [2625.00]	
		PC/40	4000.00 [4025.00]	
1629	Machinery & Machine Parts	W/M	136.00 [124.25]	124.00 [114.25]
	Machines, Coin operated, CY/CY	W/M	114.00	114.00
1642	Automatic Car Washers	W/M	111.00	
	In 40 Ft. CY/CY containers	PC/40	4500.00	
1790	Motorcycles and Side Cars (Overland) only	W/M		126.00 [134.00]
	Children's motorized Vehicles Motor Scooters (Overland)	W/M		147.00 [157.50]
1800	Mowers, Grass, Gang	W/M		91.00 [118.00]
1820	Non Dairy Cream, Milk Substitutes	W/M	130.00	
	In 20 ft. CY/CY containers	PC/20		2300.00
	In 40 ft. CY/CY containers	PC/40		4500.00
1838	Nuts, Almond Shelled	W	160.00 [161.25]	
	Nuts, Shelled			
	In packages not less than 1 cu. ft. ea.	W/M	125.00 [125.25]	
	In packages of less than 1 cu. ft. ea.	W/M	135.00 [141.75]	
1842	Nuts, in shell	W	160.00 [164.00]	
1915	Organs and Pianos, Electronic			
	Per 40 ft. container	PT 40	4400.00 [4500.00]	
	Per 20 ft. container	PT 20	2200.00 [2250.00]	

Far Eastern Shipping Company Tariff FMC–20

From: Pacific Coast Ports in the United States and Ports in Hawaii
To: Ports in Australia and New Zealand

Tariff Item No.	Commodity	Rate Basis	Local	OCP
1970.55	Paints, Artists'	W/M	140.00 [144.00]	
2110	Paper, Printing	LT	17300 [185.00]	165.00 [175.50]
2510	Recreational Vehicle Parts & Accessories	W/M	94.00 [101.00]	
2540	Drugs and Medicines, Harmless	W/M	229.00	
2700	Resins, Synthetic, Dry			
	Value up to and including $650.00 per 2000#	W	109.00 [103.00]	
	Value over $650.00 up to and including $1000.00 per 2000#	W	115.00	
	Value over $1000.00 up to and including $1700.00 per 2000#	W	129.00	
	Value over $1700.00 per 2000#	W/M	101.00	
2714	Rice, in bags	W	96.00 [101.75]	
2770	Rubber Tires	W/M	68.00 [72.25]	
	In 20 ft. CY/CY containers	PC/20	1400.00	
	In 40 ft. CY/CY container minimum 20 L.T. per 40 ft. CY/CY	LT	140.00	
2814	Scales, Bathroom	W/M	133.00	
2995	Sprinklers and Irrigation Equipment, N.O.S.			
	Containers include terminal receiving charge	PC/20	2100.00 [2150.00]	
		PC/40	4200.00 [4250.00]	
3001	Stairs, Folding-Includes terminal receiving charge	PC/40	4000.00 [4050.00]	
3008	Stereo Hi-Fidelity Assembled Units, Components or Parts	W/M	96.00 [104.25]	
	In 40 ft. CY/CY containers, not subject to terminal receiving charge	PC/40	5200.00 [5000.00]	
3035	Swimming Pool Toys, Games and Furniture	W/M	85.00 [90.00]	
3150	Toys and Parts, Hobby Kits and Skate Boards, Toy Books	W/M	97.00 [106.50]	
	In 20 ft. CY/CY containers	PC/20	2200.00	
3248	Water Mattresses, Water Beds	W/M	132.00 [135.00]	
3280	Wine	W/M	150.00 [162.00]	

Far Eastern Shipping Company Tariff FMC–20

From: Pacific Coast Ports in the United States and Ports in Hawaii
To: Ports in Australia and New Zealand

Tariff Item No.	Commodity	Rate Basis	Local	OCP
3310	Woodpulp			
	Measurement not over 45 cu. ft. per 2240#	LT	74.00 [76.75]	
	In Bales, in bundles of 6 or more bales per unit	LT	72.00 [74.75]	
	Over 45 cu. ft. to and including 50 cu. ft. per 2240#	LT	79.00 [82.50]	
	Over 50 cu. ft. to and including 55 cu. ft. per 2240#	LT	84.00 [88.00]	
	Over 55 cu. ft. to and including 60 cu. ft. per 2240#	LT	90.00 [93.75]	
	In CY/CY 20 ft. container	PC/20	1400.00	

[1] Rates in brackets filed between March 2, 1979 and May 7, 1979.

ATTACHMENT A—Continued

Far Eastern Shipping Company Tariff FMC–23

From: Ports in the Philippines
To: United States Ports

Tariff Item No.	Commodity	RATE			
		Rate Basis	Atlantic Ports	Overland Common Point	Pacific
100	Beer, Mineral Waters, Soft Drinks, and Spirits	M	61.00		52.00 [52.50]
200	Charcoal	M	48.00	48.00	46.00 [47.00]
		PC/20	1400.00	1150.00	1250.00
220	Cigars and Cigarettes	M	93.00	78.00	84.00
	Including Refrigeration	M	127.00	113.00	119.00
270	Coconut Desiccated	W[2]	115.00	98.00 [101.25]	106.00 [109.25]
	Unitized (Palletized) Shipments	W[2]	112.00	95.25 [97.50]	102.85 [105.00]
425	Fiberglass Sheets, in CY/CY containers	PT 20			1200.00 [1250.00]
		PT 40			2000.00 [2100.00]
450	Fish-Dried, Salted, Smoked	M	79.00		74.00 [76.50]
460	Food Stuffs-Bottled, Canned or Preserved	M	62.00	53.00 [53.50]	57.00 [57.50]
		W	69.00	58.00 [71.25]	64.00 [65.00]
470	Footwear	M	57.00	50.00 [50.50]	53.00 [53.50]
480	Furniture Made of Bamboo, Buri, Rattan	M	55.00	39.00 [41.00]	
		PC/20			1550.00
		PC/40			2500.00
510	Glass Manufacturers, N.O.S.	M	63.00		58.00 [59.00]
		W	70.00		64.00 [65.75]
	Sheet and Window Glass	M	55.00		52.00 [53.50]
		W	61.00		58.00 [59.50]
570	Handicrafts	M	72.00	62.00 [63.25]	72.00 [68.00]
580	Hemp				
	In standard bales	Bale	17.50	15.00 [16.50]	16.00 [15.10]
	In high density bales	Bale	16.50	13.50 [13.75]	15.00 [15.25]

Far Eastern Shipping Company Tariff FMC–23—Continued

From: Ports in the Philippines
To: United States Ports

Tariff Item No.	Commodity	Rate Basis	RATE Atlantic Ports	RATE Overland Common Point	RATE Overland Common Pacific
850	Pineapple & Pineapple Products Canned or Preserved	W	63.00	52.00 [53.50]	58.00 [59.00]
870	Plywood	40 CFT	45.80		
	To Long Beach & Los Angeles	40 CFT		37.65	35.50
	To San Francisco Bay Area Ports	40 CFT		38.70	37.40
	To Ports North of San Francisco	40 CFT		39.90	38.40
	To East Coast & Gulf Coast ports	40 CFT	45.80		
	To Long Beach & Los Angeles	40 CFT			36.10
890	Reefer Cargo				
	Crustaceans	W	207.00		191.00
	Fish, Packed	W	134.00		127.00
910	Rope Cordage, Binder Twine	W	136.00	119.00 [122.75]	127.00 [130.00]
920	Rope, Synthetic	W	151.00		147.00 [151.75]
930	Rope Yarn	W	119.00		116.00
960	Sea Corals, Shell, and Shell Waste	M	60.00	50.00 [50.25]	55.00 [55.25]
		W	67.00	55.00 [55.25]	61.00 [61.25]
990	Textiles-Natural & Synthetic alone or in combination	M	77.00		74.00 [74.25]
1020	Tobacco	M	62.00	51.00 [58.25]	57.00 [52.75]
1050	Wood Products				
	Finished	M	78.00	67.00 [67.25]	71.00 [71.25]
	Knocked-Down, Semi-Finished	M	64.00	54.00 [54.25]	58.00 [58.25]
1070	Woven Articles	M	65.00	54.00 [54.25]	59.00 [59.25]
1080	Yarn-Natural & Synthetic alone or in combination	M	74.00		70.00 [72.25]

[2] Net Weight.

ATTACHMENT A—Continued

Far Eastern Shipping Company Tariff FMC-24

From: United States Pacific Coast Ports
To: Ports in the Far East

Tariff Item No.	Commodity	Rate Basis	Japan	Manila
3055	Diapers, Disposable	W/M	63.00 [69.25]	
4600	Hides, Wet Salted, Green and Hides Split In 40 Ft. CY/CY Containerloads	W	43.00 [43.25]	
	(LOC)	Each	1190.00	1615.00 [1600.00]
	(OCP)	Each	960.00	1270.00 [1250.00]
4870	Iron and Steel Articles Pipe and Fittings, N.O.S.	W/M	90.00	99.00
4880	Steel Billets	W/M	62.00	
8310	Soap, Bar or Toilet	W/M	92.00	
8315	Soap, Cleaning Compound, Detergents and Household Cleaners			
	(LOC)	W/M		56.00 [61.00]
	(OCP)	W/M	50.00 [55.00]	55.00 [60.00]
8525	Sodium Hexametaphosphate (Non-Hazardous) (LOC)	W	82.00 [86.50]	
9550	Trucks, Fork Lift	W/M	97.00 [97.25]	95.00 [124.25]
10320	Zinc	W		69.00
10330	Ingots In 20 ft. CY/CY Containers	PC/20	1040.00	
10340	Skimming	PC/20	975.00	
5980	Molybdenum Oxide and Trioxides	W	61.00 [61.50]	
6027	Motorcycles, New or Used, Motorscooters, Motorbikes	W/M	94.00	99.00 [128.00]
9720	Onions and Garlic	M	63.00	
6610	Paints, Water based interior	W/M	88.00 [87.50]	
5255	Lumber Cedar, Rough In 20 ft. CY/CY Containerloads	PC/20	1010.00	

ATTACHMENT A—Continued

Far Eastern Shipping Company Intermodal Freight Tariff No. 7, FMC–28

From: Rail Terminals at U.S. Atlantic & Gulf Port Cities
To: Ports in Australia

Tariff Item No.	Commodity	Rate Basis	Australia
982	Abrasive Pads		
	To All Ports	PT 40	4600.00
	To All Ports except Adelaide	PT 20	2500.00
	To Adelaide only	PT 20	2850.00
987	Acetaminophen, CY/CY		
	To All Ports except Adelaide	PT 20	2500.00 [2600.00]
	To All Ports	PT 40	4800.00 [4900.00]
	To Adelaide From:		
	East Coast Ports	PT 20	2850.00 [2950.00]
	Gulf Coast Ports	PT 20	2550.00 [2650.00]
1120	Additives for Petroleum Lubricant or Fuel, other than Gasoline Petroleum Lubricating Grease Petroleum Lubricating Oil, including White Industrial	W/M	115.00 [129.00]*
1150	Agricultural Machinery, Implements, Parts and Accessories, N.O.S.	W/M	124.00 [124.25]
1200	Air-Conditioners, Air-Conditioning Machinery and Parts, N.O.S.	W/M	110.00 [113.75]
1205	Air-Conditioners	W/M	102.00 [108.00]*
1210	Air Conditioners for Recreational Vehicles	PT 20	2800.00 [92.50]*
1330	Automobiles	W/M	135.00 [145.00]
1350	Auto, Truck, Trailer Parts, N.O.S.	W/M	89.00 [96.50]*
1390	Board, Not Coated, Impregnated or Laminated	W/M	134.00 [154.00]*
1400	Books, N.O.S.	W/M	140.00 [155.50]
1423	Bowling Equipment, Parts & Accessories	W/M	178.00
1427	Breakfast Cereals & Bars	W/M	125.00 [126.00]*
1490	Camping Equipment	W/M	107.00 [109.50]*
	Special Rate		
	To All Ports (Except Adelaide)	PT 20	2500.00
	To All Ports	PT 40	4600.00 [100.00]*

Far Eastern Shipping Company Intermodal Freight Tariff No. 7, FMC-28—Continued

From: Rail Terminals at U.S. Atlantic & Gulf Port Cities
To: Ports in Australia

Tariff Item No.	Commodity	Rate Basis	Australia
1600	Carpets, Rug, Carpet Backing	W/M	95.00 [95.25]*
	Special Rate—From Philadelphia Only CY/CY	PT 20	2205.00
1850	Chemicals, Non-Hazardous Mixed shipments of 5 or more Chemicals	W/M	154.00 [161.25]
1900	Chemicals, N.O.S. Value up to and including $225.00 per 2240 lbs.	W/M	109.00 [124.75]*
	Value over $225.00 up to and including $750.00 per 2240 lbs.	W/M	120.00 [140.75]*
	Value over $750.00 up to and including $1000.00 per 2240 lbs.	W/M	154.00 [161.25]*
	Value over $1000.00 up to and including $1250.00 per 2240 lbs.	W/M	163.00 [175.25]*
	Value over $1250.00 up to and including $1500.00 per 2240 lbs.	W/M	170.00 [185.50]*
	Value over $1500.00 per 2240 lbs.	W/M	180.00 [196.75]* [201.75]*
1930	Cigarette Tow Not exceeding 80 cu. ft. per 2000 lbs.	LT	160.00 [168.75]
	Exceeding 80 cu. ft. but not exceeding 100 cu. ft. per 2000 lbs.	W/M	75.00 [76.25]
	Measurement exceeding 100 cu. ft. per 2000 lbs	W/M	115.00 [119.25]*
2200	Cotton and/or Synthetic Piece Goods	W/M	142.00
	From Gulf Coast Ports Only	PT 20	2650.00
	From East Coast Ports Only	PT 20	3000.00
	Corduroy Piece Goods	PT 40	4500.00
2345	Ethafoam Sheets & Planks	PT 20	3000.00
		PT 40	6000.00
2520	Filter Paper, Resin Impregnated	W/M	90.00 [95.25]*
	In 40 ft. CY/CY Containers	PT 40	3800.00 [3950.00]
2600	Floor Covering	W/M	115.00 [132.25]*
2800	Freight, All Kinds Per 20 Foot Container	PT 20	3000.00 [3100.00]
	Per 40 Foot Container	PT 40	5000.00 [5100.00]

Far Eastern Shipping Company Intermodal Freight Tariff No. 7, FMC–28—Continued

From: Rail Terminals at U.S. Atlantic & Gulf Port Cities
To: Ports in Australia

Tariff Item No.	Commodity	Rate Basis	Australia
3100	Glassware, Machine Made	W/M	95.00 [99.00]*
	Special Rates—Minimum twenty 40 foot Containers per vessel—CY/CY		
	To Melbourne, Sydney & Brisbane Only	PT 40	4000.00
	To Adelaide Only	PT 40	4475.00
3200	Herbicides, Fungicides, Insecticides	W	140.00 [140.00 LT]
3700	Nylon Hosiery Yarn, CY/CY	PT 20	2500.00 [105.50]*
		PT 40	3800.00 [170.50]*
3900	Nylon Yarn (Carpet Yarn)	PT 40	3800.00 [105.50]*
4000	Organs, Electronic Pianos & Parts including Stools	W/M	92.00 [93.25]*
4062–1	Paper Cups	W/M	118.00 [118.25]*
4063	Paper, Latex Impregnated	W/M	116.00 [135.50]*
4077	Paratertiary Butylphenol	LT/M	161.00
		PT 20	3000.00
4100	Perambulators, CY/CY	PT 20	3200.00
		PT 40	4500.00
4365	Printed Matter, N.O.S.	W/M	178.00
4370	Refrigerators & Refrigerating Equipment & Parts	W/M	109.00 [109.25]*
	CY/CY—Except Adelaide	PT 20	2800.00 [3000.00]
	CY/CY—Except Adelaide	PT 40	3800.00 [4000.00]
4440	Rubber Goods, N.O.S.	W/M	170.00 [171.75]*
	Special Rate—In straight or mixed shipments—CY/CY	PT 40	4800.00
4470	Rubber, Synthetic, Not Liquid		
	Measurement not exceeding 65 cu. ft. per 2240 lbs.	W	123.00 [137.50 LT]
	Measurement exceeding 65 cu. ft. per 2240 lbs.	W/M	115.00 [129.50 LT]
5600	Spirits, including Whiskey, Bourbon & Tequila	W/M	132.00 [110.00]*

Far Eastern Shipping Company Intermodal Freight Tariff No. 7, FMC–28—Continued

From: Rail Terminals at U.S. Atlantic & Gulf Port Cities
To: Ports in Australia

Tariff Item No.	Commodity	Rate Basis	Australia
5700	Stereo, Equipment Components & Parts, Radio Sets (including Automobile Radios) Radio Parts & Equipment	W/M	130.00 [119.75]* [108.00]* [91.75]*
5800	Synthetic Resin, N.O.S.	W/M	130.00
	Value up to and including $650.00 per 2240 lbs.	LT	130.00 [135.75]
	Special Rate—Minimum of 35 20 ft. containers per vessel. From Houston & New Orleans only to Sydney or Melbourne only. CY/CY—One shipper to one Consignee	PT 20	2100.00
5850	Synthetic Rubber Based Tubing used in the maintenance of Refrigeration & Air Conditioning Equipment	PT 20	2200.00 [2250.00]
	From Houston or New Orleans only to Sydney or Melbourne only	PT 40	3500.00 [3550.00]
6070	Tobacco, Leaf	W/M	101.00 [102.50]* [99.00]*
6254	Veneer	W/M	122.00
6341	Yarn, Acrylic	W/M	148.00 [170.50]* [105.50]*
6345	Yarn, Fiberglass	W/M	102.00 [112.50]*

*LT/M Rate Basis.

ATTACHMENT B

FMC 20

FESCO Item No.	Commodity	FESCO Rate Challenged	FMC No.	Item No.	Other Carrier's Comparative Rate
					Karlander
320	Batteries & Parts, N.O.S.	LOC PC/20 2400.00 LOC PC/40 5500.00	12	320	LOC PC/20 2400.00 LOC PC/40 5500.00
					Karlander
488	Canned Apricots	LOC PC/20 2140.00	12	488	LOC PC/20 2100.00
					Karlander
1915	Organ & Pianos Electronic	LOC PC/20 2200.00 LOC PC/40 4400.00	12	1915	LOC PC/20 2100.00 LOC PC/40 4300.00
					Karlander
2995	Sprinklers & Irrigation Equip., N.O.S.	LOC PC/20 2100.00 LOC PC/40 4200.00	12	2995	LOC PC/20 2100.00 LOC PC/40 4200.00
					Karlander
3008	Stereo Hi-Fidelity	LOC PC/40 5200.00	12	3008	LOC PC/40 5000.00
					Karlander
3150	Toys & Parts, Hobby Kits & Skate Boards, Toy Books	LOC PC/20 2200.00	12	3150	LOC PC/20 2200.00
					ZIM
470	Footwear	OCP M 50.00	14	475	OCP M 53.25
					PNAC
570	Handicrafts	LOC M 72.00	14	550	LOC M 75.50
					Maritime Company of Philippines
870	Plywood				
	LB/LA	LOC 40CFT 35.50	14	881	LOC CBM 28.50 (32.26)*
	SF	LOC 40CFT 37.50	14	881	LOC CBM 27.00 (30.56)*
	N.S.F.	LOC 40CFT 38.40	14	881	LOC CBM 26.25 (29.72)*
	LB/LA	LOC 40CFT 36.10	14	881	LOC CBM 25.25 (28.58)*
					OOCL
			14	881	LOC CBM 35.25 (39.90)*

*Equivalent rates on basis of measurement ton of 40 cubic feet.

ATTACHMENT B—Continued

FMC 24

FESCO Item No.	Commodity	FESCO Rate Challenged	FMC No.	Item No.	Other Carrier's Comparative Rate
3055	Disposable Diapers	Japan W/M 63.00	80	3055	OOCL Japan W/M 62.00
4600	Hides, Wet Salted	Manila LOC PC/40 1615 OCP PC/40 1270	80	4600	OOCL Manila LOC PC/40 1600 OCP PC/40 1250

ATTACHMENT B—Continued

FMC 28

FESCO Item No.	Commodity	FESCO Rate Challenged	FMC No.	Item No.	Other Carrier's Comparative Rate
1200	Air Conditioners Machinery & Parts N.O.S.	W/M 110.00	105	2351	Seatrain W/M 104.00 *(W 114.71) *(M 117.73)
2520	Filter Paper	W/M 90.00	105	2051	Seatrain W/M 81.00 *(W 89.29) *(M 91.69)
2800	Freight All Kinds	PC/20 3000.00	10	1000	Karlander PC/20 3000.00
4000	Organs, Electronic Pianos & Parts	PC/20 3000.00 PC/40 5000.00	10	1800	Karlander PC/20 2450.00 PC/40 4900.00
4440	Rubber Goods, N.O.S.	W/M 170.00	105	2510	Seatrain W/M 170.00 *(W 187.39) *(M 192.44)
6070	Tobacco, Leaf	W/M 101.00	105	2820	Seatrain W/M 93.00 *(W 102.51) *(M 105.28)
6345	Fiberglass Yarn	W/M 102.00	105	3241	Seatrain W/M 100.00 *(W 110.23) *(M 113.20)

*Equivalent rates on basis of weight ton of 2000 pounds and measurement ton of 40 cubic feet.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 678

APPLICATION OF YAMASHITA-SHINNIHON LINE FOR THE BENEFIT OF NISSHO-IWAI AMERICAN CORPORATION

ADOPTION OF INITIAL DECISION

April 8, 1980

By Order served February 25, 1980, applicant Yamashita-Shinnihon Line was directed to submit an affidavit advising as to whether any shipments of the relevant commodity, "Edible Nuts, Mixed," were transmitted under Pacific Westbound Conference Local and Overland Freight Tariff No. 5—FMC 13. Failure to do so would have resulted in denial of the application.

Applicant has filed the requisite affidavit. Accordingly, the Commission hereby adopts the initial decision herein.

Applicant shall promptly cause to be published in the appropriate tariff the following notice:

Notice is given as required by the decision of the Federal Maritime Commission in Special Docket 678 that effective January 1, 1979 and continuing through April 24, 1979, inclusive, the rate on 'Edible Nuts, Mixed' was $163.00 W during that period for purposes of refund or waiver of charges, subject to all other applicable rules, regulations, terms and conditions of said rate and this tariff.

Applicant shall refund charges within 30 days and furnish to the Secretary within five days thereafter evidence of such refund along with a copy of the above described notice.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 678

APPLICATION OF YAMASHITA-SHINNIHON LINE FOR BENEFIT OF NISSHO-IWAI AMERICAN CORPORATION

Adopted April 8, 1980

Permission granted to refund $2,724.42 portion of an aggregate freight charge of $3,561.03 collected.

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

Yamashita-Shinnihon Line, a common carrier in foreign commerce, joined in by the Pacific Westbound Conference to which it belongs, makes application pursuant to special docket provision of Rule 92 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.92 and section 18(b)(3) of the Shipping Act, 1916, for permission to refund, due to an error in the applicable tariff of an administrative nature, a $2,724.42 portion of an aggregate freight charge of $3,561.03 collected from shipper Nissho-Iwai American Corporation for a shipment of "Edible Nuts, Mixed" from Los Angeles to Tokyo, Japan.

The Conference certified that the instant application was mailed October 5, 1979, by it to the Secretary of this Commission. Under such circumstances and Rule 92(a)(3) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.92(a)(3), the said date is the date of filing of this application. The date of the sailing of the commodity on the carrier's vessel *Japan Ace* from Los Angeles was April 17, 1979 (supporting evidence of proof of sailing date is attached to the application). The filing of the application on October 5, 1979, was within the required 180 days from the date of sailing of the shipment, thus the filing of the application is timely.

The application describes the commodity as "Edible Nuts, Mixed." Yamashita-Shinnihon Steamship Lines Bill of Lading No. LAT-001 dated April 12, 1979, describes "1–20 foot container S. T. C. 1428 cartons Canned Nuts, 'Chipper's' Brand; Gross Weight 9345.5#, 4239 KGS, Measurement

[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 C.F.R. § 502.227).

614'; 17.376M3. The port of loading is Los Angeles, California, on the vessel *Japan Ace,* Voyage 4715-B. Freight charges are shown as:

Meas. 17.376M3 at 164/M3	=	$2,849.66	prepaid
CAF	21% =	598.43	prepaid
TRC	6.50/M3 =	112.94	prepaid
	Total	$3,561.03	

Under date of November 2, 1979, the Presiding Administrative Law Judge sent a letter to the Pacific Westbound Conference (none to carrier as he had only an address in Japan for carrier; subsequently advised by PWC of carrier's agent, Lilly Shipping Agencies, address in San Francisco—One California Street, San Francisco, California 94111) asking for explanation as to how one can tell from the description on the Bill of Lading that the commodity in the involved shipment consists of "Edible Nuts, Mixed," and how one arrives at the conclusion that description and "Canned Nuts, 'Chipper's' Brand" are without more, the same or interchangeable. Also asked when the omission in the tariff of a specific item for mixed nuts was discovered. The PWC in a letter dated November 9, 1979 (received November 13, 1979) attached a copy of Harbor Terminal Services delivery receipt No. 32742, dated April 12, 1979, to vessel *Japan Ace* from Chipper's Nut Hut, full container YSAA 26973-0, 1428 cases of mix [sic] nuts. The letter also advised that the omission in the tariff was discovered on April 19, 1979, and that action to correct the omission, effective April 25, 1979, was taken by the Conference. Also wished to point out that in Exhibit A of the application, the Conference incorrectly marked tariff Item 053.9055.06 as the applicable item for mixed nuts. The correct item, which also appears on the same exhibit, is 053.9060.06 with no change in applicable rates from 053.9055.06. The application indicates the said freight charges were paid by the shipper, Nissho-Iwai Corp., that the rate applicable at the time of shipment was $164.00 W/M tariff Item 001.0900.00, as shown on Pacific Westbound Conference Local and Overland Freight Tariff No. 11—FMC-19, Revised 3rd Page 229, effective April 1, 1979, Commodity "Edible Nuts and Fruits, N.O.S. Ordinary Stowage" (Exhibit B-1, attached to application).

The Conference in its Tariff No. 5—FMC-13, 12th Revised Page 231, effective September 1, 1978, had Item No. 053.9060.06, Commodity "Nuts, (Except Peanuts), Prepared or Preserved, Packed," which provided a local freight rate to Japan Base Ports of $153.00 WT (Exhibit A attached to application). When the Conference converted its Tariff No. 5—FMC-13 to conform to the Schedule B numbering system adopted by the Congress, tariff No. 11—FMC-19, effective January 1, 1979, (Exhibit B attached to application), the application states, that through oversight the Conference failed to establish a specific item for mixed nuts. Thus, an N.O.S. item 001.0900.00, Original Page 229, effective January 1, 1979, Tariff No. 11—FMC-19 "Edible Nuts and Fruits, N.O.S. Ordinary Stowage" applied in which the rate was $154 W/M to Japan Base Ports. According to the application, when the omission was discovered, it was not until after the Conference's announced and

filed April 1, 1979, general rate increase came into effect (Exhibit C attached to application).

The Conference established Tariff Item 145.9000.00 "Mixtures of two or more kinds of edible nuts," 5th Revised Page 230 of Tariff No. 11—FMC-19, effective April 25, 1979. The rate is $163.00 WT. This is the rate which is sought to be applied in this proceeding.

The applicants aver that through oversight the Conference failed to establish a specific item for mixed nuts.

In addition to the above information, applicants submit:

They have no knowledge of docket numbers of other Special Docket Applications or decided or pending formal proceedings involving the same rate situations.

They have no knowledge of shipments of other shippers of the same or similar commodity which moved via applicants during the period of time beginning on the day the bill of lading was issued and ending on the day before the effective date of the conforming tariff and moved on the same voyage of the vessel carrying the shipment described in this application.

When the omission was discovered, it was not until after their announced and filed April 1, 1979, general rate increase came into effect (see Exhibit C).

Effective April 25, 1979, Tariff Item 145.9000.00 was established for mixed nuts at a rate to Japan Base Ports of $163.00 Wt., which reflects the pre-January 1, 1979, rate of $153.00 plus the April 1, 1979, general rate increase of 10%, maximum $10.00 (see Exhibit D).

Based upon the administrative error and subsequent correction outlined above, they pray the Commission will give favorable consideration to this application and allow a refund to Nissho-Iwai American Corporation in the amount of $2,724.42.

DISCUSSION

Upon consideration of the above, it is *found* and *concluded* by the Presiding Administrative Law Judge that the applicants have satisfactorily pointed out and explained the administrative error so as to warrant the finding and conclusion that they have met the requirements for special docket relief as per section 18(b)(3) of the Shipping Act, 1916, and Rule 92 referred to above, and that permission to refund as requested should be granted.

For the reasons given, the Presiding Administrative Law Judge *finds* and *concludes,* in addition to the findings and conclusions hereinbefore stated:

(1) The application was filed timely.

(2) There was filed with the Commission, prior to this application, an effective tariff setting forth the rate on which the refund would be based.

(3) There was an error of an administrative nature which resulted in the necessity for refund.

(4) The refund requested will not result in discrimination as between shippers.

(5) The application for permission to refund should be granted.

Wherefore, it is *ordered* that,

(A) The application be and hereby is granted.

(B) Applicant-carrier Yamashita-Shinnihon Line and applicant-conference Pacific Westbound Conference are granted permission to refund for the benefit of Nissho-Iwai American Corporation a $2,724.42 portion of an aggregate freight charge of $3,561.03 collected.

(C) Appropriate notice shall be published by the applicants in the appropriate tariffs.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON, D.C.
November 14, 1979

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 550(I)

INTERPUR, A DIVISION OF DART INDUSTRIES, INC.

v.

BARBER BLUE SEA LINE

INFORMAL DOCKET NO. 628(I)

INTERPUR, A DIVISION OF DART INDUSTRIES, INC.

v.

BARBER BLUE SEA LINE

INFORMAL DOCKET NO. 629(I)

INTERPUR, A DIVISION OF DART INDUSTRIES, INC.

v.

BARBER BLUE SEA LINE

INFORMAL DOCKET NO. 643(I)

DOW CORNING CORPORATION

v.

UNITED STATES LINES, INC.

INFORMAL DOCKET NO. 646(I)

SCM CORPORATION

v.

COMPANIA SUD-AMERICANA DE VAPORES

INFORMAL DOCKET NO. 667(I)

FMC CORPORATION

v.

SEA-LAND SERVICE, INC.

INFORMAL DOCKET NO. 708(I)

J. T. BAKER CHEMICAL COMPANY

v.

POLISH OCEAN LINES

PARTIAL ADOPTION OF DECISIONS OF SETTLEMENT OFFICERS*

April 8, 1980

In each of the above-captioned proceedings, the Settlement Officer awarded reparations to Complainants for violations by Respondents of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817)(b)(3)).

The findings and conclusions of the Settlement Officers as to award of reparations will not be disturbed. The Commission has undertaken a review of these proceedings for the sole purpose of addressing the matter of interest on grants of reparations.

* Because the Commission is considering only award of interest in each proceeding, these proceedings are being consolidated for review purposes.

As a general rule, it is the intention of the Commission to grant interest on awards of reparation in cases involving the misclassification of cargo and arising under section 18(b)(3). Exceptions from the general policy will be considered on an ad hoc basis. Moreover, interest shall, until further notice, be calculated at the rate of 12%, accruing from the date of payment of freight charges.

THEREFORE, IT IS ORDERED, That the decisions of the Settlement Officers in these consolidated proceedings are adopted except as indicated; and

IT IS FURTHER ORDERED, That each Respondent pay to the respective Complainant in each proceeding 12% interest on the award of reparation, accruing from the date of payment of freight charges; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

[DOCKET NO. 78-11; GENERAL ORDER 44]

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

PART 525—EXEMPTION OF COLLECTIVE BARGAINING AGREEMENTS

PART 530—INTERIM POLICY STATEMENT—COLLECTIVE BARGAINING AGREEMENTS

April 10, 1980

ACTION: Final Rule

SUMMARY: The Federal Maritime Commission is hereby establishing a new Part 525 to Title 46 of the Code of Federal Regulations to provide for the exemption of collective bargaining agreements between labor unions and maritime multi-employer collective bargaining units from the filing and approval requirements of section 15, Shipping Act, 1916.

EFFECTIVE DATE: April 16, 1980

SUPPLEMENTARY INFORMATION:

Notice is hereby given that the Federal Maritime Commission is adopting a rule providing for the exemption of collective bargaining agreements in the maritime industry from the filing and approval requirements of section 15 of the Shipping Act, 1916 (the Act).

BACKGROUUND

On March 1, 1978, the Supreme Court of the United States held that collective bargaining agreements as a class are not categorically exempt from the filing requirements of section 15 of the Act, and that "[t]he Commission is the public arbiter of competition in the shipping industry. . . ." *Federal Maritime Commission v. Pacific Maritime Association,* 435 U.S. 40, 53

(1978) (*PMA*). The Supreme Court recognized, however, that the Commission need not require the filing of all or even most collective bargaining contracts entered into in the shipping industry. The Court explained that, while the only collective bargaining agreements covered by section 15 are agreements between a union and a multi-employer bargaining unit, not all such agreements are necessarily subject to the requirements of section 15. And to the extent such agreements may be subject to the section 15 requirements, the Court noted the Commission's authority under section 35 of the Act to exempt from those requirements "any class of agreements between persons subject to this chapter or any specified activity of such persons. . . ." (Citing *United Stevedoring Corporation v. Boston Shipping Association,* 16 F.M.C. 7 (1972) (*BSA*)).

The Commission, as a result of the Court's decision in *PMA* and because of its concern that needless uncertainty and delay could result in the collective bargaining process if all collectively bargained agreements between unions and maritime multi-employer collective bargaining units (hereafter "employer units") on all U.S. coasts were filed for approval under section 15, sought to develop an expedited procedure for permitting such agreements to take effect. Therefore, on April 26, 1978, the Commission published in the *Federal Register* (43 Fed. Reg. 17845) an Advance Notice of Proposed Rulemaking, to solicit comments on a Commission proposal which would either exempt certain collective bargaining agreements from the pre-implementation approval requirements of section 15 of the Act, or grant such agreements interim, conditional, or final approval under that section.

The Commission concurred with the consensus of opinion expressed in the comments on the Advance Notice of Proposed Rulemaking that any procedure which effectively leaves the legitimacy of a collective bargaining agreement (or any provision(s) thereof) in limbo pending Commission review—regardless of the dispatch with which such review could be undertaken—has a potential for disrupting the collective bargaining process to a considerable extent.[1] The clear pattern of collective bargaining in the maritime industry is that immediate implementation is called for once a settlement has been reached. The adoption of any pre-implementation filing requirement would cause delay and introduce a destabilizing element into the collective bargaining process which could precipitate or prolong strikes and cause substantial harm to the industry, its employees, its customers and the national interest. Moreover, the uncertainty associated with potential disapproval of such agreements, even if they were permitted to be implemented prior to section 15 finality, may hamper labor-management negotiations and relations in a manner contrary to the national labor policy of the United States without any corresponding Shipping Act benefit.

[1] From the comments received, it was also apparent that there was a need to notify the public of the action the Commission would take with regard to collective bargaining agreements which are filed with the Commission during the period prior to adoption of a final rule in this proceeding. Consequently, on June 12, 1978, the Commission served an *Interim Policy Statement—Collective Bargaining Agreements,* (46 C.F.R. § 530.9) which established procedures for interim approval and/or temporary exemption of collective bargaining agreements becoming effective after June 9, 1978. The final rule in this proceeding supersedes the procedures set forth in 46 C.F.R. § 530.9.

In view of the foregoing, the Commission concluded that section 35 of the Act may provide an appropriate remedy for accommodating the conflicting labor and shipping policies presented by collective bargaining agreements which involve persons subject to the Commission's jurisdiction under the Act.[2]

Accordingly on February 21, 1980, the Commission, pursuant to its exemption authority under section 35, published a Notice of Proposed Rulemaking in the *Federal Register,* proposing a new Part 525 to Title 46 of the Code of Federal Regulations to provide for the exemption of collective bargaining agreements from the filing and approval requirements of section 15 (45 Fed. Reg. 11514). The proposed exemption was on the condition that the parties to a collective bargaining agreement who are subject to the act execute and file with the Commission a certification providing that they agree to make reparation for or otherwise remedy any loss or injury to any person caused by any provision of the agreement or by any practice in implementation of the agreement which is found to violate any provision of the Act. The certification also provided that a copy of each of the collective bargaining agreements to which it applied would be provided to the Commission upon request.

The Commission considered the proposed exemption to be justified on the basis that it would facilitate its administration of the Act in a manner consonant with the national labor policy without impairing either the Commission's effective regulation of activities engaged in by parties subject to the Act under the agreements, or the protection of parties of interest with respect to activities found to be unjustly discriminatory or unfair or which grant an unreasonable preference or advantage within the meaning of section 16 First and 17 or are otherwise violative of the laws administered by the Commission.

It should be noted that the proposed rule addressed collective bargaining agreements exclusively.

Comments on the Notice of Proposed Rulemaking were submitted on behalf of eleven parties: six maritime multi-employer collective bargaining units (employer units), the New Orleans Steamship Association (NOSA), the New York Shipping Association (NYSA), the Pacific Maritime Association (PMA), the Council of North Atlantic Shipping Associations (CONASA), the Mobile Steamship Association (MSA), and the Boston Shipping Association (BSA); one labor union, the National Marine Engineers' Beneficial Association (MEBA); the Labor-Management Maritime Committee, a group composed of U.S. flag liner and tanker interests in association with American maritime labor (LMMC); Agreement 10109, a group of ocean carriers authorized by the Commission to discuss matters affecting the handling of their non-containerized cargo; Standard Fruit and Steamship Company, Inc., United Brands, Inc., and Salen Shipping Agencies, Inc. (Standard, *et al.*); and the National Customs Brokers and Forwarders Association of America, Inc. (NCBFA).

[2] Section 35 provides that the Commission, upon application or on its own motion, may by order or rule exempt any class of agreements between persons subject to the Act, or any specified activity of such persons from any requirement of the Act where it finds that such exemption will not impair effective regulation by the Commission, be unjustly discriminatory, or be detrimental to commerce. It further provides that the Commission may attach conditions to any such exemption.

POSITIONS OF THE PARTIES[3]

While the employer units generally support the concept of exempting collective bargaining agreements from the filing and approval requirements of section 15, they are unanimously opposed to any exemption conditioned upon execution of the certification set forth in the proposal, as discussed more fully under section 523.3(a) below.

NCBFA opposes the proposed exemption and has requested oral argument, citing the grave consequences it believes would flow from the rule's implementation. In particular, it contends that the Commission's proposal would permit unions to impose work rules, such as the International Longshoremen's Association so-called 50-Mile Rule, which NCBFA argues is unjust and unreasonably prejudicial to the shipping public. As an alternative, NCBFA suggests a procedure wherein collective bargaining agreements would be filed with the Commission and granted a temporary exemption upon filing, which would become final if no complaints were received by the Commission within sixty days of the filing. If a complaint is received, the Commission would have thirty days to determine whether the complaint had a reasonable basis. If it did, the Commission would begin an expedited proceeding under section 15; if it did not, the temporary exemption would become final. NCBFA submits that its recommended procedure would achieve the objective of allowing collective bargaining agreements to be implemented immediately, yet it would preserve for all segments of export-import commerce the protection that Congress intended under the Act.

Section 525.2(a)

MEBA believes that the proposed rule could be interpreted as requiring the certification for collective bargaining agreements not subject to section 15. Therefore, it recommends that the definition of "employer" be clarified to make certain that the rule would have no application to collective bargaining agreements between a single employer and a union. As drafted, MEBA submits that the proposed rule fails to adequately distinguish between single and multi-employer agreements; an ambiguity which it believes could lead to an overbroad interpretation in excess of the Commission's jurisdiction under the Act. Specifically, MEBA states that the definition is not clear with regard to whether two or more persons subject to the Act merely must be parties to an association which negotiates with a union, or whether two or more such persons must be parties to a single collective bargaining agreement so negotiated. Therefore, MEBA suggests that the definition be clearly drafted to reflect that a multi-employer association is an "employer" for the purpose of the rule only when it negotiates a collective bargaining agreement to which two or more of its members subject to the Act are actually bound.

[3] All comments, whether or not specifically described or discussed herein, have nevertheless been carefully reviewed and considered by the Commission.

Section 525.2(c)

This section defines the term collective bargaining agreement for the purpose of the Rule.

Standard, *et al.,* and Agreement 10109 recommend that assessments for employee benefits that are set forth in a collective bargaining agreement be ineligible for an exemption. In this regard, Standard, *et al.,* state that in the event an assessment is determined to operate unfairly, the appropriate relief is not simply to award reparations for the past, but also to modify the assessment formula prospectively. Agreement 10109 submits that while an assessment may ultimately be found unacceptable, the Rule would allow the implementation of an assessment without Commission approval which would remain in effect until otherwise found unlawful, and which could be disastrous to the parties damaged by the assessment.

CONASA is concerned about the exclusion of agreements among employer members to which the employee organization is not signatory, such as intra-employer assessment agreements for funding benefits. If assessment formulae which are in the body of the collective bargaining agreement are to be exempt from section 15, CONASA contends that all such assessment formulae implementing fringe benefit funding requirements should be exempt from section 15, regardless of whether a union is party to the agreement. In this regard CONASA believes that it makes no sense from either a policy standpoint or a regulatory standpoint to exempt only those agreements to which a union is a signatory when the Commission has no jurisdiction over that signatory, particularly where the Commission would retain jurisdiction under sections 16 and 17 of the Act to determine whether the assessment rate is unreasonable or discriminatory.

Section 525.3(a)

As noted above, while the employer units commenting on the proposed rule generally support the concept of exempting collective bargaining agreements from the filing and approval requirements of section 15, they unanimously oppose the proposed certification requirement set forth in this section. The objections of this requirement are essentially threefold.

First, the certification requirement is characterized as superfluous and unnecessary since the Commission would retain its jurisdiction under sections 16, 17 and 22 of the Act, which should enable the Commission to determine the lawfulness of any practices arising out of a collective bargaining agreement.

Second, many of the employer units criticize the certification requirement as a blank check which would impose open-ended liability for which employers would not otherwise be lawfully responsible because of the labor exemption from federal antitrust laws. The Commission is advised in this regard that no responsible party could possibly execute such a certification in view of this liability, particularly since an employer would thereby incur an obligation to

make reparation to any person damaged by practices implementing the agreement undertaken by other employer unit members—who may or may not be subject to the Act—or by a union or its members.

Third, the certification requirement is criticized as being particularly unreasonable and unfair since the entire burden of harmonizing the Shipping Act with the national labor policy would fall solely on employers subject to the Act rather than all of the parties to a collective bargaining agreement, including the union and those employer unit members who are not subject to the Act.

Alternative Proposals

Several commentators suggested alternatives to the exemption proposed in the Rule.

NOSA submits that exempting collective bargaining agreements entirely from section 15 would not leave the parties and their labor agreements ungoverned, rather, such an approach would place maritime labor agreements where they properly belong, *i.e.,* before the Department of Justice and the courts under federal antitrust law, which is the regulatory scheme applicable to labor relations in all other U.S. industries.

NYSA recommends the adoption of an alternative rule, which would provide for section 15 approval—rather than exemption—of collective bargaining agreements, that includes a certification which would provide that, in the event a complaint is filed with the Commission with respect to particular provisions of a collective bargaining agreement, the parties would modify those provisions to comply with the provisions of the Act, and take such further action as the Commission may lawfully direct after a final determination that the provisions violate the Act and are not labor exempt under the Act and the antitrust laws. Until such final determination, however, NYSA's proposal provides that the agreement and the approval thereof would continue in full force and effect.

PMA states that, while the apparent purpose for the certification is to make sure that the exemption from section 15 does not exempt persons subject to the Act from other sections of the Act, the rule can simply state so as a condition of the exemption.

LMMC recommends that the Commission give automatic approval to collective bargaining agreements upon filing, with further consideration of such agreements limited to specific complaint if and when brought before the Commission by a party who contends he has suffered loss or injury as the result of the agreement.

MSA suggests that a procedure calling for filing and provisional approval, subject to later non-retroactive disapproval upon further study or challenge, would better accommodate the interests of the parties to a collective bargaining agreement and those affected by it.

DISCUSSION

Section 525.2(a)

Even though the exemption adopted by the Commission in this proceeding will not have a certification requirement, as discussed more fully below, in the interest of avoiding any ambiguity with regard to the proper application of the exemption, the definition of "employer" under this section will be revised in the manner suggested by MEBA.

Section 525.2(c)

The Commission does not concur with the recommendations of Standard, *et al.*, and Agreement 10109 that the exemption exclude employee benefit assessment provisions set forth in collective bargaining agreements. Neither the Commission nor the courts have held that such assessment provisions unequivocably require Commission scrutiny pursuant to section 15. To establish an exemption which is applicable to part, but not all, of a collective bargaining agreement would largely defeat the exemption's purpose with no countervailing benefit, in view of the jurisdiction the Commission is retaining under sections 16, 17 and 22 of the Act.

Nor does the Commission agree with CONASA's position that the exemption should include agreements to which the employee is not a signatory, such as intra-employer assessments agreements for funding benefits. While the exemption of assessment provisions in the context of collective bargaining agreements is clearly warranted by labor policy considerations, once such provisions are removed from a collective bargaining agreement, the Commission is no longer faced with the problem of resolving the conflicting national labor and shipping policies which justify the exemption of collective bargaining agreements. Therefore, while the Commission is aware of the necessity for prompt action on intra-employer assessment agreements, it finds that the exemption of such agreements from the filing and approval requirements of section 15 is not warranted.

Section 525.3(a)

After careful consideration of the comments on this issue, and in view of the jurisdiction it will retain under sections 16, 17 and 22, the Commission finds that the certification requirement set forth in the proposed rule is superfluous and unnecessary. Consequently, the certification requirement will be deleted from section 525.3 and section 525.1 will be revised accordingly.

The foregoing is responsive to some of the comments offered on the proposed exemption. However, the Commission does not consider the other alternatives offered to be viable for the following reasons.

With regard to NCBFA's proposal, it is not clear what would happen to the temporary exemption upon the filing of a complaint. It would appear that, in such event, the exemption would either be partially withdrawn—which would deprive that aspect of the agreement of its legitimacy under the Act and thereby threaten the stability of maritime labor-management relations—or the exemption would be continued pending an expedited section 15 proceeding. In either event, however, there would remain a certain delay in making injured parties whole, a delay which cannot be wholly eliminated without violating the precepts of due process and the appropriate accommodation of conflicting national labor and shipping policy considerations. Notwithstanding NCBFA's position on the so-called 50 Mile Rule, the inclusion of such provisions in the context of collective bargaining agreements is not an insuperable obstacle to the proposed exemption either. The issue of whether such provisions, in a collective bargaining agreement, are subject to section 15 has never been specifically addressed by the Commission or the courts. Moreover, if such provisions are included in a collective bargaining agreement and are granted a temporary exemption (under NCBFA's proposal) or permanent exemption (under the Commission's proposal), the fact remains that the inclusion of such provisions is not the same thing as the implementation of the practices provided therefor by parties subject to the Commission's jurisdiction. Even if such provisions—in the context of collective bargaining agreements—are exempted from section 15 under the rule, expedited section 16, 17 and 22 procedures will remain available to parties affected by practices in implementation of such provisions, and the Commission fully intends to exercise its statutory authority in this regard.

Under the Commission's earlier Interim Policy Statement in this proceeding, the Commission has been conferring interim section 15 approval of portions of collective bargaining agreements, pending *Federal Register* notice, opportunity for comment, and subsequent action by the Commission under the Act. However, a grant of automatic section 15 approval to the entirety of a collective bargaining agreement upon its filing, as suggested by NYSA and LMMC, would exceed the Commission's statutory authority under section 15.

NOW, THERFORE, 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 525, as set forth below.

IT IS FURTHER ORDERED, That the Interim Policy Statement, 46 C.F.R. § 530.9 be revoked.

PART 525—EXEMPTION OF COLLECTIVE BARGAINING AGREEMENTS

Sec.

AUTHORITY: Sections 15, 35 and 43; 46 U.S.C. 814, 833a and 841a

§ 525.1 *Purpose and Scope*

Section 15 of the Shipping Act, 1916 (the Act), requires that certain agreements between persons subject to the Act be filed with and approved by the Commission prior to implementation. Section 35 of the Act provides that the Commission, upon application or on its own motion, may by order or rule exempt any class of agreements between persons subject to the Act, or any specified activity of such persons from any requirement of the Act, where it finds that such exemption will not impair effective regulation by the Commission, be unjustly discriminatory, or be detrimental to commerce.

This part provides for the exemption of maritime collective bargaining agreements from the filing and approval requirements of section 15 in order to facilitate the Commission's administration of the Act in a manner consonant with national labor policy. The grant of such exemption will not impair the effective regulation by the Commission of the activities engaged in pursuant to these agreements by parties subject to the Act.

§ 525.2 *Definitions*

As used in this part:

(a) "Employer" means any association of employers of maritime labor, established for the purpose of negotiating and administering collective bargaining agreements, to which two or more persons subject to the Shipping Act, 1916, as set forth in section 1 of that Act, are bound.

(b) "Employee" means any association of employees established for the purpose of dealing with employers on matters relating to grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.

(c) "Collective bargaining agreement" includes any agreement, or any amendment of an agreement, between an employer and an employee which regulates terms and conditions of employment. It does not include an agreement among employer members, to which the employee is not a signatory, such as an intra-employer assessment agreement for funding benefits.

§ 525.3 *Exemption*

Collective bargaining agreements are exempt from the filing and approval requirements of section 15 of the Act.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 530(I)

GEORGE W. MOORE, INC.

v.

INTERNATIONAL CONTAINER EXPRESS, INC.

PARTIAL ADOPTION OF DECISION OF SETTLEMENT OFFICER

April 11, 1980

This proceeding is before the Commission upon its determination to review the decision of Settlement Officer Charles C. Hunter, served January 9, 1980, denying reparation. The Settlement Officer found that International Container Express, Inc. (Respondent) did not violate section 18(a) of the Shipping Act, 1916 (46 U.S.C. §817) in receiving duplicate payments from Complainant George W. Moore, Inc. as well as from consignees on a series of F.O.B. shipments from New Jersey to Puerto Rico.

POSITIONS OF THE PARTIES AND DECISION OF THE SETTLEMENT OFFICER

Complainant alleges that it mistakenly paid $2,419.62[1] in charges when it received copies of the bills of lading from Respondent and mistook them for currently payable charges. Complainant contends that Respondent also received payment from the consignees on each of the 43 shipments in issue, violating section 18(a) by collecting greater compensation than the rates in its tariffs.

Respondent notes that it had previously refunded to Complainant $2,027.62 in similar erroneous payments, and admits that for most of the shipments currently in issue, there were duplicate payments by Complainant and consignees. Respondent has since begun operating under Chapter XI of the Bankruptcy Act, and has notified the committee of creditors that Complainant is a valid creditor in the amount of $1,635.36.

[1] Complainant originally alleged $2,456.35 in duplicate payments, but has since admitted that a $36.73 claim was made in error.

The discrepancy between the $1,635.36 which Respondent claims it owes, and the $2,419.62 which Complainant claims is owed, is the product of a dispute between the two parties as to certain of the transactions: (1) on eight bills of lading, Respondent has no record of receipt from a consignee; (2) in five others, Respondent claims no record of receipt of payment from Complainant; and (3) in two others, credit was taken by the consignee for the double payment. In response, Complainant admits that, as to the first group, it was unable to contact the consignees for verification that the consignees actually paid the charges. Complainant reasserts its claim for refunds on these shipments, "until proof is presented that these claims were not paid by consignees." Complainant also asserts that, as for the remaining claims in contention, its proof that it paid the charges suffices to justify reparation.

The Settlement Officer denied reparation on several grounds. Citing *Duplicate Payments of Freight Charges,* 350 I.C.C. 513 (1975), which held that duplicate payments do not constitute "overcharges" as defined in section 16(3)(g) of the Interstate Commerce Act, the Settlement Officer concluded that duplicate ocean freight payments were not violations of section 18(a) of the Shipping Act, 1916. He also concluded that some of the claims were barred by the two year limitations period prescribed by section 22 of the Shipping Act, 1916 (46 U.S.C. §821), and that the remaining claims failed because the burden of proof had not been met.

Discussion and Conclusion

The underlying rationale of the Interstate Commerce Commission in the decision relied upon by the Settlement Officer, *i.e.,* that once a proper payment of freight charges is made, the contract for transportation service is completed, and the submittal of a duplicate bill no longer represents charges for transportation service, is unacceptable for Shipping Act purposes. The Commission concludes that collection of duplicate payments does constitute compensation for transportation service greater than that lawfully specified in the applicable tariffs.[2]

Other considerations bar recovery on most of the disputed claims, however. The five claims in which Respondent alleges no record of receipt of payment from Complainant, and two other claims in which neither party produced a record of receipt of payment from a consignee, were all filed more than two years after the date of shipment and payment by Complainant. Thus, reparation for these seven claims is barred by the statute of limitations.

Complainant has not met its burden of proof on six other claims, in which it admits that it could not verify that the consignees actually made payment. Complainant's challenge to the Respondent to prove that the consignees did not make payment constitutes an attempt to shift its burden of proof to Respondent. As Complainant has not proven, as alleged in its complaint, that

[2] It is noted, however, that section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. §844) is the governing tariff filing provision.

Respondent collected duplicate payments for these shipments, reparation on these claims will also be denied.

The Settlement Officer denied reparation on two claims as to which Respondent refuses to refund Complainant's payment on the ground that credit was taken by the consignees.[3] Respondent admits receiving a double payment on both claims, but chose to credit the consignees the amounts they paid rather than to refund the amounts mistakenly paid by Complainant. Respondent's subsequent gratuitous and misdirected action on behalf of the two consignees does not negate the fact that it had accepted duplicate payments for the transportation services rendered, and does not serve as a defense to Complainant's claims. Reparation on these two claims will therefore be granted.

THEREFORE, IT IS ORDERED, That the decision of the Settlement Officer is adopted except as indicated; and

IT IS FURTHER ORDERED, That International Container Express, Inc. pay reparations in the amount of $125.92 to George W. Moore, Inc., at 12% interest accruing from August 6, 1976;[4] and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[3] These claims refer to bills of lading JSY 837/106515 ($43.36) and JSY 837/106516 ($82.56).

[4] Date of payment by Complainant.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 530(I)

GEORGE W. MOORE, INC.

v.

INTERNATIONAL CONTAINER EXPRESS, INC.

Partially Adopted April 11, 1980

DECISION OF CHARLES C. HUNTER, SETTLEMENT OFFICER[1]: REPARATION DENIED

On April 5, 1978, George W. Moore, Inc. (GWM) filed a complaint with the Federal Maritime Commission which alleged that International Container Express, Inc. (ICE) had collected duplicate payments for the carriage of a number of GWM shipments. It was asserted therein that ICE's receipt of such duplicate payments constituted a violation of Section 18(a) of the Shipping Act, 1916, 46 U.S.C. §817.[2] As a result of the alleged violation of section 18(a), GWM sought reparation pursuant to section 22 of the Shipping Act, 1916, 45 U.S.C. §821, in the amount of $2,456.35.

By answer, dated May 9, 1978, ICE acknowledged that it had received duplicate payments for the transportation of cargo shipped by GWM, but advised that all such monies, with the exception of $1,635.26, had been returned to GWM. ICE's recent transition from a manual billing and accounts receivable system to a computerized system was stated to have occasioned the retention of the duplicate payments. ICE further advised that it was currently operating in accordance with the provisions of Chapter XI of the Bankruptcy Act, 11 U.S.C. §1101, and that it had notified the committee of creditors that GWM was a valid creditor in the amount of $1,635.26.

[1] Both parties having consented to the informal procedure outlined in Rule 19(a) of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.301-304), this decision will become final unless the Commission elects to review it within 30 days from the date of service thereof.

[2] Section 18(a) reads in pertinent part as follows:

No [common carrier by water in interstate commerce] shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section. . . .

By letter, dated June 2, 1978, the Settlement Officer[3] directed GWM and ICE to submit affidavits addressing the $821.09 discrepancy between the amount that was claimed by GWM and the amount that ICE acknowledged that was due GWM.

On June 8, 1978, ICE submitted the affidavit of Paul Braneky, President. In his affidavit, Mr. Braneky offered the following itemization of the $821.09 discrepancy:

1.	$408.46	No record of the receipt of payment by ICE from the consignee;
2.	$249.98	No record of the receipt of payment by ICE from GWM;
3.	$ 36.73	GWM responsible for payment of freight charges;
4.	$125.92	Credit for the double payment taken by consignee.
	$821.09	

In the affidavit of Craig E. Lundberg, President, dated June 21, 1978, GWM responded to the itemization of the $821.09 discrepancy which Mr. Braneky had detailed in his affidavit. Mr. Lundberg stated that GWM had been unable to verify that the consignee actually had paid the $408.46 figure which Mr. Braneky asserted that it failed to pay. However, with the exception of the $36.73 figure which GWM had mistakenly included in its claim, Mr. Lundberg asserted that all sums sought by GWM were paid by it to ICE and he, therefore, reasserted GWM's claim to these funds.

During the period October 1975 through January 1977, GWM made a series of shipments aboard ICE vessels from the Port of Elizabeth, New Jersey to the Port of San Juan, Puerto Rico. The terms of these shipments were "F.O.B. Waltham, Massachusetts", GWM's principle place of business. The consignee in Puerto Rico was responsible for the payment of the applicable freight charges.

ICE forwarded record copies of all bills of lading reflecting these shipments to GWM. GWM alleged that it mistakenly tendered payment to ICE of all of the freight charges specified in these bills of lading. It was further alleged by GWM that ICE also collected from the consignee on all of these bills of lading.

In its efforts to secure repayment of the monies it had mistakenly paid to ICE, GWM initiated an informal claim with the Commission's Office of Domestic Commerce, as well as filing its Complaint in the subject docket. As of this date, ICE has refunded $2027.62 to GWM and has acknowledged the validity of GWM's claim for an additional $1,635.26. At this juncture, the amount in dispute is $784.36.

GWM's claim to the disputed $784.36 must be denied on a number of grounds. Initially, the shipments which occasioned the freight charges which comprised the $249.98 figure for which ICE has alleged that it has no record of the receipt of payment from GWM were all made in late 1975. These freight charges were allegedly paid by GWM in November and December 1975. Section 22 of the Shipping Act, 1916,[4] authorizes the Commission to order reparation to a complainant who has alleged an injury resulting from a vio-

[3] James G. Cannon, Settlement Officer.

[4] Section 22 reads in pertinent part:

> The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

lation of the Act only if that complainant had filed a complaint within two years after the given cause of action had accrued. It is well established that a shipper's cause of action which is based upon a carrier's collection of excessive compensation accrues at the time of the shipment or at the time of the payment, whichever is later. *Tyler Pipe Industries, Inc. v. Lykes Brothers Steamship Company, Inc.*, 15 F.M.C. 28 (1971). Inasmuch as GWM shipped the cargo and allegedly tendered payment of the freight charges encompassed within the $249.98 figure prior to two years before it filed its Complaint in the subject docket, this Commission may not order ICE to pay reparation to GWM in this amount.

Further, GWM's remaining claim for $534.38 must also be denied in that GWM has failed to meet its burden of proof regarding its claim for this amount. In order to trigger the right to receive reparation for a violation of section 18(a), a complainant must establish by a preponderance of the evidence in the record that a carrier collected compensation in excess of the applicable tariff rate. See *Madeplac S.A. Industria De Madeiras v. L. Figueriedo Navegacao S.A. a/k/a Frota Amazonica S.A.*, 20 F.M.C. 578 (1978). In the present proceeding, GWM has alleged that ICE collected duplicate payments of freight charges in the amount of $534.38. ICE has denied GWM's allegation asserting that of the $534.38 claimed by GWM, ICE has no record of the receipt of payment from the consignee in the amount of $408.46 and has given credit to the consignee in the amount of $125.92. No evidence has been submitted by GWM which supports its claim or refutes ICE's denial. GWM has established that it paid the applicable freight charges, but has failed to prove that these freight charges also were paid by the consignee. Hence, GWM has not substantiated its allegation that ICE collected duplicate payments of those freight charges. Consequently, GWM has not met its burden of proof in this proceeding.

Finally, and perhaps most significantly, GWM's claim for reparation must be denied because this Commission does not possess the authority to order ICE to reimburse GWM for any duplicate payments received by ICE. It is well established that "where dissimilarities in the respective modes of transportation do not warrant a different construction, the Shipping Act should be construed in the light of similar provisions of the Commerce Act." *North Atlantic Mediterranean Freight Conference—Rates on Household Goods*, 11 F.M.C. 202 (1967). See *Far East Conference v. United States*, 342 U.S. 570 (1952). The Interstate Commerce Commission has addressed directly the question of its authority to deal with duplicate payment of freight charges under the Interstate Commerce Act, 49 U.S.C. § 1. In *Duplicate Payments of Freight Charges*, 350 I.C.C. 513 (1975), the ICC held that duplicate payments clearly do not constitute overcharges under the Interstate Commerce Act. Emphasizing the congressional intent evidenced by the mandate that no carrier shall collect a greater compensation for the transportation of property than that specified in its tariff, the ICC noted that:

> The duplicate payment situation bears no relation to this intent to prohibit discrimination in the rates charged . . . different shippers.
> 350 I.C.C. at 519.

Explaining this perspective, the ICC stated that:

> In the duplicate payment situation, the carrier has assessed and the shipper or consignee has paid the published charges . . . We are unable to view carrier submittal to the shipper of a duplicate bill when one bill for services rendered has previously been paid as representing charges for transportation service . . .
> 350 I.C.C. at 519.

In conclusion, the ICC added that:

> Omitting duplicate payments from the term overcharge . . . excludes Commission consideration of these cases and places them solely within the jurisdiction of the civil courts . . .
> 350 I.C.C. at 520.

The Commission's authority to deal with duplicate payments of freight charges is no more expansive than that of its sister agency. The duplicate payment of freight charges does not constitute an overcharge under either the Interstate Commerce Act or the Shipping Act, 1916, and, therefore, does not stand as a violation of section 18(a). As noted by the ICC, "the duplicate payment bears no relation to the transportation service performed" and, therefore, does not fall within the scope of this Commission's jurisdiction. 350 ICC at 520. The remedy GWM seeks is available to it only in the civil courts.

For the reasons set forth above, GWM's claim for reparation in the amount of $784.36 is denied. As ICE has already informed the committee of creditors that GWM's claim to the remaining $1,635.26 is valid, it is unnecessary to issue a ruling regarding these funds.

(S) CHARLES C. HUNTER
Settlement Officer

January 9, 1980

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-84

MATSON NAVIGATION COMPANY PROPOSED 5.90 PERCENT BUNKER SURCHARGE INCREASE IN TARIFFS FMC-F NOS. 164, 165, 166 AND 167

ORDER ON RECONSIDERATION

April 14, 1980

On February 19, 1980, Oscar Mayer & Co., Inc. filed a pleading in this proceeding entitled "Petition for Reopening For the Purpose of Reconsideration Because of Error in Figures Used to Make the Ultimate Decision." Because this pleading is ambiguous procedurally[1] and was not filed sufficiently in advance of the date a final Commission decision was due to allow for replies by other parties to the proceeding under Rule 230 the Commission's rule governing the reopening of a proceeding (46 C.F.R. § 502.230),[2] and to afford procedural due process to the other parties to the proceeding, it is being treated as a Petition for Reconsideration. Replies to the Petition were filed by the Commission's Bureau of Hearing Counsel and Matson Navigation Company.

POSITIONS OF THE PARTIES

The Petition seeks reconsideration of that portion of the Initial Decision adopted by the Commission concerning the calculation of the *KOPAA* tonnage. Oscar Mayer argued to the Presiding Officer and on exception to the Commission that the tonnage figures submitted for the *KOPAA* in this proceeding were not stated in measurement tons and that a conversion factor of .9524 must be applied to produce a measurement ton figure. Matson indicated to the Presiding Officer and in its reply to Oscar Mayer's exception that the figure was indeed measurement tons. It is now alleged by Oscar Mayer in its Petition that the submissions of Matson in another case, *i.e.*, Docket

[1] The pleading cites "Rule 201.174, 46 C.F.R.," a Maritime Administration regulation, as its procedural basis. Moreover, at different places in the document it appears to be addressed to the Presiding Officer as well as the Commission.

[2] Replies to a Petition to Reopen would have been due 10 days after the receipt of the Petition (46 C.F.R. § 502.230(b)) or by February 29, 1980. By law a final decision in this proceeding was required to be served by February 21, 1980. Moreover, the Commission had already decided this case on January 30, 1980, and a reopening would have required agreement by three Commissioners to a 60-day extension. 46 U.S.C. § 845.

No. 79-92, filed after the Commission rendered its decision in this proceeding, reveal that Matson did apply a conversion factor of .9524 to the *KOPAA* tonnage figures, indicating that these tonnage figures were not originally stated in terms of measurement tons. It is further argued that applying the conversion factor in this case reduces the permissible surcharge from 5.73%, as found by the Commission, to 5.03%.

Hearing Counsel in its Reply agrees with Oscar Mayer that the .9524 conversion factor should be applied to the *KOPAA* tonnage calculation but disagrees as to the calculation of the proper surcharge.[3] It included with its reply an extensive exhibit calculating the surcharge at 5.72%.

Matson states in its Reply that Oscar Mayer's Petition should not be received because it does not comply with the requirements of Rule 261 in that it was filed before the issuance of a final decision and did not contain a dated certificate of service. Moreover, it allegedly repeats arguments made prior to the decision and rejected by the Commission and raises other matters not admitted into evidence.

Matson admits, however, that it did make an "error" in computing the *KOPAA* tonnage but disputes the surcharge computed by Oscar Mayer. Matson argues that Oscar Mayer apparently failed to include past underrecoveries of fuel costs in its computations, contrary to the requirements of Form FMC-274. It argues that Oscar Mayer's calculations are unsupported by any evidence and are unexplained. Matson further states that, in any event, any overrecovery resulting from the incorrect computation will be compensated for in subsequent surcharges by operation of Line 7 of Form FMC-274.

DISCUSSION

It appears that Matson did misrepresent its submissions in this proceeding and that a conversion factor should have been applied to the *KOPAA* tonnage figures. However, the impact of this alteration appears to be *de minimis, i.e.,* .01%. While Oscar Mayer alleges that the impact is more significant, it has not proffered any underlying documentation of its calculations to support this conclusion. In contrast Hearing Counsel has submitted a detailed document supporting its calculation of the proper surcharge level.

The question then becomes what, if any, corrective measures should be taken.

Bunker surcharge calculations in these cases are based upon estimated data and do not purport to be so precise as to be correct within one hundredth of one per cent. *See Increased Rates on Sugar,* 7 F.M.C. 404, 411 (1962). The Commission has recognized this in establishing a bunker surcharge procedure which adjusts for past projection and methodology errors in future surcharges by carrying forward past over and under recoveries to such calculations, *i.e.* the "Line 7" remedy. Docket No. 79-55—*Matson Navigation Co.—Proposed Bunker Surcharge,* Order of Clarification, 19 S.R.R. 1411 (1980). Accord-

[3] Hearing Counsel also urges the Commission to treat this pleading as a Petition for Reconsideration, noting that it would clearly fall within the "substantive error" provision of Rule 261. 46 C.F.R. §502.261.

ingly, while the Commission has calculated bunker surcharges and the resulting projected overrecoveries with some precision, these efforts serve only to reduce the margin of error and do not represent the actual fuel cost needs or the actual overrecoveries. It is the methodology established in these proceedings as it is applied in future surcharge filings that give them their significance. Since in future surcharges the conversion factor will be applied to the *KOPAA* tonnage figures in the calculation of the overrecovery of fuel costs resulting from prior surcharges, a calculation error resulting in a surcharge that is only .01% greater than the theoretically "correct" surcharge would appear to be of no real consequence.[4]

Accordingly, the Commission will deny the procedural relief requested, *i.e.*, reopening of the proceeding, but will grant the Petition to the extent certain factual findings contained in the Order Adopting Initial Decision, served February 21, 1980, are reconsidered and amended. The Commission therefore adopts the factual assertions of Hearing Counsel and concludes that because the effect of the permissible surcharge is *de minimis, i.e.*, .01%, and because the error can readily be remedied in future surcharges by operation of Line 7, Form FMC-274, no regulatory purpose would be served by reopening this proceeding. However, Matson is cautioned to avoid such situations in the future by being more careful in its data preparations and submissions.

THEREFORE, IT IS ORDERED, That the "Petition for Reopening for the Purpose of Reconsideration Because of Error in Figures Used to Make the Ultimate Decision" of Oscar Mayer & Co., Inc., is granted to the extent indicated herein and is denied in all other respects, and

IT IS FURTHER ORDERED, That the Order Adopting Initial Decision, served February 21, 1980, is amended in accordance with this Order.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[4] Although this may theoretically reduce a shipper's potential recovery in section 22 complaint proceedings, the Commission has stated that Line 7 of Form FMC-274 is the primary shipper remedy in this regard. Docket 79-55, *supra*. Moreover, on the alleged average surcharge of $5.50 per ton on general cargo, this would result in a surcharge reduction of $.009 per ton. *Order Adopting Initial Decision*, 19 S.R.R. 1399, 1401 (1980).

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 574(I)

S. C. JOHNSON & SON, INC.

v.

OVERSEAS SHIPPING COMPANY,
AGENT FOR EAST ASIATIC CO., LTD.

ADOPTION OF THE SETTLEMENT OFFICER'S DECISION

April 14, 1980

By complaint filed September 1, 1978, S. C. Johnson & Son, Inc., seeks reparation in the amount of $4,298.30 for freight overcharges assessed by East Asiatic Company, Ltd., on two shipments of mixed lots of "Insecticides and Buffing/Polishing Compounds" carried by East Asiatic from San Francisco to Singapore.

Settlement Officer John L. Sheppard issued a decision on December 27, 1979, which awarded $4,298.30 to S. C. Johnson & Son, Inc. No exceptions were filed, but the Commission, on its own motion, determined to review the Settlement Officer's decision.

The Commission concurs in the Settlement Officer's decision awarding reparation, and that decision will be adopted. However, it is unclear from the Settlement Officer's decision against whom that award was made. Overseas Shipping was not a carrier and acted merely as a general agent for East Asiatic. In this role, it accepted service, made bookings and generally acted on the carrier's behalf. Hence, the proper party to pay such reparation to S. C. Johnson is East Asiatic and not Overseas Shipping.

THEREFORE, IT IS ORDERED, That the Settlement Officer's Decision issued in this proceeding is adopted and made a part hereof; and

IT IS FURTHER ORDERED, That East Asiatic Company, Ltd. is directed to pay reparation in the amount of $4,298.30 to S. C. Johnson & Son, Inc., plus 12% interest accruing from the date the freight charges were paid.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 574(I)

S. C. JOHNSON & SON, INC.

v.

OVERSEAS SHIPPING COMPANY, AGENT, EAST ASIATIC COMPANY, LTD.

Adopted April 14, 1980

DECISION OF JOHN L. SHEPPARD, SETTLEMENT OFFICER[1]:

Reparation Awarded

S. C. Johnson & Son, Inc. of Racine, Wisconsin, are manufacturers of various household products such as cleaning compounds, waxes, insecticides and so forth.

East Asiatic Co., Ltd. is a common carrier by water in the foreign commerce of the United States and operates in the trade between Singapore and the U.S. West Coast mainland, among others. Overseas Shipping Company is agent for East Asiatic in San Francisco, California, and may accept service, make bookings and generally act on the carrier's behalf.

The complainant alleges that on two occasions they shipped mixed lots of insecticides and buffing/polishing compounds from San Francisco to its Singapore subsidiary via vessels of East Asiatic. The complainant further alleges that, in accordance with Local Singapore requirements, the bill of lading indicated certain of the items shipped to be hazardous cargo, which caused said cargo to be assessed the hazardous cargo rate of $179.00/cubic meter then applying in the carrier's tariff, as hazardous cargo (so-called "red label" cargo) according to U.S. Coast Guard Regulations.[2] In fact, however, these products were excepted from classification as hazardous cargo by virtue of being packed in appropriate containers holding less than 19.3 ounces each of the product. The products in question were in cans, some of 16 ounces and some of six

[1] Complainant consenting and the Carrier failing to object, both parties are deemed to have consented to the informal procedure of the Commission's Rules of Practice and Procedure (46 §§502.301-304); this decision will be final unless the Commission elects to review it within 30 days from the date of service thereof.

[2] Pacific Straits Conference Local/Overland Freight Tariff No. 11—FMC-7, Items 554.20000.00 and 599.20000.04

ounces and should therefore have been assessed the same rate as the other items in the shipment.

Specifically, 2710 cartons/pails of buffing and polishing compound and 668 cartons of insecticide moved under carrier B/L#41 on August 10, 1977, under a rate of $179.00/cubic meter and 929 cartons of buffing and polishing compound and 2100 cartons of insecticides moved under carrier B/L#48 on June 18, 1977 at $179.00/cbm. The above commodities should have moved under a rate of $129.00/cubic meter. The resultant discrepancy resulted in a total overcharge of $4298.30.

Overseas Shipping Company, speaking for the carrier, conceded the merits of the claim and agreed that the complainant was overcharged $4298.30 but declined to honor the claim because to do so would be in violation of the applicable tariff rule which requires such claims to be filed within six months.[3] In fact, Overseas suggested that the complainant initiate this informal complaint so that they could legally pay the claim.

It is well settled that a claim may be filed with the Commission up to two years after the cause of action, notwithstanding any tariff rule.

The only issue between the carrier and complainant is thus disposed of. Both agree that the cargo, as packaged, was not hazardous or dangerous cargo according to the regulations of the U.S. Coast Guard, which serve to define hazardous cargo for the purposes of the tariff. Both B/Ls are claused "This shipment contains dangerous goods of various classes in small receptacles. Authorized per USA competent authority certificate No. 001-77, copy attached." This notification was required by Singapore authorities. Overseas Shipping's freight department saw the clause and did not refer to the attached material, but rated the items as dangerous, even though they were excepted by virtue of being in "small receptacles".

Since the only issue here is the question as to whether the claim is time-barred by the carrier's "six month rule" and such rules have been declared a nullity, reparation is hereby awarded in the amount of $4298.30. Evidence of payment should be furnished to complete the record.

(S) JOHN L. SHEPPARD
Settlement Officer

[3] Rule 33.2—*Six Months Rule* of FMC-7

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 566(I)

EXCAM, INC.

v.

LYKES LINES AGENCY, INC. AND COSTA LINES

ORDER ON REMAND

April 17, 1980

By complaint filed August 16, 1978, Excam, Inc. seeks reparation in the amount of $1,594.10 for freight overcharges assessed by Lykes Bros. Steamship Co., Inc., on two shipments described on the bills of lading as "Firearms." Excam further seeks reparation for overcharges assessed by Costa Line in the amount of $778.38 on one shipment that was also rated as "Firearms."

Settlement Officer Donald T. Pidgeon issued a decision on December 27, 1979 awarding $1,594.10 and $743.17 in reparation to Excam on the basis that the merchandise shipped was in fact "Replica Arms" and not "Firearms." The Commission determined to review the Settlement Officer's decision on its own motion.

The Commission, after a review of the record, is not convinced that Excam has satisfied its burden and demonstrated that these shipments were indeed "Replica Arms" and not "Firearms." The Settlement Officer's decision relies exclusively upon Lykes Bros.' failure to contest the claims. This is not sufficient in a misrating proceeding. Complainant must always produce tangible evidence (*e.g.,* invoices, bills of lading, manifests) to corroborate its assertion that the identity of the commodity actually shipped was different than the description stated on the bill of lading.

This matter was addressed in *E.I. DuPont v. Seatrain International,* 18 S.R.R. 879 (1978), where it was held that:

> . . . a determination of the applicable rate must be based not on a mere admission by the carrier that it misrated the cargo but on *evidence in the record* showing the true nature of the commodity shipped. 18 S.R.R. at 880.

It is in this regard that Excam has failed to sustain its burden of proof. Accordingly, this matter will be remanded to the Settlement Officer for expedited

handling in order to issue a supplemental decision which includes additional findings of fact and conclusions of law on the question raised herein.

One further point requires clarification. The Settlement Officer's decision does not clearly indicate whether the award for reparation was made against Lykes Bros. or Lykes Lines Agency, Inc. The latter corporation is not a carrier and acted merely as a general agent for Lykes Bros. In this role, it accepted service, made bookings and generally acted on the carrier's behalf, but is not the proper party to pay reparation to Excam.

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the Settlement Officer for decision consistent with this Order.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

* Commissioner Peter N. Teige did not participate because the case was decided before he took office.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 688(I)

DOW CORNING CORPORATION

v.

SEA-LAND SERVICE, INC.

ADOPTION OF THE SETTLEMENT OFFICER'S DECISION

April 17, 1980

By complaint filed May 17, 1979, Dow Corning Corporation seeks reparation in the amount of $645.73 plus 6% interest for freight overcharges assessed by Sea-Land Service, Inc., on one shipment containing synthetic resin, chemicals and silicon rubber compound carried by Sea-Land from New York to Antwerp, Belgium on August 3, 1977.

Settlement Officer Hubert E. Bradford issued a decision on January 28, 1980, denying reparation. The Commission determined to review the Settlement Officer's decision on its own motion.

The Commission concurs in the Settlement Officer's decision and it will be adopted. It is to be noted, however, that the lawful rate found to be applicable in this proceeding, results in a higher freight charge ($2,582.15) than originally assessed and collected by the carrier ($2,502.00). Hence, Sea-Land has a statutory duty to collect $80.15 in freight due on this shipment.[1]

THEREFORE, IT IS ORDERED, That the Settlement Officer's decision in this proceeding is adopted and made a part hereof; and

IT IS FURTHER ORDERED, That Sea-Land Service, Inc., is directed to collect the applicable freight charge due in the amount of $80.15 from Dow Corning Corporation.

By the Commission.[2]

(S) FRANCIS C. HURNEY
Secretary

[1] Section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)), states in pertinent part:

> No common carrier by water . . . shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property . . . 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. . . .

[2] Commissioner Peter N. Teige did not participate because the case was decided before he took office.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 688(I)

DOW CORNING CORPORATION

v.

SEA-LAND SERVICE, INC.

Adopted April 17, 1980

DECISION OF HUBERT E. BRADFORD, SETTLEMENT OFFICER[1]: REPARATION DENIED

Dow Corning Corporation (claimant) by informal docket claim filed May 17, 1979 seeks recovery of alleged overcharges of $645.73 plus 6% interest from Sea-Land Service, Inc. (respondent). Claimant is located in Midland, Michigan and is engaged in the manufacture and distribution of synthetic resin, silicon rubber compounds and various chemicals. Respondent is a common carrier engaged in transportation by water from New York, New York to Antwerp, Belgium and as such is subject to the provisions of the Shipping Act, 1916.

Claimant states that when its overcharge claim was filed with the respondent on January 24, 1979, the respondent refused to honor the claim stating that the statute of limitations as contained in Rule 8 of the NACFC Tariff No. 29 had expired. Said rule states that the claim must be submitted to the carrier in writing within six months of the date of shipment. Section 22 of the Shipping Act, 1916, however, permits the filing of such claims within two years of the cause of action; therefore, the claim must be considered on its merits.[2]

Respondent transported a shipment of synthetic resin, chemicals and silicon rubber compound from New York to Antwerp on August 3, 1977. This shipment moved aboard the vessel *Galloway* on bill of lading No. 901-498508. The Bill of lading reflects that the shipment consisted of one house to house container containing 30 leverpaks of Silicone Rubber Compound (Dimethyl Vinyl End Block Methyl Vinyl Dimethyl Polysiloxane) Combustible Liquid N.O.S.,

[1] Both parties having consented to the informal procedure of 46 C.F.R. 502.301-304 (as amended), this decision will be final unless the Commission elects to review it within 30 days from the date of service thereof.

[2] It has been well established by the Commission that carrier's so-called "six-month" rules cannot act to bar recovery of otherwise legitimate overcharge claims.

weighing 6,360 lbs.; 10 drums of Chemicals (Asitopysilane) Corrosive Liquid N.O.S. Corrosive label weighing 4,670 lbs.; 30 drums and 7 pallets of Synthetic Resin weighing 25,706 lbs.; and 4 drums of Synthetic Resin (Vinyltriacetoxysilane) Anchorage Additive Corrosive Liquid N.O.S. Corrosive Material Corrosive Label. The rate of $139.00 weight minimum 40,320 lbs. per container for "Special Transactions not Classified According to Kind—Mixed Containerloads of the Following: Silicone Fluids, Silicone Resins Solutions, Silicone Rubber Compounds, Silicone Base Adhesive and Sealers, Silicone Antifoam Emulsions, Silicone Base Lubricating Greases." per Item 931.0120.587 as contained in the North Atlantic Continental Freight Conference Tariff No. (29) FMC-4, was applied.

Claimant seeks to apply instead the rates named in individual rate items as follows:

Chemicals, N.E.S., Packed, Up to find $1,500 per 2,240 lbs.	Item 510.0001.225	$107.00W/M
Synthetic Resin	Item 581.0001.234	$ 96.25W/M
Silicone Rubber Compound	Item 581.1020.001	$123.50W/M

Total charges for the shipment were $2,502.00. Applying the rates sought by the claimant as stated above, would reduce the total charges to $1,856.27 which is $645.73 less than collected. Charges were prepaid by the claimant.

The respondent agrees with the complainant that the $139.00 rate that was assessed for the shipment was not applicable and that the shipment should have been rated under the individual rate items as follows:

Chemicals, N.E.S. Packed, Over $1,500 per 2,240 lbs.	Item 510.0001.229	$147.75W/M
Synthetic Resin	Item 581.0001.234	$ 96.25W/M
Silicone Rubber Compound	Item 581.1020.001	$123.50W/M

Based upon the valuation stated on the "Intermodal Export Master Set" the "Chemical" portion of the shipment was valued in excess of the $1,500, therefore, the respondent is correct in claiming that the $47.75W/M rate in Item 510.0001.229 should be charged and not the rate of $107.00W/M in Item 510.0001.25 for value up to and including $1,500 per 2,240 lbs. as claimant seeks to apply.

The North Atlantic Continental Freight Conference Tariff No. 29, FMC 4 provides that the rates apply per ton of 2,240 lbs. or 40 cubic feet, whichever produces the greater revenue.

The carrier and the complainant are in agreement that the shipment was improperly rated. Based upon documents that both the carrier and respondent furnished, it is established that the greater revenue of $2,582.15 would be produced by rating the shipment on a measurement basis rather than $1,856.27 when rated on a weight basis as stated by the claimant.

The following rate computations apply:

Chemicals	107 cu. feet @	$147.75M =	$ 395.23
Synthetic Resin	692 cu. feet @	96.25M =	1,665.13
Silicone Rubber	169 cu. feet @	123.50M =	521.79
			$2,582.15

Accordingly, the Dow Corning Corporation claim against Sea-Land Service, Inc. is denied.

(S) HUBERT E. BRADFORD
Settlement Officer

January 28, 1980

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 509(I)

GENERAL ELECTRIC DE COLOMBIA, S.A.

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

Shipper failed to meet its burden of proof in charging that carrier misrated a shipment and overcharged shipper. Reparation denied.

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice-Chairman;* James V. Day, Leslie L. Kanuk, *Commissioners.* Commissioner Peter N. Teige did not participate because the case was decided before he took office.)

REPORT AND ORDER

April 17, 1980

This proceeding was instituted by complaint filed by General Electric de Colombia, S.A., alleging that Flota Mercante Grancolombiana, S.A. erroneously assessed the rate for "merchandise NOS" on a shipment identified on the bill of lading as "Partes y piezas sueltas para Maquineria Caterpillar" (loose parts and pieces for caterpillar machinery).[1] Complainant argues that the shipment should have been charged under the lower rate for "Tractor Parts." Settlement Officer John L. Sheppard agreed, and awarded Complainant reparation in the amount of $1,202.63. The Commission determined to review the decision pursuant to 46 C.F.R. 304(g). Because the Commission concludes that Complainant has not met its burden of proof in this proceeding, the decision of the Settlement Officer is reversed.

[1] This was erroneously translated to "Small parts and pieces for Caterpillar Machinery" in both the complaint and the decision of the Settlement Officer.

DISCUSSION

The bill of lading constitutes the sole exhibit, and provides the only evidence of the nature of the commodities. The Settlement Officer requested more information from Complainant about the shipment, but the record indicates no response to the request. He nevertheless concluded that " 'tractor parts' is descriptive of the component parts of all the self-propelled equipment manufactured *by* the Caterpillar Tractor Company" (emphasis added).

The Settlement Officer's statement is not only unsupported by the evidence of record, but to the extent the commodities may not have been built *by* the Caterpillar Tractor Company,[2] the statement is also irrelevant. Moreover, there is no evidence that the commodities were tractor parts at all. They may have been parts for caterpillar-type machinery other than tractors. The Settlement Officer's statement that Caterpillar Tractor Company products are "essentially" tractors is not based on the record.

It is Complainant's burden to prove that an improper rate was charged. *Johnson & Johnson International v. Venezuelan Lines,* 16 F.M.C. 84, 85 (1973). This burden has not been met, and Complainant's claim for reparation must therefore be denied.

THEREFORE, IT IS ORDERED, That the decision of the Settlement Officer is reversed; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

[2] It is unclear whether "Caterpillar" in the bill of lading refers to the trademark or is used generically.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-11

IN RE: AGREEMENT NOS. 150 DR-7 AND 3103 DR-7

ORDER ON RECONSIDERATION

August 18, 1980

The Commission has before it the joint petition of the Trans-Pacific Freight Conference of Japan/Korea (TPFC) and Japan/Korea-Atlantic & Gulf Freight Conference (JKAG) seeking reconsideration of the December 31, 1979 decision conditionally disapproving Agreement No. 150 DR-7 and dismissing Agreement No. 3103 DR-7. Seatrain Pacific Services, S.A., and the Bureau of Hearing Counsel filed pleadings in response to the petitions opposing any alterations in the Commission's December 31, 1979 Order.

JKAG states that the Commission should either have approved its proposed dual rate contract on a "standby" basis or deferred all action until a final decision is reached on the proposed JKAG intermodal authority amendments pending in FMC Docket No. 79-74, *Japan/Korea-Atlantic & Gulf Freight Conference—Extension of Intermodal Authority* (Agreement No. 3103-67). As stated in the December 31st Report and Order, the unavailability of a JKAG intermodal service itself prevents the approval of an intermodal merchant's contract for that conference as a matter of law. *See Agreement No. 8765,* 9 F.M.C. 333 (1966). It would also be inappropriate to defer all action on a docketed proceeding involving elaborate factual issues and major questions of law and policy pending the specific resolution of JKAG's proposed intermodal authority in Docket No. 79-74. JKAG may instead submit another intermodal dual rate contract proposal at such time as it obtains section 15 authority to offer intermodal services. Regardless of the procedure used to place JKAG intermodal contract before the Commission, the burden remains on its proponents to demonstrate that current competitive circumstances in the trade justify the proposal.

TPFC seeks authority to use a single dual rate contract which includes both intermodal and port-to-port shipments—a request examined and rejected in the Commission's December 31, 1979 decision. TPFC now alleges that competition in its trade has increased since the record closed and states that these changed circumstances verify its prior contention that separate dual rate con-

tracts for intermodal and port-to-port cargoes would be "worse than no contract at all." Reopening of the record was not requested.

No TPFC intermodal shipments are presently subject to dual rate arrangements and if TPFC wishes to preserve the *status quo* by not offering its shippers the option of signing an intermodal dual rate contract, it may do so. If TPFC wishes to employ a unitary intermodal/port-to-port contract, however, it must first demonstrate a clear factual connection between the unitary contract sought and the provision of definite transportation benefits to the shipping public. TPFC may file a further amendment to its dual rate contract at any time in the future seeking to make such a demonstration of benefits.

TPFC also seeks reconsideration or clarification of the condition requiring it to release intermodal shippers using a "different through intermodal route than that offered by the Conference." * The phrase "through intermodal route" was intended to describe reasonably distinct points of origin or destination and not the particular inland carrier chosen or the particular path followed in traversing the territory between such points and the ports used by TPFC vessels. By requiring the release of shippers moving cargo to or from points located a reasonable distance from the points served by the conference, the Commission was affirming the applicability of the "natural routing clause" of section 14b of the Shipping Act, 1916 (46 U.S.C. §813a), to intermodal transportation. Accordingly, there is no need to modify the conditions imposed by the December 31, 1979 Order.

Finally, TPFC directs attention to a clerical error at page 36, line 20 of the December 31, 1979 Report and Order and requests recognition that the word "not" was not intended in that sentence. This request will be granted.

THEREFORE, IT IS ORDERED, That the Commission's December 31, 1979 Report and Order is amended by deleting the word "not" from page 36, line 20; and

IT IS FURTHER ORDERED, That the "Petition for Reconsideration" of the Trans-Pacific Freight Conference of Japan/Korea and the Japan/Korea-Atlantic and Gulf Freight Conference is granted to the extent indicated above and denied in all other respects.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

* Agreement No. 150 DR-7, Paragraph 6, Further Proviso.

* Commissioner Peter N. Teige did not participate because the case was decided before he took office.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-1

SUNMARK, INC.—PETITION FOR DECLARATORY ORDER

Containerload shipments of a product marketed as "Fun Dip Candy" and consisting of individual packets of a granular substance containing 97% dextrose is properly rated as "Candy" rather than "Dextrose."

Lee K. Mathews for Sunmark, Inc.
Jacob P. Billig for Combi Line.

REPORT AND ORDER

April 18, 1980

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice-Chairman;* James V. Day, Leslie L. Kanuk, *Commissioners.* Commissioner Peter N. Teige did not participate because the case was decided before he took office.)

This proceeding arises from a "Petition for Declaratory Order" filed by Sunmark, Inc., and the "Reply to Petition" filed by Combi Line.

Combi Line is a common carrier by water in the foreign commerce of the United States. Sunmark is a shipper located in St. Louis, Missouri and the manufacturer of a product known as "Fun Dip." This product is a mixture of granular ingredients, 97% of which is dextrose. It is marketed as candy.

Between March, 1978 and September, 1978, Sunmark arranged with Combi Line to transport seven containers of "Fun Dip" from New Orleans to European destinations; three to Felixstowe, England and four to Rotterdam, Holland, at the rate specified for the commodity "Dextrose (Dextroglucose, Baker's Sugar, Grape Sugar, Corn Sugar)."[1] Freight totaling $15,358.15 was prepaid. In October, 1978, Combi informed Sunmark that these shipments

[1] European Freight Association Tariff No. FMC-3, Page 95, Item No. 061-9008 (Holland) and Gulf/United Kingdom Conference Tariff No. FMC-18, Page 130, Item No. 061-9008 (England). The shipments were all "House-to-house" movements ultimately destined for interior points in England, Germany or Austria.

should have been assessed one of three different rates for "Candy."[2] When Sunmark refused to pay additional freight, Combi Line commenced a state court action to collect the unpaid balance on the seven disputed shipments.[3] On November 6, 1979, the court invoked the primary jurisdiction doctrine, and issued an order staying its judicial proceedings pending a Federal Maritime Commission determination of: (1) the correct tariff rate; and (2) the reasonableness of the rate found to be correct—two matters governed by the Shipping Act, 1916 (46 U.S.C. §801 *et seq.*).

Sunmark now petitions the Commission to rule that its containerload shipments of "Fun Dip" were entitled to the "Dextrose" rate, but does not seek a ruling under section 18(b)(5) or any other provision of the Shipping Act, 1916, pertaining to the reasonableness of foreign commerce rates.[4] Combi Line replied to the Petition and opposes relief on either of the two possible grounds mentioned by the St. Louis County Circuit Court.

POSITION OF THE PARTIES

Sunmark contends that all seven "Fun Dip" shipments were entitled to the "Dextrose" rate because:

(1) "Fun Dip" is essentially dextrose. Dextrose is corn sugar in raw form. Sunmark acquires dextrose in bulk tanks or in 100 lb. bags. "Fun Dip" is manufactured from raw dextrose simply by blending it with minor amounts of coloring, flavoring and preservative ingredients. There is no cooking or drying. Candy is typically cooked, rather than blended.

(2) Sunmark received a written rate quotation from the "Moram Agencies" in New York in January, 1978, stating that Combi Line's rate for dextrose from New Orleans to Rotterdam was $109.25 (plus currency adjustment surcharge) per long ton, or about $2,211 per container.[5] Sunmark would also have to pay inland transportation costs in Europe and the United States.

(3) "Fun Dip" is sold in paper packets. Two dozen packets are enclosed in cardboard retail display cartons. These cartons are packed into a corrugated cardboard shipping container known as a "case." The cases sent to England hold 8 cartons and weigh 15 lbs. The cases sent to Holland hold 16 cartons and weigh 27 lbs. A typical container load of either type case weights approximately 42,000 lbs.

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[2] Combi wishes to apply the commodity rates for: (1) "Candy, Hard In Bags," European Freight Association Tariff No. FMC-18, Item No. 062-0100 (two shipments before June 7, 1978); (2) "Confectionery (Candy)," European Freight Association Item No. 062 0115 (two shipments after June 7, 1978); and (3) "Candy," Gulf/United Kingdom Conference Tariff No. FMC-3, Item No. 062-0115.

[3] *Combi Line v. Sunmark, Inc.*, Circuit Court of St. Louis County, Missouri, Case No. 425905. Combi claims additional freight in the amount of $6,886.14 based upon the difference in the tariff rates described in notes 1 and 2, above.

[4] The Commission has authority to judge the intrinsic reasonableness of carrier rates in domestic offshore commerce, but its foreign commerce ratemaking powers are more limited. *Compare* 46 U.S.C. §817(a) with 46 U.S.C. §§817(b)(5), 817(c), 816 and 815 First.

[5] Sunmark does not assert that Moram is an agent for Combi Line. The letter ultimately recommended the use of a Baltic Gulf Lines intermodal rate.

(4) The bills of lading and export declarations pertaining to the challenged shipments were prepared to read "Dextrose" or "Dextrose, Confectionery."[6]

(5) Upon Combi's demand of higher rates, Sunmark ceased all shipments until a new rate was negotiated. Combi promptly negotiated new conference rates for "Candy, Dextrose, Granular base packed" effective November 1 and 10, 1978.[7] These rates were the same as the "Dextrose" rates originally applied by Combi.

(6) The application of tariff rates must be based upon the true nature of the commodity actually shipped. *Kraft Foods v. Moore McCormack Lines*, 19 F.M.C. 407, 409 (1976). Processing may change the appearance or use of a commodity, without changing its essential nature. A commodity will often retain a *continuing substantial identity* despite undergoing several stages of processing. *E.g.*, pasteurizing, homogenizing, enriching, and bottling raw milk still leaves you with the original commodity—"milk." *See East Texas Lines v. Frozen Food Express*, 351 U.S. 49, 54 (1956), interpreting the "nonmanufactured" agricultural products exemption of the 1935 Motor Carrier Act. Blending 97% raw dextrose with 3% other ingredients still leaves you with "dextrose."

(7) When two or more rates could apply to a shipment, the more specific rate must be applied. *United States v. Gulf Refining Company*, 268 U.S. 542, 546 (1925). Combi Line's tariffs distinguish between commodities which are basically "dextrose" and those which are "candy or confectionery." In this instance, "Dextrose" is the more specific rate.

(8) "Candy" and "Dextrose" *both* appear in Combi's tariffs under the generic heading of "Sugar, Sugar Preparations and Honey," thereby creating an ambiguity as to their application to "Fun Dip."[8] Because only one rate may properly be applied to the commodity shipped, the shipper is entitled to the benefit of the doubt in cases of tariff ambiguity. In this instance, Sunmark is entitled to the lower "Dextrose" rate.

(9) "Fun Dip" is sold in Europe on a CIF or "delivered price" basis. Its retail price cannot exceed 50 Dutch cents or 8 UK pence (about 25 U.S. cents) per packet if it is to compete successfully with similar products manufactured in Europe. A rate higher than the "Dextrose" rate (which approximated $2.00 per case of 384 "Fun Dip" packets) would preclude Sunmark from selling the product in Europe. At the "Dextrose" rate, an annual export business of between $1,000,000 and $2,000,000 is possible.

In reply, Combi Line asserts that the "Dextrose" rate is inapplicable because:

(1) Combi charged the "Dextrose" rate only until it learned that the commodity being shipped was packaged and commercially marked as "Fun Dip Candy." This product is more specifically rated as either: (a) "Candy" (English shipments); (b) "Candy, Hard in Bags" (two Dutch shipments); or (c) "Confectionery (Candy)" (two Dutch shipments).

[6] The record does not indicate who prepared the bill of ladings. Sunmark used an ocean freight forwarder, J. W. Allen & Co., Inc. (FMC No. 671), for all seven shipments.

[7] Tariff Item No. 061-9009 in both conference tariffs.

[8] The relevant portions of the three governing Combi Line tariffs are set forth in the Appendix to this decision.

(2) The commercial description of the product given by the shipper for sales purposes should be controlling, *Mead Johnson & Co. v. Atlantic Coast Line R.R.*, 168 I.C.C. 157 (1930). The Commission frequently determines the tariff status of commodities from descriptions in the shipper's sales literature or stock catalog. *E.g., Reliance Pet Products Corp. v. Nippon Yusen Kaisha,* 19 S.R.R. 904 (1979); *European Trade Specialists v. Prudential Grace*, 17 S.R.R. 1351, 1354 (1977). In this instance, the gustatory aspects of the product dominate Sunmark's display packaging, and the word "dextrose" appears only in small type on the ingredients section.

(3) The end use is a necessary factor to consider in categorizing commodities for tariff purposes. *E.g., Pan American Health Organization v. Moore-McCormack Lines*, 19 S.R.R. 762, 764 (1979), where a "Stationery" rate was applied in lieu of a "Bond Paper" rate. *See also Continental Can Co. v. United States*, 272 F.2d 312, 315 (2d Cir. 1959). "Fun Dip" is neither intended to nor likely to have any use other than as a candy treat.

(4) There is no ambiguity in Combi Line's tariffs because the "Dextrose" and "Candy" rates are *not* equally applicable. The "Candy" rate is more specific because demand for the finished article, rather than the raw materials of which it is comprised, provides the sole reason for transporting the commodity to Europe.

(5) Combi Line's subsequent creation of a lower rate for "Fun Dip" is not an admission that the earlier rate was an unlawfully high rate. *Dubuque Packing Co. v. H & W Motor Express Co.*, 62 M.C.C. 101, 102 (1953). Unless additional evidence of unreasonableness were required, a carrier could accomplish a retroactive application of rates merely by amending its tariff. The Shipping Act was clearly intended to prohibit the retroactive application of rates. *E. Mahlab v. Concordia Line*, 8 F.M.C. 133, 136 (1964).

(6) Sunmark's January, 1978 letter from the "Moram Agencies" is not only unconvincing for lack of a firm connection to Combi Line or to "Fun Dip," but is generally irrelevant. A misquotation of rates cannot be a justification for the shipper's payment of less than the proper tariff rate. *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915).

DISCUSSION

The question presented is whether Sunmark's "Fun Dip" cartons were properly rated as "Dextrose" instead of one of three "Candy" items available in Combi Line's tariff.

The applicable freight rate depends upon the intrinsic nature and market value of the goods actually shipped, matters whch are not necessarily determined by the description provided by a manufacturer or shipper, the use intended by a consignee, the physical appearance or chemical composition of the goods, or any other single factor. *See Crestline Supply Corp. v. Concordia Line*, 19 F.M.C. 207, 211 (1976). In a particular case, however, one or more factors can be decisive in establishing the true nature of the commodity being

rated. In this instance, the physical appearance and intended use of the commodity are the controlling characteristics.

Examination of the "Fun Dip" sample attached to Sunmark's Petition leaves the Commission with no doubt that the commodity is candy rather than dextrose. "Fun Dip" is packaged in one-ounce consumer oriented packets and consigned to candy distributors in Europe. Sunmark also considers its product to be candy and the record provides no indication that "Fun Dip" has any use other than as a candy treat. There is no ambiguity in Combi's tariffs under the circumstances.

The nature of a commodity can be altered by changes which are not chemical or physical in nature. The addition of flavoring, coloring or packaging frequently create a "new" commodity for transportation or sales purposes. Despite the fact that "Fun Dip" contains 97% dextrose, the product shipped cannot be reasonably described as "dextrose." The blending in of 3% other ingredients sufficiently alters the raw dextrose base to convert it into a product readily recognizable as candy.

Accordingly, it is concluded that Combi Line misrated Sunmark's first seven shipments of "Fun Dip" by assessing the rate for "Dextrose" instead of the rates for "Candy" (Gulf/United Kingdom) and "Confectionery (Candy)" (European Freight Association, both before and after June 7, 1978).[9]

THEREFORE, IT IS ORDERED, That the "Petition for Declaratory Order" of Sunmark, Inc., is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

[9] Combi Line's conduct violtates section 18(b)(3) of the Shipping Act, 1916, despite the fact that Sunmark or its ocean freight forwarder prepared the shipping documents which described the shipments as "Dextrose." It also appears that even the "Dextrose" rate was misapplied for the first two Rotterdam shipments, where $109.75 and $107.75 rates were assessed rather than the $97.25 rate specified for "House-to-House Containers." *See* Appendix "A" to Sunmark's Petition. Moreover, the classification "Candy, Hard in Bags" does not describe the second two Rotterdam shipments as specifically as does "Confectionery (Candy)." Only the specially processed "Lik-A-Stik" portion of the product is hard. The larger portion of "Fun Dip's" contents is granular.

APPENDIX

(1) The items from Gulf/United Kingdom Conference Tariff No. FMC–18 most relevant to Sunmark's three shipments to England are:

(a) Sugar, in bags	open	
(b) Glucose (NOT syrup solutions) Liquid or Powdered	$107	W
(c) Dextrose (Dextroglucose: Baker's Sugar; Grape Sugar; Corn Sugar)	$114	W
(d) Candy	$ 63	M

(2) The items from European Freight Association Tariff No. FMC–3 (pre-June 7, 1978) most relevant to Sunmark's first two shipments to Holland are:

(a) Sugar, Raw or Refined	$128.75	W
(b) Glucose (NOT Solutions)	$104.50	W
(c) Dextrose, in House/House containers, min. 40,320 lbs.	$ 97.25	W
(d) Confectionery (Candy)	$182.75	W

(3) The items from European Freight Association Tariff No. FMC–3 (June 7, 1978) most relevant to Sunmark's last two shipments to Holland are:

(a) Sugar, Raw or Refined	$142.25	W
(b) Glucose (NOT solutions)	$114.75	W
(c) Dextrose, in House/House containers, min. 18,289 kgs.	$107.75	W
(d) Confectionery (Candy)	$180.00	W
(e) Candy, hard, in bags	$130.00	W

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-95

CANCELLATION OF TARIFFS FOR NONCOMPLIANCE WITH TARIFF FILING REGULATIONS

REPORT AND ORDER

April 23, 1980

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* James V. Day, Leslie Kanuk, *Commissioners;* Peter N. Teige, *Commissioner,* did not participate because the case was decided before he took office.)

On November 15, 1979, a show cause proceeding was commenced against approximately 350 foreign commerce ocean carriers (Respondents). These carriers were ordered to show cause why some 600 Federal Maritime Commission tariffs published by them should not be cancelled for noncompliance with Part 536 of the Commission's Rules (46 C.F.R. § 536), as amended on November 16, 1977.[1] A copy of this Order was mailed to each Respondent at the address listed on the subject tariffs and was also published in the November 20, 1979 *Federal Register.* Replies were due by January 7, 1980.

A large number of Respondents were either unreachable by the United States Postal Service at the addresses contained in their tariffs or simply chose not reply to the Show Cause Order. The tariffs of this group of carriers are listed in Appendix "A" to this decision and will be cancelled pursuant to sections 18(b)(4) and 22 of the Shipping Act, 1916 (46 U.S.C. § 817(b)(4) and 821).[2]

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[1] *Report on Reconsideration in Docket No. 72-19,* 20 F.M.C. 286 (1977), 42 *Fed. Reg.* 5925. The 1977 amendments were the first significant revision of Part 536 since 1965. Their principal object was to prescribe 19 (*now* 20) mandatory topics for treatment in common carrier tariffs. A numbering system for these tariff rules was also prescribed. 46 C.F.R. § 536.5(d). The 1977 amendments took effect on January 1, 1978 for newly filed tariffs. Existing tariffs were given until January 1, 1979 to conform. All foreign commerce carriers were mailed three circular letters during 1977 and 1978 reminding them of the approaching deadline and announcing the availability of FMC-conducted seminars on the new requirements (Circular Letter Nos. 2-77, 2-78 and 4-78).

[2] Those carriers which did not receive notice by mail received valid constructive notice under 44 U.S.C. § 1507 by virtue of the *Federal Register* publication. *See North American Pharmacal Inc., v. Department of Health, Education and Welfare,* 491 F.2d 546 (8th Cir. 1973). Moreover, section 536.5(a)(9) of the Commission's Rules requires carriers to maintain a current address in their FMC tariffs.

A second group of Respondents replied by stating that they had previously cancelled one or more of the subject tariffs, were immediately cancelling their nonconforming tariffs, or were tendering amendments which brought their tariffs into conformity with revised Part 536. The tariffs of this group are listed in either Appendix "B" (properly amended) or Appendix "C" (previously cancelled).

Only eight carriers contested the proposed cancellation of 17 different tariffs, and two of these carriers filed conforming amendments before the date of this decision. A third carrier, N.Y.K. Line, stated that its tariff FMC No. 84 was a specialized "governing tariff" issued under section 536.13 of the Commission's Rules and was not affected by the 1977 amendments. This container interchange tariff was inadvertently included in the instant proceeding and, accordingly, will not be cancelled.

Of the five remaining carriers, United Intermodal Lines attempted to replace its nonconforming tariff FMC No. 14 with another tariff (FMC No. 26). The later filing was rejected, however, and tariff FMC No. 14 remains nonconforming and subject to cancellation. Palau Shipping Co., Inc., Pacific Van and Storage Co., Inc., and Hellenic Lines indicated that they would either revise their tariffs or cancel them, but to date they have not taken the necessary actions to do so. Mamenic Line submitted an unauthorized response to Hearing Counsel's memorandum which claimed Mamenic was unable to amend tariff FMC Nos. 16 and 19 because it was never informed of the particular deficiences which required correction.[3] Individual notice describing the nonconforming aspects of each affected tariff was not required. The three FMC circular letters sent over the course of a year advised all foreign commerce carriers of the new Part 536 requirements and offered Commission assistance in achieving compliance. Moreover, Mamenic Line did properly amend two other foreign commerce tariffs (FMC Nos. 22 and 23) before the instant proceeding commenced. Examination of Mamenic's January 4, 1980 response to the Show Cause Order indicates that it may not have amended tariff Nos. 16 and 19 because it has suspended service in all or part of the Central American trades covered by these tariffs.[4] Because a tariff which does not describe an active and *bona fide* offer of common carrier service is also inconsistent with Part 536 and section 18(b) of the Shipping Act, 1916, Mamenic has presented no defense to the proposed cancellations. *Inactive Tariffs of Vessel Operating Common Carriers,* 20 F.M.C. 433 (1978).

Carriers which have tariffs cancelled as a result of this proceeding may immediately file a successor tariff which conforms to Part 536 and takes effect upon 30 days notice.

THEREFORE, IT IS ORDERED, That the tariffs listed in Appendix "A" to this Order are cancelled without prejudice to the publishing carriers; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

[3] Letter dated February 29, 1980, from United States Navigation, Inc., Mamenic's agent in the United States.

[4] Mamenic is a Nicaraguan carrier. It advised the Commission that its operations in Nicaragua have ceased because of political disturbances.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 420(I)

STOP AND SHOP COMPANIES, INC.,
BRADLEES DIVISION

v.

BARBER BLUE SEA LINE AND
BARBER STEAMSHIP LINES, INC.

ORDER ON REMAND

April 25, 1980

By complaint filed June 28, 1977, Stop & Shop Companies, Inc. seeks reparation in the amount of $252.64 for freight overcharges assessed by Barber Blue Sea Line and Barber Steamship Lines, Inc., on one shipment described on the bill of lading as "Hardware Gadget Assortment."

Settlement Officer James S. Oneto issued a decision on February 28, 1980 dismissing this proceeding on the basis that Stop & Shop was not the proper party to bring such an action because it had not furnished proof that it paid the freight charges in question and accordingly suffered injury. The Settlement Officer determined that the freight charges had been paid by Pistorino & Company, an independent ocean freight forwarder. The Commission, on its own motion, determined to review the Settlement Officer's decision.

The Commission, after a review of the record, is not convinced that the Complainant was given an adequate opportunity to demonstrate that it had standing to bring this action. Consequently, this matter is remanded to the Settlement Officer with instructions that he determine whether Stop & Shop actually reimbursed Pistorino & Company, for freight charges advanced by it to the Respondent. If this is found to be the case, the Settlement Officer is further directed to address the merits of the proceeding.

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the Settlement Officer for issuance of a decision consistent with this Order.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 C.F.R. 536, 538; DOCKET NO. 79-58]

DUAL RATE CONTRACT SYSTEMS IN THE FOREIGN COMMERCE OF THE UNITED STATES—RATE INCREASE ON LESS THAN NINETY DAYS' NOTICE

AGENCY: Federal Maritime Commission

ACTION: Withdrawal of Proposed Rule

SUMMARY: The proposed rule prescribed a uniform method for ocean carriers and conferences to justify short notice (less than 90 days) dual rate increases. The Commission has decided not to amend its existing regulations at this time and accordingly withdraws the proposed rule.

SUPPLEMENTAL INFORMATION:

This proceeding was instituted by Notice of Proposed Rulemaking published June 6, 1979 (44 Fed. Reg. 32408—32418). The proposals would amend Article 14 of the Uniform Merchants' Contract contained in Subpart B of Part 538 of the Commission's Rules (46 C.F.R. § 538.10). This Article sets forth in the dual rate contract a provision allowing less than 90 day rate increases in extraordinary circumstances. The proposal would also add a new section to the Commission's tariff filing rules (46 C.F.R. Part 536) prescribing a form of justification for carriers or conferences seeking to invoke Article 14 of the Uniform Merchants' Contract. The proposal was designed to allow increases in rates covered by Commission approved exclusive patronage contracts to go into effect on as little as 15 days' notice for sudden, severe, and unforeseen cost increases. The proposed rule was intended to cover, among other things, unforeseen cost increases in bunker fuel.

Comments have been filed by carriers, conferences, and shippers. Upon review of these comments and reexamination of the proposed rule, the Commission finds that the rule will not serve its intended purpose and that the Commission's current regulation of short notice dual rate increases better serves to grant relief to ocean carriers and conferences for sudden, severe, and

unforeseen cost increases, including bunker fuel costs. Accordingly, the proposed rule is withdrawn and this proceeding is discontinued.

It Is So Ordered.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

* Commissioner Peter N. Teige did not participate because the case was decided before he took office.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 440(I)

ALLIED STORES INTERNATIONAL, INC.
SUBSIDIARY OF ALLIED STORES CORPORATION

v.

UNITED STATES LINES, INC.

INFORMAL DOCKET NO. 441(I)

THE STOP & SHOP COMPANIES, INC.,
BRADLEES DIVISION

v.

BARBER BLUE SEA LINE

INFORMAL DOCKET NO. 460(I)

KRAFT FOODS CORPORATION

v.

BARBER BLUE SEA LINE

INFORMAL DOCKET NO. 701(I)

WARNER-LAMBERT LTD.

v.

COMPANIA PERUANA DE VAPORES

PARTIAL ADOPTION OF DECISIONS OF SETTLEMENT OFFICERS*

May 1, 1980

In each of the above-captioned proceedings, the Settlement Officer awarded reparations without interest to Complainants for violations by Respondents of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817(b)(3)).

In cases involving the misclassification of cargo and arising under section 18(b)(3), the Commission has determined to grant interest on awards of reparation, calculated at the rate of 12 percent, and accruing from the date of payment of freight charges. *Interpur, A Division of Dart Industries, Inc. v. Barber Blue Sea Line,* 19 S.R.R. 1554, April 8, 1980. This policy shall be applied in these proceedings.

THEREFORE, IT IS ORDERED, That the decisions of the Settlement Officers in these consolidated proceedings are adopted except as indicated; and

IT IS FURTHER ORDERED, That each Respondent pay to the respective Complainant in each proceeding 12 percent interest on the award of reparation, accruing from the date of payment of freight charges; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

* Because the Commission is considering only award of interest in each proceeding, these proceedings are being consolidated for decision.

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-26

TRIMODAL, INC.—INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND POSSIBLE VIOLATIONS OF SECTIONS 16, PARAGRAPH 18(b)(1), 18(b)(3) AND 44

NOTICE

May 2, 1980

Notice is given that no appeal has been taken to the March 26, 1980, dismissal of this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78-26

TRIMODAL, INC.—INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND POSSIBLE VIOLATIONS OF SECTIONS 16, FIRST PARAGRAPH, 18(b)(3) AND 44

PETITION TO REACTIVATE PROCEEDING AND AMEND ORDER OF INVESTIGATION AND HEARING DENIED

Finalized May 2, 1980

On March 7, 1980, Hearing Counsel served the instant petition to Reactivate Proceeding and Amend Order of Investigation and Hearing. The Commission order on request to settle was served October 27, 1978. The Petition states, among other things, that "On December 31, 1980 (sic) Trimodal and the Commission's General Counsel entered into a settlement agreement[1] which, *inter alia,* called for Trimodal to pay civil penalties. As Trimodal only paid a portion of the civil penalties as part of the settlement agreement, it also executed a promissory note which provided that installment payments were to begin on January 1, 1980. Trimodal has failed to pay the first installment due on the promissory note and is now two months in arrears. Trimodal was notified by a certified letter from the General Counsel that the Commission considers Trimodal to be in default of the note but Trimodal has not responded to the General Counsel's letter."

Trimodal has not replied to the instant petition.

DISCUSSION

The Order of Investigation and Hearing in this proceeding was served June 23, 1978. Some 18 months later Trimodal and the Commission's General Counsel entered into a settlement agreement. Trimodal, according to the instant petition, paid a portion of the civil penalties as part of the settlement agreement and also executed a promissory note.[2] However, the Commission's General Counsel never filed a petition requesting the Commission to issue an

[1] No evidence of the settlement agreement is in this docket nor is there any statement as to the amount of civil penalties imposed.

[2] No evidence of the promissory note is in this docket.

order discontinuing the proceeding because, says Hearing Counsel, of Trimodal's failure to meet the terms of the promissory note.

Although Trimodal has remained silent does it not have cause for concern that the settlement agreement was treated as it was and no petition for discontinuance served?

Trimodal, a non-vessel operating common carrier and applicant for a license to operate as an Independent Ocean Freight Forwarder, by letter dated November 14, 1978, withdrew its application for a freight forwarder license.

The Shipping Act Amendments of 1979, PL 96-25 in the 2nd provision of section 10, empowers the Federal Maritime Commission to assess all civil penalties prescribed by the Shipping Act, 1916, and it is indicated that this will not only expedite the formal assessment of penalties and eliminate the existing likelihood of inconsistent treatment, varying on the basis of the particular U.S. District Court in which the action is brought, but will assist the Federal Maritime Commission in compromising penalties before trial.

It appears that in this proceeding there was a compromise before trial, which was not processed nor a petition filed to discontinue the proceeding. No copy of the compromise has been presented herein. The promissory note that had been executed as part of the settlement could be converted to judgment. Perhaps the circumstances of the case may warrant such. There is not sufficient information herein to determine.

This non-vessel operating common carrier has withdrawn its application for a license as an Independent Ocean Freight Forwarder. There has not been adequate showing that a regulatory purpose would be served, or a deterrent to violations of the Shipping Act, 1916, would be realized by pursuing this matter other than through processing the settlement agreement and pursuing recovery through the promissory note.

Further, this proceeding, begun in June of 1978, under the circumstances, well may best serve the interests of the public and regulatory purpose by the settlement and pursuance of action on the promissory note.

In addition, the petition is found not to comply with Rule 69, of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.69, having failed to cite by appropriate reference the statutory provision or other authority relied upon for relief.

Upon consideration of the above, the Presiding Administrative Law Judge *finds* and *concludes* the instant petition should be denied.

Wherefore, it is *Ordered,*

(1) Petition is denied.

(2) Proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

March 26, 1980

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-102

SEA-LAND SERVICE, INC. PROPOSED TWENTY-FIVE PERCENT GENERAL RATE INCREASES IN THE PUERTO RICO TRADES

ORDER

May 8, 1980

Sea-Land Service, Inc. has filed a Petition for Clarification in this proceeding addressing certain portions of the Order Approving Offer of Settlement issued on March 17, 1980. That Order approved and adopted, with certain clarifications, the order of the Presiding Officer Administrative Law Judge Seymour Glanzer, served March 3, 1980, approving Sea-Land's offer of settlement. Replies to the Petition have been filed by the Military Sealift Command (MSC) and the Commission's Bureau of Hearing Counsel.

BACKGROUND

Sea-Land, on November 1, 1979, filed a 25% general rate increase in the trades between U.S. East and Gulf Coast Ports and Puerto Rico and Virgin Islands Ports to become effective January 1, 1980.[1] The Commission, in its Order of Investigation and Suspension, served December 26, 1979, questioned the reasonableness of Sea-Land's rate increases due to certain methodologies used in computing its rate of return, and accordingly, suspended 10% of the Puerto Rico Trade increases and placed those increases under investigation.[2] Subsequently, the Commission reconsidered its Order of Investigation and

[1] The tariffs to which the 25% rate increase applied were FMC-F No. 27 (between United States Atlantic and Gulf ports and *Virgin Islands ports via transshipment service*), FMC-F No. 34 (between U.S. Atlantic ports and ports in Puerto Rico), FMC-F No. 36 (from U.S. South Atlantic ports to ports in Puerto Rico), FMC-F No. 37 (from ports in Puerto Rico to U.S. South Atlantic ports), FMC-F No. 40 (from U.S. Gulf ports to ports in Puerto Rico), FMC-F No. 41 (from ports in Puerto Rico to U.S. Gulf ports) and FMC-F No. 53 between San Juan, Puerto Rico, and Canadian ports *with interchange at New Jersey—Intermodal* tariff).

[2] The specific issues noted by the Commission in its Order of *Investigation and Suspension* were: (a) *Is the methodology used* by Sea-Land in making cargo volume projections appropriate? (2) Are Sea-Land's cargo volume projections adequate? (3) Has Sea-Land properly calculated Account 940: Management Fees and Commission—Affiliates? (4) Is Sea-Land's rate of return on rate base in the North Atlantic, South Atlantic, Gulf/Puerto Rico Trades (excluding the Virgin islands) excessive?

Suspension and included the Virgin Islands Trade rate increases in the investigation, although it did not suspend any portion of those increases.[3]

After the proceeding commenced, negotiations among the parties resulted in an offer of settlement by Sea-Land which was agreed to by all parties except the Puerto Rico Manufacturers Association (PRMA). A stipulation between Sea-Land and the Commission's Bureau of Hearing Counsel was filed regarding a resolution of the specific issues noted in the Order of Investigation and **Suspension.** Also filed was a Joint Motion For Expedited Consideration of Settlement and Issuance of Order in which all parties, except PRMA, joined.[4] The settlement offer was ultimately approved by both the Presiding Officer and the Commission.

The settlement offer essentially required Sea-Land to reduce its general rate increase to 21% over the base rates in effect on December 31, 1979. The reduction of the Virgin Islands rates was to be accomplished on 5 days notice within 3 work days of the Commission's approval of the offer of settlement. The reduction of the Puerto Rico rates was to be accomplished by June 30, 1980. The 21% increase limit was a ceiling increase on individual rates and not a prescription of a uniform 21% increase in all rates. As a result, the settlement offer would have permitted Sea-Land to institute individual rate item increases of less than 21% if competitive conditions so required. The approval of the settlement offer would also have precluded the Commission from requiring further financial justification of these increases or suspending and/or investigating individual rate changes.

The Commission approved the settlement agreement and adopted the order of the Presiding Officer with the express understanding that the settlement applied to only the general revenue aspects of the rate increases. It specifically noted that the condition not to suspend, investigate or require further justification for the individual rate item increases did not encompass issues of the reasonableness that were separate and distinct from the issue of the general revenue needs of the carrier. As a result, individual rate changes could be suspended and investigated on the basis of issues of preference and prejudice or of justness and reasonableness due to the transportation factors affecting an individual commodity. The Commission therefore reserved to itself "the right to investigate and suspend any such increase of 21% or less on any individual rate item under section 18(a) of the Shipping Act, 1916, section 3(a) of the Intercoastal Shipping Act, as amended and section 16, First, of the Shipping Act, 1916. . . ."[5]

[3] The Commission had originally determined that the projected rate of return in the Virgin Islands trade was not excessive. However, on reconsideration it determined that the methodological issues raised in this proceeding might affect the projected rate of return in that trade, and, accordingly, placed tariff FMC-F No. 27 under investigation. Because the Virgin Islands rate increase had already gone into effect, the Commission could not suspend any portion of that increase applicable thereto. *Alaska Steamship Co. v. F.M.C.*, 362 F.2d 406 (9th Cir. 1966).

[4] PRMA did not endorse or approve the settlement offer but did not object to it and, after being given an opportunity by the Commission, did not file a notice of intent to file exceptions to the Presiding Officer's approval of the settlement.

[5] Order Approving Offer of Settlement, served March 17, 1980, slip opinion at 3.

POSITIONS OF THE PARTIES

In its Petition for Clarification, Sea-Land now takes the position that the Commission's reservation of the right to suspend and investigate the individual rate changes has the effect of substantially altering the terms of the settlement offer. It argues that the Commission's authority to determine the justness and reasonableness of any such rate changes is limited to proceedings instituted under section 22 of the Shipping Act, 1916 (46 U.S.C. §821) and that under that provision the Commission has no authority to suspend rate increases which are the subject matter of the settlement offer. Sea-Land concedes, however, that rate reductions below the 15% general rate increase originally allowed by the Commission are not within the settlement agreement and that the Commission would have full statutory authority over such rate changes.

Sea-Land also notes that the Commission's Order did not address the technical aspects of the implementation of the settlement agreement, and while not specifically seeking clarification of this issue, submits its view of its obligations thereunder. Sea-Land states that it will: (1) submit tariff amendments which will incorporate the 15% general rate increase not suspended; (2) indicate in such amendments that a 25% general rate increase was filed effective January 1, 1980, but that 10% was suspended through June 28, 1980; (3) make changes to its tariffs not to exceed 21% over the December 31, 1979 base rates on not less than 30 days notice; and (4) inform the Commission's staff by transmittal letter of its tariff filings effectuating the Order of March 17, 1980. Finally, Sea-Land advises that although all parties agreed to a June 30, 1980 limitation on individual rate changes in the Puerto Rico tariffs, the time period was intended to coincide with the suspension period, *i.e.,* June 28, 1980.

MSC concurs with the position taken by Sea-Land that the Commission's suspension authority is "exhausted." Moreover, MSC is of the opinion that the Commission's investigative authority under section 3 of the Intercoastal Shipping Act (46 U.S.C. §845) is also precluded to the extent that individual rate increases filed on or before June 30, 1980 that do not exceed 21% of the base rates in effect on December 31, 1979, are beyond the reach of the Commission under that section. MSC notes that the Order of Investigation and Suspension did not set forth any issues regarding individual rates, and, on that basis, concludes that individual rates filed by Sea-Land pursuant to the settlement agreement may be investigated but not suspended.

Hearing Counsel's reply addresses the following three basic arguments which it views as being raised by the Sea-Land Petition: (1) the Commission's reservation of suspension authority substantially alters the settlement agreement; (2) the Commission has exhausted its suspension authority over the proposed rate changes in its Order of Investigation and Suspension instituting the proceeding; and (3) section 22 of the Shipping Act, 1916, represents the Commission's only authority to redress potential injuries to individual shippers.

In response to the first argument, Hearing Counsel disagrees with Sea-Land's assertion that the settlement agreement has been substantially altered. Hearing Counsel states that the agreement only dealt with the Commission's inquiry into the general revenue needs of the carrier and that the authority of

the Commission over new Sea-Land rates under other statutory provisions was never discussed.

Hearing Counsel asserts that Sea-Land's second contention assumes that any subsequent rates to be filed under the settlement agreement are part of those rates originally filed by the carrier and not "new rates" within the meaning of section 3 of the Intercoastal Shipping Act.[6] In this regard, Hearing Counsel is of the opinion that the reduced rates that Sea-Land is permitted to file under the agreement are clearly "new rates" within the meaning of that section. The fact that the Commission did not act on the rates originally filed by Sea-Land in this proceeding and instead has agreed not to question the carrier's general revenue needs for a 21% general rate increase allegedly does not alter this fact.

Hearing Counsel notes that because under the agreement Sea-Land is not required to file individual rate increases or a general rate increase, Sea-Land's rate structure could change and, under the carrier's interpretation of the agreement, the Commission would be precluded from suspending future rates which are different from the rates originally filed. Hearing Counsel argues that the settlement agreement only limits the issues which may be noted in any future suspension and investigation of Sea-Land's rate changes, *i.e.*, the general revenue needs of the carrier will not be questioned.

As to the third argument, Hearing Counsel submits that the suspension authority was clearly intended to protect the interests of individual shippers regardless of the availability of section 22 procedures.

DISCUSSION

The two major issues presented by Sea-Land's Petition are: (1) whether the Commission's interpretation of the settlement agreement is in conformity or contrary to the intention of the parties thereto, and (2) whether the Commission's interpretation of the settlement agreement exceeds its statutory authority.

There is no question as to the Commission's interpretation of the agreement. The Commission made it abundantly clear in its Order approving the settlement agreement that its approval of the agreement extended only to the general revenue aspects of the rates to be established under the agreement and that it in no way affected the Commission's authority to address those rates under other Shipping Act and Intercoastal Shipping Act provisions and requirements.[7]

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[6] Section 3(a) of the Intercoastal Shipping Act of 1933, provides, *inter alia*, that "[w]henever there shall be filed . . . any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the [Commission] shall have . . . authority . . . to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice . . . ." Section 3(b) provides, *inter alia*, that the Commission may "suspend the operation of such schedule" for up to 180 days after the proposed effective date thereof.

[7] The Commission could dispose of Sea-Land's "Petition For Clarification" on this basis alone. However, the Petition is actually one for reconsideration under Rule 261 of the Commission's Rules of Practice and Precedure (46 C.F.R. §502.261). Because the Commission wishes to consider the Petition on its merits, the deficiencies of form in this regard will be waived under Rule 10 (46 C.F.R. §502.10).

This interpretation is supported by the record established by the parties in support of the settlement agreement. The specific language of Sea-Land's offer stated that "Sea-Land Service, Inc. will be permitted to file individual rate actions in the Puerto Rican tariffs increase in the December 31, 1979 base rates to a level not to exceed 21% of the base rate through June 30, 1980 without any further requirement *of justifying those rates*, and that rate activity will not be subject to suspension or investigation by the Commision . . . ." (Emphasis added). Neither the offer, the factual stipulation arrived at with Hearing Counsel, nor the Joint Motion of the parties to the proceeding contains any reference to any Shipping Act and Intercoastal Shipping Act considerations other than the general revenue needs of the carrier.

Although Sea-Land *now* asserts that section 22 is sufficient to protect the interests of individual shippers no such position was advanced at the time of the making of the agreement.[8] Sea-Land did not indicate, and still has not indicated, exactly what rates it intends to implement and, accordingly, it does not appear that the parties agreed to individual rate items as part of the agreement.

Moreover, Sea-Land has admitted in its Petition that it did not contemplate that the Commission would be totally precluded from examining individual rate items. It admits that the Commission could investigate those items *sua sponte* under section 22 of the Shipping Act and that it could both investigate and suspend such items under section 3 of the Intercoastal Shipping Act if they were less than 15% over the December 31, 1979 base rates. These admissions and the absence of any evidence or indication supporting Sea-Land's restrictive interpretation of the language of the settlement offer on the matter of the Commission's suspension authority over the new rates mitigate in favor of the rejection of this position. The Commission's Order of March 17, 1980 reflects a reasonable and objective interpretation of the scope and applicability of the settlement agreement.

The second issue to be resolved here is whether the Commission's reservation of limited suspension authority over the individual rate items to be implemented as part of the agreement is within its statutory authority. The resolution of this issue depends on whether the rates to be implemented under the settlement agreement are viewed as "new rates" within the meaning of section 3 of the Intercoastal Shipping Act or whether they are included in the rates filed by Sea-Land in its original rate fllings in this proceeding.

It is clear that under no circumstances will the rates to be implemented be the same as those originally filed by Sea-Land in this proceeding. They *all* will be different rates. Unless a clear contrary intent is shown in the legislative history of a statute, the term "new rates" must be given a literal interpretation. *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643-646 (1978). No such contrary intent has been shown by the parties and a review of the legislative history of the statutes reveals none. It appears, therefore, that such rates are "new rates" under the meaning of the statute and the Commission retains full

[8] If Sea-Land's assertions in this regard are construed as an argument that, as a matter of law, the Commission's suspension powers may not be used to protect the interests of individual shippers, such an argument has no merit. *See Intercoastal Cancellations and Restrictions*, 2 U.S.M.C. 397 (1940).

statutory authority over them, subject to whatever limitations result from its approval of the settlement agreement.

That the rates to be filed are part of an agreement between the litigating parties does not alter the status of these filings. The Commission has merely exercised implied powers under its rate regulation authority by conditionally approving a proposed new rate filing by the carrier which in essence replaces the originally proposed rate increase. A limited and conditional withholding of rate suspension power based upon the carrier's representations as to the particular need for the revenues derived from a rate increase has been held to be a reasonable, legitimate and direct adjunct to the statutory power to suspend and prescribe rates. *United States v. Chesapeake & Ohio R. Co.*, 426 U.S. 500, 514–515 (1976). While such a conditional approval of revenue needs may have induced Sea-Land to settle for a 21% increase in lieu of its originally proposed 25% increase, the approval was limited to the undertakings and concessions contemplated by the settlement agreement. The blanket approval of an undefined future rate structure was not contemplated by the agreement or granted by the Commission. In any event, neither the fact that the rates to be filed are the product of a negotiated settlement of a prior contested general rate increase nor the fact that the Commission will not suspend or investigate them on the sole issue of Sea-Land's general revenue requirements changes their essential nature as "new rates." Sea-Land's argument to the contrary is therefore, rejected.

The final point raised by Sea-Land in its Petition goes to the mechanics of the implementation of the settlement agreement. The Commission's Order of March 17 did not specifically address this matter other than allowing a shortened time period for filing the new Virgin Islands rates and stating that the suspension of 10% of the Puerto Rico rate increases would not be lifted until the filing of new rates in those trades. Sea-Land has indicated that in addition to adhering to these procedures it will substitute its original tariffs imposing a 25% general rate increase with ones reflecting a 15% general rate increase and an additional 10% increase suspended through June 28, 1980. It will then file individual rate items not to exceed 21% over the base rates of December 31, 1979 on not less than 30 days notice and inform the Commission's staff by transmittal letter which individual rate changes are being made pursuant to the settlement agreement, it being contemplated that other rate changes will occur outside of the agreement by June 28, 1980.

The Commission's Order of March 17, 1980 did not include a requirement that the carrier *file* reduced rates by June 28, 1980. The language is permissive and if the carrier fails to file reduced individual rate items by June 28, 1980, the expiration date of the suspension period, the original 25% rate increase becomes effective on those items for which a substitute rate has not been filed. Sea-Land's offer to file a 15% general rate increase as an intermediate step in the process would solve this problem if the tariffs do *not* provide that the remaining 10% will become effective on June 28, 1980.

The procedures suggested by Sea-Land are acceptable to the Commission. However, Sea-Land will be permitted only one rate change per tariff item by June 28, 1980 under the settlement procedures and any subsequent item

changes are deemed not to fall within the terms of the agreement.

THEREFORE, IT IS ORDERED, That the second ordering paragraph of the Order Approving Offer of Settlement, issued March 17, 1980, is amended to read as follows:

"IT IS FURTHER ORDERED, That Sea-Land Service, Inc. file tariff amendments incorporating a 15% general rate increase over the base rates effective December 31, 1979 in tariffs FMC-F Nos. 34, 36, 37, 40, 41 and 53 and cancelling the proposed 25% general rate increase applicable to those tariffs made subject to suspension and investigation in this proceeding, and,"

and

IT IS FURTHER ORDERED, That the language "by one amendment to each individual rate item," is inserted after the word "rates" on line four of the third ordering paragraph of the Order Approving Offer of Settlement, issued March 17, 1980, and

IT IS FURTHER ORDERED, That the Petition for Clarification of Sea-Land Service, Inc., is granted to the extent indicated above and denied in all other respects.

By the Commision.*

(S) FRANCIS C. HURNEY
Secretary

* Commissioner Peter N. Teige did not participate in this proceeding.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 750(I)

GENERAL ELECTRIC DE COLOMBIA, S.A.

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

PARTIAL ADOPTION OF DECISION OF SETTLEMENT OFFICER

May 12, 1980

In the above-captioned proceeding, Settlement Officer Edgar T. Cole awarded reparation without interest to General Electric de Colombia, S.A. for violation by Flota Mercante Grancolombiana, S.A. of Section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817(b)(3)).

In cases involving the misrating of cargo and arising under section 18(b)(3), the Commission has determined to grant interest on awards of reparation, calculated at the rate of 12 percent, and accruing from the date of payment of freight charges. *Interpur, A Division of Dart Industries, Inc. v. Barber Blue Sea Line*, 19 S.R.R. 1554, April 8, 1980. This policy shall be applied here.

THEREFORE, IT IS ORDERED, That the decision of the Settlement Officer is adopted except as indicated; and

IT IS FURTHER ORDERED, That Flota Mercante Grancolombiana, S.A. pay to General Electric de Colombia, S.A. 12 percent interest on the award of reparation, accruing from the date of payment of freight charges; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 750(I)

GENERAL ELECTRIC DE COLOMBIA, S.A.

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

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

Partially Adopted May 12, 1980

This complaint was filed with the Commission on November 20, 1979, by Traffic Service Bureau, Inc., Agent for General Electric de Colombia, S.A., located in Bogota, Colombia, hereinafter referred to as complainant, an importer and exporter of electric lamps and parts. Complainant alleges that Flota Mercante Grancolombiana, S.A. (Grancolombiana) assessed charges in excess of those lawfully applicable for the transportation of a shipment of parts necessary for electric lamp bulbs from New York to Barranquilla, Colombian aboard the vessel *Ciudad de Armenia*, bill of lading Z-25, dated February 15, 1979.

The record indicates that the carrier applied a rate of $114.50 W/M based on the commodity description published in Item 510 found in the East Coast Colombia Conference Freight Tariff S.B. ECC8, FMC-1, resulting in total freight charges of $3194.70. Reparation in the amount of $91.97 is sought by complainant based on the tariff description of Bases, incandescent lamp, resulting in the application of a class rate of $90.75 W/M. The application of this rate results in total freight charges of $2602.73.

Claimant maintains that a claim for overcharge was submitted to the carrier well within the six month time limitation, as prescribed by Rule 20 published in the tariff, but was turned down on that basis. A review of the foregoing rule reveals that there is a six month time limitation, however a further reading of the rule provides that:

Adjustment of freight based on alleged error in weight, measurement, or description will be declined unless application is submitted in writing sufficiently in advance to permit reweighing,

[1] Both parties having consented to the informal procedure of 46 C.F.R. §502.301-304 (as amended), this decision will be final unless the Commission elects to review it within 30 days from the date of service thereof.

remeasuring, or verification of description, before the cargo leaves the carrier's possession . . . . (underscoring supplied)

Contact with claimant indicates that claim was filed April 16, 1979, approximately two months after possession of the cargo had taken place and had left the custody of the carrier. Therefore, claim does not appear to have been denied on the basis that claim was filed after six months as claimant suggests, but on the fact that the cargo had left the possession of the carrier before they could verify the misdescription.

The test the Commission applies on claims of reparation involving alleged error of a commodity tariff classification is what the complainant can prove based on all the evidence as to what was actually shipped differed from the bill of lading description.[2] The complainant, however, has a heavy burden of proof once the shipment has left the custody of the carrier.[3]

The bill of lading describes the commodity as parts necessary for electric light bulbs. In addition, an invoice prepared by General Electric clearly states that the commodity is aluminum bases. The carrier has classified the commodity as Lamps or Lighting Fixtures: Incandescent Electric (Electric Light Bulbs, NOS.). It is the opinion of this Settlement Officer that the carrier has erred and that the commodity is in fact a part for lighting fixtures, i.e., aluminum bases. The carrier incorrectly applied the rate applicable to lighting fixtures, incandescent electric.

The complainant in the instant case has satisfied the required burden of proof as to the actual commodity shipped. Therefore, reparation in the amount of $591.97 is awarded to General Electric De Colombia, S.A., based on the following computation:

997 cu. ft.=24.925	
24.925×$90.75	$2261.94
Container	174.48
H/C Container Discharge	52.40
Port Charge	113.91
Total	$2602.73
Amount assessed by carrier	$3194.70
Correct Charges	2602.73
Difference	$ 591.97

Upon evidence of payment of the amount awarded, this record will be complete.

(S) EDGAR T. COLE
Settlement Officer

[2] *Western Publishing Company v. Hapag Lloyd A.G.*, Docket No. 283(I), May 4, 1972. 13 SRR 16 (1972).

[3] *Colgate Palmolive Co. v. United Fruit Co.*, Docket No. 115(I), September 30, 1970. 11 SRR 979 (1970).

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-14

IN THE MATTER OF COMPENSATION OF
INDEPENDENT OCEAN FREIGHT FORWARDERS

ORDER DENYING PETITION FOR DECLARATORY ORDER

May 13, 1980

On January 29, 1980, Kuehne & Nagel, Inc. (K&N), a licensed independent ocean freight forwarder, petitioned the Commission to issue a declaratory order finding the following:

1. Receipt of payment from an ocean common carrier by an independent ocean freight forwarder at a rate different from that published in that carrier's tariff does not violate any section of the Shipping Act or the Commission's regulations, or reflect adversely upon the forwarder's "fitness" under section 44 of the Act.
2. Receipt of payment from an ocean common carrier by an independent ocean freight forwarder at a rate different from that published in the carrier's tariff does not, in itself, give rise to an agreement required to be filed under section 15 of the Shipping Act.
3. Receipt of payment in any amount from an ocean common carrier by a person who is not an independent ocean freight forwarder, which payment or payments are solely for the securing or booking of cargo and not for any services connected with the dispatching or forwarding of cargo is not payment for "carrying on the business of forwarding" as defined in section 1 of the Shipping Act, and does not violate any section of that Act; nor does any such payment give rise to an agreement which must be filed for approval under section 15 of the Act.

The Commission's Bureau of Hearing Counsel filed a Reply opposing K&N's Petition for Declaratory Order. Specifically, Hearing Counsel maintains that the Petition should be denied because it: (1) does not conform to either the letter or spirit of Rule 68 of the Commission's Rules and Regulations (46 C.F.R. §502.68) or the Administrative Procedure Act (APA); and, (2) raises issues presently pending in another Commission proceeding—Docket No. 80-20, *Kuehne & Nagel, Inc.—Independent Ocean Freight Forwarder*

License No. 1162, Order of Investigation and Hearing served April 3, 1980.

Because K&N's Petition allegedly raises three "abstract" issues based upon eight hypothetical situations, Hearing Counsel argues that this matter is not the proper subject of a declaratory order. In this regard, Hearing Counsel cites *Ashcroft v. Mattis*, 431 U.S. 171, 172, *rehearing denied*, 433 U.S. 915 (1977), where it was held that:

> For a declaratory judgment to issue, there must be a dispute which "calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right *upon established* facts." (Emphasis added).

Hearing Counsel further points out that the Commission in determining whether to exercise its discretionary authority to issue a declaratory order should consider whether an actual controversy has been presented—"whether the facts alleged, under all circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Hearing Counsel notes that these criteria have been codified by Rule 68 of the Commission's Rules of Practice and Procedure (46 C.F.R. §502.68), which directs that declaratory order petitions include, among other things:

> (a) [a] complete statement of the facts and grounds prompting the petition, together with full disclosure of petitioner's interest . . .
>
> * * *
>
> (c) Petitions under this section shall be accompanied by the complete factual and legal presentation of petitioner . . ."

It is Hearing Counsel's position that K&N's Petition does not present facts, as required by the APA and Commission Rule 68, upon which a declaratory order could be issued.

Hearing Counsel further argues that the issues raised by K&N are pending before the Commission in Docket No. 80-20, *Kuehne & Nagel, Inc.—Independent Ocean Freight Forwarder License No. 1162*, Order of Investigation and Hearing served April 3, 1980. Accordingly, Hearing Counsel concludes that the Commission should deny K&N's request for a declaratory order and allow the issues raised to be resolved in the evidentiary hearing to be held in connection with Docket No. 80-20.

We find Hearing Counsel's arguments convincing and accordingly deny K&N's Petition. K&N's Petition is of a hypothetical nature and therefore appears not to comply with the requirements of Commission Rule 68. In any event, all of the issues raised by the K&N's petition are currently under investigation in the specific context of Docket No. 80-20. It would be premature to resolve those issues at this time.* They will more properly be disposed of in the adjudicatory proceeding now pending before the Commission.

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* This is in keeping with the Commission's general policy enunciated in *Petition for Declaratory Order of Seatrain International, S.A.*, *18 S.R.R. 805, 806 (1978)*, that:

> It is generally inappropriate . . . for the Commission to "terminate" a controversy in a pending adjudicatory proceeding by independently issuing a declaratory order.

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order of Kuehne & Nagel, Inc., Claus D. Schuster and Peter Till is denied.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 593(I)

IDEAL TOY CORPORATION

v.

ATLANTIC CONTAINER LINE

ADOPTION OF DECISION OF SETTLEMENT OFFICER

May 14, 1980

This proceeding is before the Commission upon its determination to review the decision of the Settlement Officer, denying reparation. Complainant had alleged that a shipment of Used Molds, which the carrier rated as Electrical Machinery, N.E.S., should have been rated as Plastic Working Machinery.

Upon careful review of the record, the Commission concludes that the Settlement Officer's denial of reparation was correct. Complainant offered no evidence establishing the nature of the commodity, or supporting its contention that the commodity was misrated. Complainant's failure to meet its burden of proof, therefore, requires that reparation be denied.

THEREFORE, IT IS ORDERED, That the Decision of the Settlement Officer is affirmed; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 593(I)

IDEAL TOY CORPORATION

v.

ATLANTIC CONTAINER LINE

DECISION OF FRANK L. BARTAK, SETTLEMENT OFFICER[1]: REPARATION DENIED

Adopted May 14, 1980

By complaint filed October 5, 1978, Ideal Toy Corporation (Ideal) seeks $174.29 as reparation plus 6% interest from Atlantic Container Line (ACL) claiming a freight overcharge on a shipment from New York, New York to London, England on the *Atlantic Cognac*. The shipment consisted of 11 cases of Used Molds weighting 9,465 pounds (34 cubic feet) and 3 pallets and 5 cartons of Toy and Game Parts weighting 4,089 pounds (118 cubic feet). The shipment moved on ACL's Bill of Lading A67056 dated May 28, 1977.

Ideal, through its agent, Traffic Service Bureau, Inc., does not dispute the charges with respect to the Game and Toy Parts. Ideal does dispute the charges with respect to the 11 cases of Used Molds which were rated as Electrical Machinery, N.E.S. per item 720.0001 at a rate of $163.50 per ton as contained in the North Atlantic United Kingdom Freight Conference Tariff No. (48) FMC-3. Ideal claims that the Used Molds should have been rated as Plastic Working Machinery, Item 719.8005, at a rate of $122.25 per ton of the same tariff.

Consequently, Ideal claims an alleged overcharge of freight in the amount of $174.29.[2]

ACL initially denied Ideal's claim in accordance with Rule 22 of the North Atlantic United Kingdom Freight Conference Tariff, which provides that all

[1] The parties have consented to the informal procedure of 46 C.F.R. § 502.301-304 (as amended). This decision will be final unless the Commission elects to review it within 30 days from the date of service hereof.

[2] $163.50 × 4.225 (tons or 9,465 pounds)=$690.79
$122.25 × 4.225 (tons or 9,465 pounds)=$516.50
Amount Claimed $174.29

claims (other than those based on errors in weight or measurement) for adjustment of freight charges must be presented to the carrier in writing within 6 months after date of shipment. Subsequently, ACL denied the claim on the grounds that the documents submitted by Ideal do not verify that the Used Molds were Plastic Working Machinery and parts thereof.[3]

In support of its claim Ideal submitted copies of some invoices covering the shipment on the *Atlantic Cognac* which contain the following descriptions:

1. E.K. Van—Used Roof Mold.
2. E.K. Van—Used Windshield Mold.
3. E.K. Van—Used Wheel Mold.
4. E.K. Van—Used Chassis Mold.
5. Beat 8 Ball—Used Funnel Mold.
6. Jaws—Used Teeth Mold.
7. E/K Cycle—Used Left/Right Cylinder Mold.
8. Jaws—Used Access. Mold.

Ideal and ACL were invited to submit additional information in support of, or in defense of, the claim herein. Neither accepted the opportunity.

Under section 22 of the Shipping Act, 1916, a complaint may be filed within 2 years after the cause of action accrued. It is well established that a conference rule cannot bar recovery of a meritorious overcharge claim filed with the Commission within 2 years of its accrual. See *Union Carbide Inter-America, Inc. v. Venezuelan Line (Compania Anonima Venezolana de Navegacion)*, 19 F.M.C. 97 (1976) and *Polychrome Corp. v. Hamburg-America Line—North German Lloyd*, 15 F.M.C. 220 (1972).

While complainant's recovery may not be barred by a 6-month time limitation, the Commission has held that where the shipment has left the custody of the carrier, a complainant has a heavy burden of proof to establish the validity of his claim. *Kraft Foods v. Moore McCormack Lines, Inc.*, 19 F.M.C. 407 (1976); *Western Publishing Co., Inc. v. Hapag Lloyd A.G.*, 13 SRR 16 (1972).

This Settlement Officer finds it difficult to understand why complainant has not accepted the opportunity to submit additional evidence in support of its claim herein, particularly in light of the denial of reparation in Informal Docket No. 607(I),[4] concerning its similar claim denied for failure to meet its burden of proof.

Although offered the opportunity to do so, Ideal has not established that the Used Molds should have been rated Plastic Working Machinery. Ideal has

[3] By letter dated November 9, 1978, addressed to the Settlement Officer, ACL stated in part as follows:

> We wish to point out that at the time of shipment all documents submitted to us by the Ideal Toy Corporation stated 'Used Molds and Fixtures'. This description is much too vague to pinpoint the actual commodity and does not necessarily mean that these molds are as stated Plastic Working Machines.
>
> We understand the molds are used in machinery. Since there was nothing to tie it down to Plastic Working Machines, the rate for Machinery NES was applied. These molds could be used in Rubber, Metal or Glass Making Machinery.

[4] *Ideal Toy Corporation v. Atlantic Container Line*, Decision served July 16, 1979, and Supplemental Decision on remand, served December 21, 1979.

failed to meet the heavy burden of proof required of a claimant once the shipment has left the carriers' custody.

Accordingly, reparation is denied.

(S) FRANK L. BARTAK
Settlement Officer

March 10 1980

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

[DOCKET NO. 79-51; GENERAL ORDER 45]

PART 547—PROCEDURES FOR ENVIRONMENTAL POLICY ANALYSIS

May 14, 1980

ACTION: Final Rules

SUMMARY: The Federal Maritime Commission is hereby issuing final rules to provide procedures for implementing the National Environmental Policy Act of 1969, 42 U.S.C. §4321 *et seq.*, in compliance with the regulations of the Council on Environmental Quality. These procedures apply to all Commission actions, though for certain specified actions no environmental analysis will normally occur.

DATES: Effective May 21, 1980

SUPPLEMENTARY INFORMATION:

This proceeding was initiated by Notice of Proposed Rulemaking published May 18, 1979, in the *Federal Register* (44 *Fed. Reg.* 29122-29126). The Federal Maritime Commission (Commission) proposed to establish procedures implementing the National Environmental Policy Act of 1969 (NEPA) as it applies to the Commission's regulatory framework.

Comments were received from or on behalf of: (1) Pacific Coast European Conference (PCEC); (2) Tampa Port Authority (Tampa); (3) Pacific Westbound Conference, Pacific-Straits Conference, Pacific/Indonesian Conference and Pacific Cruise Conference (Pacific Conferences); (4) United States Lines, Inc. (USL); (5) Philippines North America Conference, Straits/New York Conference, Trans-Pacific Freight Conference of Japan/Korea, Japan/Korea-Atlantic & Gulf Freight Conference, Agreement No. 10107 and Agreement No. 10108 (PNAC); (6) a group of eleven conferences and rate agree-

ments (AEUSC);[1] and (7) Stephen J. Buckley.[2] Subsequent to receipt of comments, the Commission's staff prepared a proposed final rule which was submitted to the Council on Environmental Quality (CEQ) for its review pursuant to 40 C.F.R. §1507.3(a). After conducting its review, CEQ sent comments and recommended changes to the Commission. All comments to the proposed rules raising substantive issues and the resultant revisions in these rules are discussed below. Those comments not specifically discussed have nonetheless been thoroughly reviewed and considered by the Commission.

1. *Section 547.1—Purpose and Scope*. PCEC suggests that the scope of these rules be narrowed to "all major non-adjudicatory actions of the Federal Maritime Commission significantly affecting the quality of the human environment." Such a revision is unnecessary. NEPA applies to *all* federal actions. However, because of the nature of certain federal actions, the specific action-forcing requirements of NEPA are often inapplicable. These rules have been drafted with this distinction in mind. Though they apply to all actions of the Commission, their various procedural requirements may not be applicable for a variety of reasons (*e.g.*, the actions are categorically excluded or will not have a significant effect upon the human environment).

2. *Section 547.2—Organization*. Because it is apparent throughout these rules that the Commission's Office of Environmental Analysis will administer the majority of the activities to be performed under this Part, this informational section has been deleted from the final rule. As a result, the remaining sections have been renumbered.

3. *Section 457.3—Definitions*. Both PCEC and Mr. Buckley question the term "potential action". PCEC contends that it is unnecessary and expands the Commission's regulations beyond statutory and regulatory requirements. While it may be true that the Commission need not commence its environmental assessment process until there is a proposed action, it is by no means clear that an agency cannot commence this process earlier. For certain Commission actions, most notably investigations and adjudications, the Commission's proposed action will not occur before the issuance of its report. *See Aberdeen & Rockfish R.R. Co. v. SCRAP*, 422 U.S. 289, 320–21 (1975). It would be impractical to defer the assessment process to this particular stage of activity. The use of "potential action" permits the Commission to assess its environmental responsibilities and prepare necessary environmental documents at a more reasonable pace.

4. *Section 547.5—Categorical Exclusions*. Initially, AEUSC contends that these rules should be specifically limited to actions affecting the environment

[1] Australia-Eastern U.S.A. Shipping Conference; Greece/United States Atlantic Rate Agreement; Iberian/U.S. North Atlantic Westbound Freight Conference; Marseilles/North Atlantic U.S.A. Freight Conference; Med-Gulf Conference; Mediterranean North Pacific Coast Freight 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 the West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference.

[2] In addition, by letter dated September 20, 1979, the Advisory Council on Historic Preservation noted that there were no provisions in the rules which ensure compliance with the National Historic Preservation Act (16 U.S.C. §470 *et seq.*). The Commission has reviewed this statute and concludes that it has no applicability to the Commission's proceedings. There is no need, therefore, to include provisions concerning the National Historic Preservation Act in these rules.

of the United States. This position appears to be contrary to the policy enumerated in Executive Order 12144 (44 *Fed. Reg.* 1957, January 9, 1979) that, for certain federal actions, agencies should take into consideration the environment outside the United States, its territories and possessions. The Commission has concluded that of the four classes of actions mentioned in this Executive Order, only the first, actions significantly affecting the environment of the global commons outside the jurisdiction of any nation, could potentially apply to its various requlatory activities. Consequently, the Commission has revised proposed sections 547.7(a) and 547.8(a)(4) to indicate that a finding of no significant impact and an environmental impact statement (EIS) will consider the potential impact on the environment of the United States and, in appropriate cases, the environment of the global commons.

Several parties have commented on the scope of the categorical exclusions, suggesting revisions of those already proposed and the inclusion of others. PNAC would extend the scope of proposed subsection 547.5(a)(11)— excluding the receipt of non-exclusive transshipment agreements—to actions involving requests for section 15 approval of exclusive transshipment agreements. They contend that even though exclusive transshipment agreements continue to require section 15 approval, they would have no more environmental impact than would non-exclusive transshipment agreements. However, regardless of the environmental effects of a non-exclusive transshipment agreement, the Commission lacks the ability to alter it. The Commission merely receives non-exclusive transshipment agreements for informational purposes, hardly a "federal action" for purposes of NEPA. *See* 46 C.F.R. Part 524. On the other hand, exclusive transshipment agreements must be submitted for Commission approval pursuant to section 15 of the Shipping Act, and this type of federal action could permit the Commission to consider the environmental effects of such agreements in appropriate cases. The Commission will, therefore, continue categorically to exclude only non-exclusive transshipment agreements from its NEPA rules (section 547.4(a)(13)).

PCEC and PNAC question proposed subsection 547.5(a)(8), which excludes amendments to section 15 agreements which neither increase nor diminish the originally granted authority. PCEC would alter this exclusion to apply to *all* amendments to section 15 agreements. Its only justification is that the present language "poses serious definitional difficulties" The Commission cannot accept such a substantial enlargement of the scope of this exclusion. Our intent was to limit the scope of the exclusion to only those amendments which would not normally have significant environmental effects.

PNAC expressed concern that amendments submitted for the sole purpose of extending the life of an agreement beyond its expiration date might be considered an "increase" in the authority originally granted and therefore not within this particular exclusion. Under certain circumstances such an amendment might be an "increase" in the authority originally granted. The Commission, therefore, finds no reason for restating this subsection and will interpret it accordingly.

The Pacific Conferences contend that it is unfair to exempt actions concerning the rates and practices of controlled carriers (proposed section

547.5(a)(15)) while not similarly exempting the rates and practices of all other carriers or conferences in the foreign commerce of the United States. They additionally claim that NEPA applies only where a federal agency has significant discretionary powers and that the Commission's rate authority in foreign commerce is strictly confined by statutory and decisional criteria. The latter contention is unconvincing. Our public laws must be interpreted and administered in accordance with NEPA's policies (42 U.S.C. §4332), and it may well be appropriate for the Commission to consider environmental factors in making determinations pursuant to its rate statutes, even though pre-NEPA precedent does not mention such criteria. Moreover, the Commission does not believe it is unfair to exempt only the rates and practices of controlled carriers. The Ocean Shipping Act of 1978, P.L. 95-483, 92 Stat. 1607, which amends sections 1 and 18 of the Shipping Act, 1916 (46 U.S.C. §§801, 817) is a relatively recent statute. The Commission has yet to acquire any substantial experience in administering it, but there are early indications that such actions will most likely not have significant environmental impacts. Should the Commission's experience prove otherwise, this exemption will be reconsidered. Until such time, environmental consideration is still possible in such matters under sections 547.4(b) or (c).

The Pacific Conferences contend that adversary adjudications before the Commission should be exempted from NEPA. They cite judicial authority for the proposition that some federal actions are exempt from NEPA because of their unique circumstances, even though there is no express exemption in the Act. They also refer to a 1975 CEQ memorandum which concluded that NEPA should not apply to Federal Trade Commission adjudicatory proceedings. They further note that CEQ's regulations exempt the "bringing of civil or criminal enforcement actions". 46 C.F.R. §1508.18(a).

There has yet to be a clear judicial pronouncement that NEPA does not apply to an agency's adjudicatory proceedings. Moreover, the CEQ memorandum relied upon by the Conferences has subsequently been renounced by CEQ. CEQ clearly indicates that it interprets NEPA as applying to *all* federal actions, including adjudications. Moreover, it appears that the conferences may have overlooked or misinterpreted the scope and effect of proposed section 547.5(a)(20) which exempts:

> Investigatory and adjudicatory proceedings pursuant to the Shipping Act, 1916, and the Merchant Marine Act of 1920, or portions thereof, the purpose of which is to ascertain past violations of these Acts.

This particular exclusion (now section 547.4(a)(22)) should alleviate most of their concerns. No further exemption for adjudicatory proceedings is warranted at this time.

AEUSC suggests that consideration of special permission applications should be expressly exempted from environmental assessment. The Commission agrees, and has therefore included such an exemption in its final rule (section 547.4(a)(6)). The Commission further agrees that many of the types of section 15 agreements listed in AEUSC's proposed subsection 547.5(a)(30)(a)-(s) will not individually or cumulatively have a significant effect on the quality of the human environment. Section 547.4(a)(10) of this

final rule consequently excludes those types of section 15 agreements which solely regulate intra-conference or intra-rate-agreement relationships or pertain to administrative matters of conferences or rate agreements. The remainder of the categorical exclusions proferred by AEUSC are rejected. Proposed subsection 547.5(a)(28), exempting activities in or under the jurisdiction of a nation other than the United States, is unnecessary in light of our revisions contained in sections 547.6(a) and 547.7(a)(4). AEUSC's proposed subsection 31 would effectively exempt every section 15 agreement except for those which would normally require the preparation of an EIS. The Commission has chosen a different approach—that of identifying, based upon its experience, those agreements which should be specifically excluded.

PCEC states that a Commission decision categorically to exclude a particular action should be final and not subject to reinclusion. It would, accordingly, delete proposed sections 547.5(b) and (c), which contain procedures for considering the environmental effects of what was otherwise an excluded action. The Commission rejects such a rigid approach in light of the requirement that it "[p]rovide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." 40 C.F.R. §1508.4. These subsections meet this requirement. The Commission likewise rejects PNAC's revision of proposed section 547.5(b) to permit challenges to exclusions "only in unusual and extraordinary circumstances" and only after a specific referral order from the Commission to OEA. We do not believe that the procedure now set forth in subsection 547.4(b) will result in any significant delay in Commission actions, especially since the OEA must review submissions challenging a categorical exclusion within 30 days.

5. *Section 547.6—Environmental Assessments.* USL suggests that in all cases the Commission should publish a notice of intent to prepare an environmental assessment in the *Federal Register*. PCEC suggest clarification of proposed section 547.6(b) to explain the "appropriate cases" in which notice of intent may be published and also suggest the addition of a subsection (c) to provide a timetable for completion of an environmental assessment by the OEA. The nature of the action will determine the time required to prepare an assessment and does not lend itself to setting a fixed timetable for all cases. There is no requirement that notice be given prior to the preparation of an envronmental assessment. As presently worded, section 547.5(b) provides the OEA with the discretion to publish notice in those cases where it deems it useful. In all other cases, decisions on the significance of an action's environmental impact can be reached more expeditiously without notice and comment.

6. *Section 547.7—Finding of No Significant Impact.* The Commission has made several changes in this section (now section 547.6) in response to various comments. First, it has clarified the fact that it is only concerned with impacts on the quality of the human environment of the United States or of the global commons. Once a finding of no significant impact is prepared, the OEA will publish notice of its availability in the *Federal Register*. This will be the only such notice to the general public. If petitions for review of a finding of no significant impact are filed, the Commission will serve notice of its decision on all parties who filed comments concerning the action (assuming there was a

prior notice of intent to prepare an assessment) or who filed petitions for review. There is no need for the Commission to "adopt" a finding of no significant impact. PCEC's recommendation of a 30-day period for review of petitions for review has been partially adopted. The Commission will now decide such petitions within 45 days of their receipt.

7. *Section 547.8—Environmental Impact Statement.* (a) *General*. The Commission has deleted subsection (1) (ii) because of its decision to delete proposed section 547.9. Subsection (3) has been amended to reflect the fact that, in certain cases, the issuance of an initial decision by an Administrative Law Judge may be a major decision point in the EIS process. Subsection (4) clarifies that EIS's shall consider impacts only on the environment of the United States and the global commons outside the jurisdiction of any nation.

(b) *Draft Environmental Impact Statements*. The Pacific Conferences note that the proposed rules provide a maximum of 60 days within which to comment on a DEIS. They suggest that the words "for up to 15 days" be deleted from proposed section 547.8(b)(3) so that extensions based upon good cause are open-ended. Though a maximum of 60 days within which to comment on a DEIS is indeed rigid, it is not unreasonable. This is all the more true when these new procedures are in effect, since the OEA will be preparing DEIS's more expeditiously and their length will likely be reduced.

USL submits that proposed section 547.8(b)(3) unnecessarily limits the scope of comments concerning a DEIS to its adequacy or the merits of the alternatives discussed in it. The Commission did not intend to limit comments in this manner and has accordingly revised this section (now section 547.7(b)(3)).

(c) *Final Environmental Impact Statements*. Sections 547.8(c)(2) through (5) of the proposed rules set forth a procedure for utilization of a completed FEIS which will apply to all Commission proceedings. The Commission noted, however, that it was also considering an alternative procedure which would require the consideration of FEIS's in formal administrative hearings. USL and PNAC support the former proposal. The Pacific Conferences and CEQ support some variation of the latter. The Pacific Conferences object to the proposed procedure because: (1) the FEIS will not be sponsored by a witness subject to cross-examination; and (2) the findings which will be part of the record of decision may not necessarily be only those supported by regular evidentiary standards such as reliability and relevance. They contend that in an adversary administrative adjudication the right to an evidentiary hearing is provided by the Administrative Procedure Act (5 U.S.C. § 556(d)) and guaranteed by the due process clause of the Fifth Amendment. They consequently recommend an addition to proposed section 547.8(c)(3) or, in the alternative, support the hearing procedures provision which was included in the supplement to the proposed rules.

The Pacific Conferences also note that proposed section 547.8(c)(4) does not permit a party objecting to an ALJ's environmental finding of fact to take exceptions to the Commission prior to its ultimate decision. They contend that the exception procedure is available for other factual issues and should likewise pertain to environmental issues. They suggest, therefore, that proposed section

547.8(c)(4) be revised to allow any party, within 30 days after an ALJ certifies a finding of fact, to file a memorandum and brief excepting to any such finding.

CEQ supports a procedure whereby an FEIS would be placed before an ALJ for consideration prior to the preparation of an initial decision.

The procedure adopted by the Commission (section 547.7(c)(3) and (4)) meets CEQ's objections and also resolves some of the problems perceived by the Pacific Conferences. Under this procedure, the FEIS will be submitted to an ALJ for consideration of the environmental impacts and alternatives in preparing an initial decision, in those cases assigned to an ALJ for hearing. However, in all cases, a party may petition the Commission for an evidentiary hearing concerning an alleged substantial and material error of fact in the FEIS. In such instances the Commission has two options: (1) it can simply refer the petition to an ALJ for resolution, or (2) to the extent it grants the petition, it can determine those issues which are substantial and material and then refer them to a ALJ for a hearing and factual resolution.

8. *Section 547.9—Actions Normally Requiring an EIS*. CEQ's regulations state that agency procedures shall include specific criteria for and identification of those typical classes of action which normally do require environmental impact statements. 40 C.F.R. §1507.3(b)(2)(i). In an attempt to meet this requirement, the Commission set forth, in proposed section 547.9, four classes of actions which will ordinarily require the preparation of an EIS. Several commenters have questioned the general nature of these classes of action and the applicability of this requirement to the FMC's regulatory scheme. The Commission has reviewed this section in light of the comments received and concludes that it should be deleted in its entirety. The FMC regulates the conduct of the ocean shipping industry and does not administer programs and projects as do other federal agencies. It is not possible to identify with any reasonable degree of specificity typical classes of actions normally requiring an EIS. In fact, it has been the Commission's experience since 1969 that NEPA actually impacts on but a very few of its actions. Any such action will be identified during the environmental assessment process and will result in the preparation of an EIS if warranted. The broad and vague categories proposed in section 547.9 would be of little practical use.

9. *Section 547.11—Information Required by the Commission*. As an initial matter, this section has been redesignated section 547.9 and the reference to dual rate contract applications deleted. Various commenters have suggested that this section shifts what is primarily a Commission responsibility onto a private party. They also claim that it places an undue burden on parties whose activities may have no environmental impact and that failure to comply fully with this section could apparently have adverse effects on actions before the Commission. This section has been redrafted slightly to alleviate these concerns and to clarify its intended effect. The requirements of this section will only arise following a specific Commission request for such information and will not, therefore, apply in all instances. Parties who appear before the Commission seeking some sort of relief are often in a position to provide information that the Commission might otherwise have difficulty obtaining. As reworded, the type of information expected of those persons identified in subsection (a) should

not be unduly burdensome. Moreover, the Commission has emphasized that it expects persons to provide such information "only" to the fullest extent "possible". Individuals are urged to contact OEA for informal assistance prior to submitting any complaint, protest, petition, or section 15 application which requests Commission action as enumerated in this section. If the OEA uses any such information in the preparation of an environmental assessment or an EIS, it will independently assure its accuracy. The OEA will, of course, remain primarily responsible for the preparation of all necessary environmental documents.

10. *Section 547.12—Time Constraints for Final Administrative Action.* PNAC notes that the time constraints on final adminstrative actions by the Commission imposed by this section (since renumbered as 547.10) are mandatory and repose no discretion in the Commission. It suggests that these time constraints be observed only to the maximum extent practicable. These time periods are consistent with CEQ's directive. 40 C.F.R. § 1506.10(b)(1) and (2). The Commission has altered this section slightly to reflect that the prescribed periods may be reduced only with the approval of the Environmental Protection Agency for compelling reasons of national security (40 C.F.R. § 1506.10(d)) or when a statutory deadline is imposed on the Commission's action.

The Pacific Conferences maintain that many of the questions presented to the Commission cannot await the delays inherent in the environmental review process. They propose a new section which would permit the Commission to waive or suspend these rules to take emergency or interim action to avoid unwarranted hardship. Such an addition to these rules is unnecessary. Section 1506.11 of CEQ's regulations (which have been incorporated into these rules) sets forth the procedures applicable to emergency circumstances. In such instances CEQ will advise the Commission on appropriate emergency arrangements.

11. *Other Comments.* The Pacific Conferences have indicated some concern that these regulations be instituted in a prompt and orderly manner. These final rules will be effective upon publication in the *Federal Register* and will apply to all proceedings or actions commenced thereafter.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. § 553) and section 43 of the Shipping Act, 1916 (46 U.S.C. § 841(a)), Part 547 of Title 46, Code of Federal Regulations, is adopted.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

* Commissioner Peter N. Teige did not participate.

PART 547—PROCEDURES FOR ENVIRONMENTAL POLICY ANALYSIS

Sec.

AUTHORITY: Section 43 of the Shipping Act, 1916, 46 U.S.C. 841, Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(B).

Sec. 547.1 *Purpose and Scope*

(a) This Part implements the National Environmental Policy Act of 1969 (NEPA) and Executive Order 12114 and incorporates and complies with the Regulations of the Council on Environmental Quality (CEQ) (40 C.F.R. 1500 *et seq.*).

(b) This Part applies to all actions of the Federal Maritime Commission (Commission). To the extent possible, the Commission shall integrate the requirements of NEPA with its obligations under section 382(b) of the Energy Policy and Conservation Act of 1975, 42 U.S.C. 6362.

Sec. 547.2 *Definitions*

(a) "Shipping Act" means the Shipping Act, 1916, as amended, 46 U.S.C. 801 *et seq.*

(b) "Common Carrier by Water or Other Person Subject to the Act" means any common carrier by water as defined by section 1 of the Shipping Act, including a conference of such carriers, or any person not a common carrier by water carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

(c) "Environmental Impact" means any alteration of existing environmental conditions or creation of a new set of environmental conditions, adverse or beneficial, caused or induced by the action under consideration.

(d) "Potential Action" means the range of possible Commission actions that may result from a Commission proceeding in which the Commission has not yet formulated a proposal.

(e) "Proposed Action" means that stage of activity where the Commission has determined to take a particular course of action and the effects of that course of action can be meaningfully evaluated.

(f) "Environmental Assessment" means a concise document that serves to "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact" (40 C.F.R. 1508.9).

(g) "Recyclable" means any secondary material that can be used as a raw material in an industrial process in which it is transformed into a new product replacing the use of a depletable natural resource.

Sec. 547.3 *General Information*

(a) All comments submitted pursuant to this Part shall be addressed to the Secretary, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573.

(b) A list of Commission actions for which a finding of no significant impact has been made or for which an environmental impact statement is being prepared will be maintained by the Commission in the Office of the Secretary and will be available for public inspection.

(c) Information or status reports on environmental statements and other elements of the NEPA process can be obtained from the Office of Environmental Analysis, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573 (telephone [202] 523-5835).

Sec. 547.4 *Categorical Exclusions*

(a) No environmental analyses need be undertaken or environmental documents prepared in connection with actions which do not individually or cumulatively have a significant effect on the quality of the human environment because they neither increase nor decrease air, water or noise pollution; the use of fossil fuels, recyclables, or energy; or are purely ministerial actions. The following types of Commission actions are therefore excluded:

(1) Issuance, modification, denial and revocation of freight forwarder licenses, pursuant to section 44 of the Shipping Act;

(2) Certification of financial responsibility of passenger vessels pursuant to 46 C.F.R. Part 540;

(3) Certification of financial responsibility for water pollution cleanup pursuant to 46 C.F.R. Parts 542 and 543;

(4) Promulgation of procedural rules pursuant to 46 C.F.R. Part 502;

(5) Acceptance or rejection of tariff filings in foreign and domestic commerce;

(6) Consideration of special permission applications filed pursuant to 46 C.F.R. 531.18 and 536.15;

(7) Receipt of terminal tariffs pursuant to section 17 of the Shipping Act;

(8) Suspension of and/or decision to investigate tariff schedules pursuant to section 3 of the Intercoastal Shipping Act, 1933;

(9) Consideration of amendments to agreements filed pursuant to section 15 of the Shipping Act, which neither increase nor diminish the authority granted in the original approval of the section 15 agreement;

(10) Consideration of agreements between common carriers or other persons subject to the Shipping Act which solely affect intraconference or intra-rate agreement relationships or pertain to administrative matters of conferences or rate agreements;

(11) Consideration of agreements between common carriers or other persons subject to the Shipping Act, to discuss, propose or plan future action, the implementation of which requires filing a further agreement under section 15 of the Shipping Act;

(12) Consideration of equipment interchange, husbanding or wharfage agreements filed for section 15 approval;

(13) Receipt of non-exclusive transshipment agreements pursuant to 46 C.F.R. 524;

(14) Action relating to collective bargaining agreements;

(15) Action pursuant to section 18(c) of the Shipping Act, concerning the justness and reasonableness of controlled carriers' rates, charges, classifications, rules or regulations;

(16) Receipt of self-policing reports and shipper requests and complaints pursuant to 46 C.F.R. Parts 527 and 528;

(17) Receipt of finanacial reports prepared by common carriers by water in the domestic offshore trades pursuant to 46 C.F.R. Parts 511 and 512;

(18) Adjudication of small claims pursuant to 46 C.F.R. 502.301 *et seq.* and 46 C.F.R. 502.311 *et seq.*;

(19) Action taken on special docket applications pursuant to 46 C.F.R. 502.92;

(20) Consideration of matters related solely to the issue of Commission jurisdiction;

(21) Investigations conducted pursuant to 46 C.F.R. Part 513;

(22) Investigatory and adjudicatory proceedings pursuant to the Shipping Act or the Merchant Marine Act of 1920, or portions thereof, the purpose of which is to ascertain past violations of these Acts;

(23) Consideration of dual rate contract systems pursuant to section 14b of the Shipping Act;

(24) Action regarding access to public information pursuant to 46 C.F.R. Part 503;

(25) Action regarding receipt and retention of minutes of conference meetings pursuant to 46 C.F.R. Part 537;

(26) Administrative procurements (general supplies);

(27) Contracts for personal services;

(28) Personnel actions; and

(29) Requests for appropriations.

(b) If interested persons allege that a categorically excluded action will have a significant environmental effect (*e.g.*, increased or decreased air, water or noise pollution; use of recyclables; use of fossil fuels or energy) they shall, by written submission to the Commission's Office of Environmental Analysis

(OEA), explain in detail their reasons. The OEA shall review these submissions and determine, not later than 30 days after receipt, whether to prepare an environmental assessment. If the OEA determines not to prepare an environmental assessment, such persons may petition the Commission for review of the OEA's decision within 15 days of receipt of notice of such determination.

(c) If the OEA determines that the individual or cumulative effect of a particular action otherwise categorically excluded offers a reasonable potential of having a significant environmental impact, it shall prepare an environmental assessment pursuant to section 547.5 of this Part.

Sec. 547.5 *Environmental Assessments*

(a) Every Commission action not specifically excluded under section 547.4 of this Part shall be subject to an environmental assessment.

(b) The OEA may publish in the *Federal Register* a notice of intent to prepare an environmental assessment briefly describing the nature of the potential or proposed action and inviting written comments to aid in the preparation of the environmental assessment and early identification of the significant environmental issues. Such comments must be received by the Commission no later than 20 days from the date of publication of the notice in the *Federal Register.*

Sec. 547.6 *Finding of No Significant Impact*

(a) If upon completion of an environmental assessment the OEA determines that a potential or proposed action will not have a significant impact on the quality of the human environment of the United States or of the global commons, a finding of no significant impact shall be prepared and notice of its availability published in the *Federal Register.* This document shall include the environmental assessment or a summary of it, and shall briefly present the reasons why the potential or proposed action, not otherwise excluded under section 547.4 of this Part, will not have a significant effect on the human environment and why, therefore, an environmental impact statement (EIS) will not be prepared.

(b) Petitions for review of a finding of no significant impact must be received by the Commission within 20 days from the date of publication of the notice of its availability in the *Federal Register.* The Commission shall review the petitions and either deny them or order the OEA to prepare an EIS pursuant to section 547.7 of this Part. The Commission shall, within 45 days of receipt of the petition, serve copies of its order upon all parties who filed comments concerning the potential or proposed action or who filed petitions for review.

Sec. 547.7 *Environmental Impact Statements*

(a) *General.* (1) An EIS shall be prepared by the OEA when the environmental assessment indicates that a potential or proposed action may have a

significant impact upon the environment of the United States or the global commons.

(2) The EIS process will commence:

(i) For adjudicatory proceedings, when the Commission issues an order of investigation or a complaint is filed;

(ii) For rulemaking or legislative proposals, upon issuance of the proposal by the Commission; and

(iii) For other actions, the time the action is noticed in the *Federal Register.*

(3) The major decision points in the EIS process are: (i) the issuance of an initial decision in those cases assigned to be heard by an Administrative Law Judge (ALJ), and (ii) the issuance of the Commission's final decision or report on the action.

(4) The EIS shall consider potentially significant impacts upon the quality of the human environment of the United States and, in appropriate cases, upon the environment of the global commons outside the jurisdiction of any nation.

(b) *Draft Environmental Impact Statements*

(1) The OEA will initially prepare a draft environmental impact statement (DEIS) in accordance with 40 C.F.R. 1502.

(2) The DEIS shall be distributed to every party to a Commission proceeding for which it was prepared. There will be no fee charged to such parites. One copy per person will also be provided to interested persons at their request. The fee charged such persons shall be that provided in 46 C.F.R. 503.43.

(3) Comments on the DEIS must be received by the Commission within forty-five (45) days of the date the Environmental Protection Agency (EPA) publishes in the *Federal Register* notice that the DEIS was filed with it. Sixteen copies shall be submitted as provided in section 547.3(a) of this Part. Comments shall be as specific as possible and may address the adequacy of the DEIS or the merits of the alternatives discussed in it. All comments received will be made available to the public. Extensions of time for commenting on the DEIS may be granted by the Commission for up to 15 days if good cause is shown.

(c) *Final Environmental Impact Statements*

(1) After receipt of comments on the DEIS, the OEA will prepare a final environmental impact statement (FEIS) pursuant to 40 C.F.R. Part 1502, which shall include a discussion of the possible alternative actions to a potential or proposed action. The FEIS will be distributed in the same manner as specified in section 547.7(b)(2) of this Part.

(2) The FEIS shall be prepared prior to the Commission's final decision and shall be filed with the Secretary, Federal Maritime Commission. Upon filing, it shall become part of the administrative record.

(3) For any Commission action which has been assigned to an ALJ for evidentiary hearing:

(i) The FEIS shall be submitted prior to the close of the record, and

(ii) The ALJ shall consider the environmental impacts and alternatives contained in the FEIS in preparing the initial decision.

(4)(i) For all proposed Commission actions, any party may, by petition to the Commission within 20 days following EPA's notice in the *Federal Register,*

assert that the FEIS contains a substantial and material error of fact which can only be properly resolved by conducting an evidentiary hearing, and expressly request that such a hearing be held. Other parties may submit replies to the petition within 15 days of its receipt.

(ii) The Commission may delineate the issue(s) and refer them to an ALJ for expedited resolution or may elect to refer the petition to an ALJ for consideration.

(iii) The ALJ shall make findings of fact on the issue(s) and shall certify such findings to the Commission as a supplement to the FEIS. To the extent that such findings differ from the FEIS, it shall be modified by the supplement.

(iv) Discovery may be granted by the ALJ on a showing of good cause and, if granted, shall proceed on an expedited basis.

Sec. 547.8 *Record of Decision*

The Commission shall consider each alternative described in the FEIS in its decisionmaking and review process. At the time of its final report or order, the Commission shall prepare a record of decision pursuant to 40 C.F.R. 1505.2.

Sec. 547.9 *Information Required by the Commission*

(a) Upon request of OEA, a person filing a complaint, protest, petition or section 15 application requesting Commission action that will:

(1) Alter cargo routing patterns between ports or change modes of transportation;

(2) Change rates or services for recyclables;

(3) Change the type, capacity or number of vessels employed in a specific trade; or

(4) Alter terminal or port facilities;

shall submit to OEA, no later than 25 days from the date of the request, a statement setting forth, in detail, the impact of the requested Commission action on the quality of the human environment.

(b) The statement submitted shall, to the fullest extent possible, include:

(1) The probable impact of the requested Commission action on the environment (*e.g.,* the use of energy or natural resources, the effect on air, noise, or water pollution) compared to the environmental impact created by existing uses in the area affected by it;

(2) Any adverse environmental effects which cannot be avoided if the Commission were to take or adopt the requested action; and

(3) Any alternatives to the requested Commission action.

If environmental impacts, either adverse or beneficial, are alleged, they should be sufficiently identified and quantified to permit meaningful review. Individuals may contact the OEA for informal assistance in preparing this statement. The OEA shall independently evaluate the information submitted and shall be responsible for assuring its accuracy if used by it in the preparation of an environmental assessment or EIS.

(c) In all cases, the OEA may request every common carrier by water, or other person subject to the Act, or any officer, agent or employee thereof, as well as all parties to proceedings before the Commission, to submit, within 25 days of such request, all material information necessary to comply with NEPA and this Part. Information not produced in response to an informal request may be obtained by the Commission pursuant to section 21 of the Shipping Act.

Sec. 547.10 *Time Constraints on Final Administrative Actions*

No decision on a proposed action shall be made or recorded by the Commission until the later of the following dates unless reduced pursuant to 40 C.F.R. 1506.10(d), or unless required by a statutorily prescribed deadline on the Commission action:

(a) Ninety (90) days after EPA's publication of the notice described in section 547.7(b) of this Part for a DEIS; or

(b) Thirty (30) days after publication of EPA's notice for an FEIS.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-75

INTERPOOL, LTD., ITEL CORPORATION (CONTAINER DIVISION), TRANS OCEAN LEASING CORPORATION

v.

PACIFIC WESTBOUND CONFERENCE, FAR EAST CONFERENCE, AND MEMBER LINES

Dismissal of proceeding is justified under 46 C.F.R. § 502.210(b)(3) by Complainants' wilful failure to answer or object to discovery requests and their refusal to obey two written orders of the administrative law judge.

Robert J. Ables for Interpool, Ltd., Itel Corporation (Container Division), and Trans Ocean Leasing Corporation.

Thomas E. Kimball, Robert B. Yoshitomi and *Charles Lagrange Coleman, III,* for Pacific Westbound Conference, Far East Conference, and Member Lines.

REPORT AND ORDER

May 15, 1980

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

This proceeding was initiated by Complaint of Interpool, Ltd., Itel Corporation (Container Division), and Trans Ocean Leasing Corporation served July 24, 1979, alleging that certain amendments to the tariffs of the Pacific Westbound Conference, the Far East Conference, and their member lines violated section 15 of the Shipping Act, 1916 (46 U.S.C. § 814), in that the amendments were adopted without section 15 authority and would allegedly result in violations of antitrust laws. The proceeding is before the Commission on Complainants' Exceptions to Administrative Law Judge William Beasley Harris' order dismissing the proceeding for Complainants' failure to respond to discovery.

* Commissioner Peter N. Teige did not participate.

BACKGROUND

The tariff amendments at issue state in part:

> (a) Any container, not owned or leased by a member line or affiliate thereof, prior to its delivery to a shipper for loading, shall be deemed to be a shipper-owned or leased container for the purpose of this rule and once so deemed, such containers shall remain shipper-owned or leased for the entire duration of its transit both by water and by land.

Complainants allege that these amendments will result in "the elimination of the neutral container system" in that the carriers would no longer reimburse shippers for their use of containers owned by independent container leasing companies such as Complainants. The practical effect of the amendments, Complainants argue, is to require shippers to use containers controlled by the carriers.

On July 13, 1979, the U.S. Court of Appeals for the District of Columbia Circuit denied Complainants' motion for a stay and preliminary injunction of implementation of the tariff amendments, on the basis of Complainants' failure to exhaust administrative remedies. Five days later, on July 18, 1979, Complainants filed the present complaint requesting "the most expedited or shortened procedure possible."[1] On August 14, 1979, Complainants obtained a preliminary injunction from the U.S. District Court for the Northern District of California, pending disposition of the instant proceeding.

On August 31, 1979, Respondents served discovery requests on Complainants, consisting of interrogatories and requests for production of documents. Answers or objections were due on October 1, 1979. Obtaining no response from Complainants, Respondents filed a Motion to Compel Discovery on October 15, 1979. On October 29, 1979, Complainants answered the Motion to Compel, alleging that the discovery requests were irrelevant to the subject matter of the proceeding. By order served November 13, 1979, the Presiding Officer granted the Motion to Compel and directed Complainants "immediately" to answer the interrogatories and respond to the requests for documents. On November 15, 1979, Respondents filed a Motion to Compel with regard to supplemental discovery requests.

Complainants continued to decline to respond to the discovery requests, and on December 3, 1979, filed a Motion for Protective Order Against Discovery or, in the Alternative if Such Motion is Denied, for Certification of the Question to the Commission. This was followed by Complainants' Supplemental Memorandum in Support of Motion for Protective Order, Memorandum in Opposition to Respondents' Motion to Compel and Further Supplemental Memorandum in Support of Complainants' Motion for Protective Order.

By order served December 28, 1979, the Presiding Officer denied as untimely Complainants' Motion for Protective Order as well as the Motion for Certification of Question to Commission. He again ordered Complainants to respond to Respondents' discovery requests "within 10 days." Complainants again failed to comply, filing instead thirteen days later a Motion for Leave to

[1] Complaint, at 8. Complainants stated in a subsequent motion that we filed [this] complaint with the FMC only to get administrative standing on the [Respondents'] rules to file a new request for injunction." Motion for Protective Order, at 6.

Appeal the Presiding Officer's December 28, 1979 order. On January 11, 1980, Respondents filed a Request for Sanctions.[2]

On January 11, 1980, the Presiding Officer dismissed the proceeding *sua sponte,* citing Complainants' failure to comply with two of his orders to answer discovery.[3]

POSITIONS OF THE PARTIES

Complainants argue that they fully complied with applicable procedural requirements; that at most, their failure to file timely objections to the discovery requests was the product of a "good faith misunderstanding" of the Presiding Officer's desired procedures; and that dismissal is an improper remedy. Complainants argue that the Presiding Officer erred in denying their various motions, in refusing to "scope" the proceeding, and in failing to "bring the parties together" to "resolve the discovery impasse."

Finally, Complainants argue that dismissal is too drastic and extreme a sanction in the instant proceeding, as their failure to respond to discovery demands did not arise out of bad faith, wilfulness, or a desire to obstruct the proceedings. Complainants assert that this proceeding also involves considerations of public interest and should be reinstated for that reason as well.

Respondents, in their Reply to Exceptions, dispute Complainants' contention that Complainants "misunderstood," rather than ignored, the Presiding Officer's orders. Respondents argue that Complainants wilfully refused to comply with the Presiding Officer's clear instructions and with the Commission's Rules of Practice and Procedure, and that dismissal is an appropriate sanction for Complainants' actions.[4]

DISCUSSION

The Commission concludes, for the reasons stated below, that the Presiding Officer's ruling is proper and is hereby affirmed. In so concluding, the Commission finds that Complainants failed to respond or object to discovery and that this conduct was wilful and deliberate.

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[2] Respondents requested that the Presiding Officer make certain findings of fact previously sought to be established by Respondents' discovery requests.

[3] On that same day, Complainants filed a Petition for Declaratory Order, seeking an order from the Commission that Respondents are not authorized to appeal to a federal district court to enforce the Presiding Officer's order requiring compliance with the discovery requests.

[4] The Commission's decision to uphold the dismissal of this proceeding obviates the necessity of its reaching the issue whether the discovery demands of Respondents were proper. Timely objection to the discovery pursuant to the Commission's Rules of Practice and Procedure (46 C.F.R. §§ 502.206(a) and 502.207(b)) would have resulted in a ruling on the merits.

Complainants argue that Respondents were on a "fishing expedition," and object to Respondents' statement that an issue in this proceeding is whether Complainants' neutral container system is "tainted with illegality." Discovery aimed at this issue, Complainants assert, is not only irrelevant but would be wasteful, burdensome, and harmful, seeking confidential and proprietary information involving tens of thousands of documents and consuming thousands of man-hours.

Respondents justify their discovery requests by citing the principle that "relevancy and materiality are most broadly construed in discovery." Respondents also argue that the discovery requests were designed to elicit information regarding possible violations by Complainants of the Shipping Act and of antitrust laws, and that the discovery requests were relevant because the complained-of tariff amendments serve to eliminate such violations.

Complainants do not deny receiving the discovery requests, but contend that they responded to Respondents' request for discovery at a prehearing conference held September 12, 1979, at which counsel for Complainants stated that he disagreed with Respondents' views of the issues raised in the proceeding, and asked the Presiding Officer to define the "scope" of the proceeding to help resolve the discovery matter.[5] Counsel for Complainants explained at that time: "I do not want to have to fight my way through to a final conclusion as to . . . whether we have to respond to [Respondents'] request for discovery."[6]

The Presiding Officer responded by advising Complainants to consult the Commission's Rules of Practice and Procedure for guidance on how to resolve the discovery dispute. The Presiding Officer stated:

> I am sure, Mr. Ables, you are familiar with the rules. There are ways to deal with that. They certainly tell you just what you can do. I do not know whether you have to answer them [the discovery] until you raise certain matters about them.
>
> Prehearing conference, at 69.

Upon a subsequent request at the conference from the Commission's Bureau of Hearing Counsel[7] that the Presiding Officer scope the proceeding, the Presiding Officer indicated that he would not do so because only Respondents had addressed in writing the potential issue of illegalities in the neutral container system. He left the issue "open" so that other parties could also respond in writing.[8]

The Presiding Officer's statements clearly indicated that any objections or concerns Complainants had with the discovery requests should be expressed in writing pursuant to the Commission's rules so that the matter could be properly resolved. Moreover, this advice was given 19 days in advance of the termination of the 30-day period allowed in 46 C.F.R. §§ 502.206 and 502.207 for objections *in writing,* ample time for Complainants to comply with the rules and the Presiding Officer's request.

The record offers no support for Complainants' contention that they were led to believe that "when some determination had been made as to the issue in the case, the question would be ripe for determination as to what, if any, discovery would be required."[9] Far from suggesting that the Commission's rules should be suspended or the time period extended with respect to responses to discovery, the Presiding Officer took pains to indicate that the rules should be followed. Neither the record nor the rules gave Complainants any reason not to answer the discovery requests or to make an appropriate and timely objection.

Nor are Complainants' other excuses for not following the rules persuasive. Complainants have claimed: "This case is unique, procedurally."[10] The record indicates no "uniqueness" in this proceeding at all, although Complainants'

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[5] The Commission's Rules of Practice and Procedure authorize a presiding officer to delineate the scope of a proceeding. 46 C.F.R. §502.147(a).

[6] Prehearing conference, at 62.

[7] Hearing Counsel participated at the prehearing conference but its Petition to Intervene in the Proceeding was eventually denied.

[8] Prehearing conference, at 77.

[9] Appeal from Ruling on Protective Order, at 13.

[10] Motion for Protective Order, at 2.

reason for instituting this proceeding may have been unusual. *See* note 1, *supra.* Complainants also seek to excuse their failure to respond to the discovery requests on the ground that their position on the issues was already known to Respondents: "The parties know each other very well and they know the issue, the arguments and the reasons therefor. They know these things because the precise question was litigated before in FMC Docket No. 76-36. . . ."[11] Familiarity with opposing counsel and opposing counsel's familiarity with the issues in another proceeding hardly justify disregard of the Commission's Rules of Practice and Procedure.

Moreover, none of Complainants' excuses for their initial failure to respond to discovery goes to their failure to comply with two orders of the Presiding Officer. The November 13, 1979 order required Complainants to answer discovery "immediately." The December 28, 1979 order directed compliance with discovery "within 10 days." Both orders left no possibility of a misunderstanding as to Complainants' obligations.

Complainants cite several cases for the proposition that dismissal of this proceeding is unnecessarily drastic a remedy for refusal to respond to discovery. Each of the cases cited, however, is clearly distinguishable from the instant situation. In *Israel Aircraft Industries, Ltd. v. Standard Precision,* 559 F.2d 203 (2d Cir. 1977) and *Securities and Exchange Commission v. Research Automation Corp.,* 512 F.2d 585 (2d Cir. 1975), the court found that dismissal was improper because there had been in those cases neither an order compelling discovery nor a complete failure to respond. In the instant case, there were *two* orders and a complete failure to respond. In the other cases relied upon by Complainants, the courts noted absence of factors which are present in the instant proceeding, such as wilfulness, a clear record of delay, repeated refusals to comply, or clear court orders or directives. *See Griffin v. Aluminum Co. of America,* 564, F2d. 1171 (5th Cir. 1977); *Flaks v. Koegel,* 504 F.2d 702 (2d Cir. 1974); *E. F. Hutton & Co. v. Moffatt,* 460 F.2d 284 (5th Cir. 1972); *Robertson v. Christofersen,* 65 F.R.D. 615 (D.N.D. 1975).

The Commission concludes that Complainants' wilful disregard of the Commission's rules and the Presiding Officer's orders requires dismissal of this proceeding. The principles set forth by the United States Supreme Court in *National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639, *reh. denied,* 429 U.S 874 (1976) are of critical relevance here:

> [T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.
>
> 427 U.S. at 643

There, the Court upheld dismissal of a complaint for the failure of plaintiffs to answer interrogatories despite the trial court's admonitions to do so.

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[11] Reply to Motion to Compel, at 2-3. In Docket Nos. 76-34 and 76-36, the Commission considered tariff rules which were virtually identical to Respondents' tariff amendments in the instant proceeding. *Tariff FMC 6, Rule 22 of the Continental North Atlantic Westbound Freight Conference and 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,* 18 S.R.R. 1343 (1978). That decision is currently on review before the U.S. Court of Appeals for the District of Columbia Circuit.

Similarly, in *Dellums v. Powell,* 566 F.2d 231 (D.C. Cir. 1977), the Circuit Court of Appeals for the District of Columbia Circuit ordered the dismissal of plaintiffs who failed to respond to discovery requests. The court's rationale applies with equal force to proceedings before this Commission:

> If parties are allowed to flout their obligations, choosing to wait to make a response until a trial court has lost patience with them, the effect will be to embroil trial judges in day-to-day supervision of discovery, a result directly contrary to the overall scheme of the federal discovery rules. (Footnote omitted).

566 F.2d at 235-236.

See also G-K Properties v. Redevelopment Agency, 577 F.2d 645 (9th Cir. 1978).

Although administrative agencies are expected to exercise more flexibility and informality in their proceedings than do the courts, there are, nevertheless, limits to what the agencies may tolerate. Agencies must protect their integrity and assure the orderly conduct of business in order to maintain their effectiveness. Adherence to agency procedure is necessary to maintain the agency's integrity and to ensure the orderly conduct of agency business in a manner protective of the rights of all parties.

Complainants also allege that the Presiding Officer's denial of their Motion for Protective Order as untimely was an abuse of discretion. Complainants argue:

> The Commission's rules state only that " . . . the presiding officer, on motion of . . . the party interrogated may make such protective order as justice may require." 46 C.F.R. sec. 502.206(b) (1978). The rule does not set forth a specific time limit in which such a motion must be filed.[12]

Complainants misstate the rule. Omitted from Complainants' quotation of Rule 206(b) is language revealing that the statement refers to *supplementary* interrogatories. Rule 206(b) clearly imposes the *10-day* limit of Rule 204(b) for motions for protective orders with respect to *initial* interrogatories. This rule was ignored by Complainants, who filed their Motion for Protective Order fully two months after service of the discovery requests, and only then after receiving the Presiding Officer's admonition at the prehearing conference and after Respondents' Motion to Compel was granted and Complainants were ordered to answer discovery "immediately." Under the circumstances, the Presiding Officer's denial of the motion as untimely was not an abuse of discretion, and is justified by the principles enunciated in *National Hockey League* and *Dellums.*[13]

Complainants assert that dismissal is an unreasonably extreme sanction, but do not suggest an alternative sanction. The Commission has carefully considered all other options under 46 C.F.R. § 502.210(b), and has found none of them to be feasible in this proceeding. Certainly, the sanction sought by Respondents—findings of fact regarding illegalities in Complainants' neutral

[12] Exceptions, at 19.

[13] Complainants also argue that "courts are not obliged" to reject motions for protective order on the ground of untimeliness, citing *Silkwood v. Kerr-McGee Corp.,* 563 F.2d 433 (10th Cir. 1977). *Silkwood* is inapposite. There the court found that denial of the motion as untimely was improper because: (1) there were substantial First Amendment constitutional questions involved; and (2) it was not inappropriate to withhold filing of a motion for protective order regarding a deposition pending resolution of a motion to transfer the location of the deposition. No such mitigating or extenuating circumstances exist in this case.

container system—appears to be even more extreme than dismissal, in that such findings would be far-reaching, and of unproven accuracy. The Commission concludes that dismissal is the only appropriate sanction under these circumstances.

Complainants would have the Commission remand the proceeding to the Presiding Officer for a ruling on the merits on Complainants' Motion for Protective Order. Such a course of action would ignore Complainants' disregard of the Commission's rules and the Presiding Officer's orders, and might even reward Complainants' conduct by prolonging this proceeding.[14]

THEREFORE, IT IS ORDERED, That the Exceptions of Interpool, Ltd., Itel Corporation (Container Division), and Trans Ocean Leasing Corporation are denied;[15] and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[14] The order of the District Court for the Northern District of California enjoining implementation of the tariff amendments in issue, remains effective "pending a final decision of the FMC Docket NO. 75-79 [sic] and the final result of any appeal therefrom."

[15] Any exceptions not specifically addressed have nevertheless been fully considered by the Commission and found to be without merit or irrelevant.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-87

TDK ELECTRONICS CO., LTD.

v.

JAPAN LINES, LTD. AND
KAWASAKI KISEN KAISHA, LTD.

ORDER ADOPTING INITIAL DECISION

May 20, 1980

This proceeding was initiated by complaint filed by TDK Electronics Co., Ltd. (TDK), alleging that Japan Lines, Ltd. (JL), and Kawasaki Kisen Kaisha, Ltd. (K Line), had violated section 18(b)(3) of the Shipping Act, 1916, by overcharging TDK and its subsidiary, TDK Mexico S.A. de C.V. (TDK Mexico) on 70 shipments of Iron Oxide carried from Tokyo to Mexico via the Port of Los Angeles, between January 13, 1977 and August 31, 1978.[1] TDK maintains that these shipments should have been rated as "Iron Oxide" (Item No. 1945-00), rather than as "Chemicals, N.O.S." (Item no. 2520-05), the classification applied by respondents.[2] As a result of these alleged erroneous assessments, TDK seeks reparation in the sum of $80,113.18 and ¥3,387,751 Japanese yen.

Administrative Law Judge Joseph N. Ingolia issued an Initial Decision in which he concluded that Complainant had substantiated its claim and was, accordingly, entitled to reparation. However, the amount of reparation awarded was less than the amount sought by TDK. TDK filed Exceptions to the Initial Decision to which there were no replies.

BACKGROUND

On May 1, 1979, TDK filed an informal docket claim pursuant to Rule 304 of the Commission's Rules of Practice and Procedure (46 C.F.R. §502.304)

[1] TDK Mexico assigned its rights to TDK with respect to these shipments involving payments made by TDK Mexico. *See Trane Co. v. South African Marine Corp.*, 19 F.M.C. 374 (1976).

[2] All of the shipments in question were transported by JL or K Line and moved under Trans-Pacific Freight Conference of Japan/Korea, Tariff No. 35, FMC-6.

requesting reparation with respect to certain alleged overcharges by JL and K Line. This filing was returned to TDK by the Secretary of the Commission with a letter advising that because TDK's claim was for an amount in excess of $5,000 it could not be considered under the informal docket procedures and TDK should file a *formal complaint* under Rule 62 of the Commission's Rules of Practice and Procedure (46 C.F.R. §502.62). The letter further advised that a formal complaint must allege a violation of a specific Shipping Act section and be verified.

Subsequently, on July 10, 1979, TDK refiled requesting the use of the shortened procedure provided in subpart K of the Commission's Rules of Practice and Procedure (46 C.F.R. §502. 181–187). This document was again returned by the Secretary because it alleged no violation of a specific Shipping Act section and was not verified.

Thereafter, on August 27, 1979, TDK filed the present complaint which was handled under the shortened procedure.

INITIAL DECISION

In his Initial Decision served January 15, 1980, the Presiding Officer concluded that: (1) with respect to all of the shipments, the proper rate classification was "Iron Oxide" and not "Chemicals, N.O.S.;"[3] (2) the governing date for the purpose of awarding reparation was August 27, 1979;[4] (3) all of the shipments carried by JL (19) and the first 14 of 51 shipments carried by K Line, and the date of payment of freight charges for these shipments, predated August 27, 1977 and, accordingly, the claims based on such shipments are barred by the two-year statute of limitations provided in section 22 of the Shipping Act, 1916; (4) claims as to the remaining misrated shipments were timely filed. On the basis of these conclusions, K Line was ordered to pay reparation to TDK in the amount of ¥3,380,449 Japanese yen, and to TDK on behalf of TDK Mexico, $39,180.41.

POSITION OF THE COMPLAINANT

TDK claims that the Initial Decision erred in limiting reparations solely to the overcharges paid during the two-year period prior to August 27, 1979. TDK contends that the governing period is the two-year period prior to May 1, 1979, or, alternatively, July 10, 1979.

TDK maintains that the filing of the May 1 complaint tolled the two-year statute of limitations. Although admittedly defective, it is alleged that the complaint should not have been returned, but retained as part of the official record.[5] TDK argues that under Commission Rule 61 (46 C.F.R. §502.61), a

[3] The Presiding Officer advised that both JL and K Line agreed with this finding.

[4] The Presiding Officer applied the general rule that a cause of action based upon a claim for reparation accrues at the time of shipment or upon payment of the freight charges, whichever is later. *U.S. ex rel Louisville Cement Co. v. ICC*, 26 U.S. 638, 644 (1918); *CSC International Inc. v. Orient Overseas Container Lines Limited*, 19 F.M.C. 465, 470 (1977).

[5] TDK cites the recent case of *Midland Metals Corp. v. Lykes Bros. Steamship Co., Inc.*, 19 S.R.R. 475 (1979), in which the filing of an informal complaint was held to be insufficient to assert the claim in question, but acted to toll the statute of limitations.

proceeding is commenced upon filing a complaint, albeit incomplete. TDK also submits that, except for its failure to allege a violation of a specific section of the Shipping Act, the May 1 document essentially meets all the requirements of Commission Rule 62, which specifies the contents of a complaint. This failure is allegedly not fatal, however, because Rule 62 provides that:

> If complaint fails to indicate the sections of the acts alleged to have been violated or clearly to state facts which support the allegation, the Commission may, on its own initiative, require the complaint to be amended . . . .

In short, TDK maintains that the Commission should not have returned this informal complaint, but should have made it part of the record as of May 1, 1979. Thus, TDK concludes that the statute of limitations was tolled as of that date.

TDK also contends that a lack of verification is *not* a sufficient basis for rejecting a complaint, especially if the verification is subsequently obtained. In this regard, TDK cites *Henry Gillen's Sons Lighterage, Inc. v. American Stevedores, Inc.*, 10 S.R.R. 195, 198 (1968), where it was held that:

> The purpose of requiring a demand for reparation to be filed within two years is to cut off liability for stale claims; such purpose is not connected with the "sworn complaint" provision, whose purpose is only to relieve the respondent and Commission from the mandatory investigation of reckless or false claims. Whether a claim is stale, however, depends on when it is made, not whether or not it is sworn to at the time.

Finally, TDK contends that in any event if the May 1 complaint is found wanting, the July 10 complaint should be found sufficient to toll the statute of limitations. TDK argues that the submission of the August 27, 1979 complaint, in which the defects in the July 10 complaint were rectified, is actually an amendment to the original complaint. Accordingly, the August 27 complaint allegedly should be deemed to relate back to the date the document was filed, *i.e.*, July 10, 1979.

Discussion and Conclusion

If either the May 1 or July 10 complaints are to form a basis to extend the reparations period, it is necessary to establish that they may be accepted for filing notwithstanding that: (1) they allege no specific statutory violation and (2) lack a verifying affidavit.

Allegation of a Violation of a Specific Section of the Shipping Act

Rule 62 specifies what a complaint must contain. TDK's complaint complied with this provision in all respects, except that it failed to allege a violation of a specific section of the Shipping Act. This failure does not, however, necessarily render the complaint null and void. Indeed, Rule 62 permits the Commission to allow a defective complaint to be amended and rectified:

> If complaint fails to indicate the sections of the acts alleged to have been violated . . . the Commission *may, on its own initiative*, require the complaint to be *amended* to supply such further particulars as it deems necessary. (Emphasis supplied).

As the Commission stated in *Trane Company v. South African Marine Corp.*, 19 F.M.C. 375, 385 (1976):

> Amendments to complaints are liberally permitted under the Commission's rules so as to protect rights which might expire under the two-year period of limitations contained in section 22 of the Act. Amendments which have corrected defects such as omitting signatures, seals, or sworn statements or selecting incorrect remedies or measure of damages have been permitted by the Commission in the interest of justice and the spirit of administrative flexibility.

The Commission has also held that a complaint which was originally defective because it chose an incorrect remedy, but correctly stated the substance or gravamen of the claim could be cured subsequently even if the limitations period had meanwhile expired. *Hetro Chemical Corporation v. Port Line, Ltd.*, 14 F.M.C. 228 (1971).[6] This is in keeping with the Commission's general policy as enunciated in *City of Portland v. Pacific Westbound Conference*, 5 F.M.B. 118, 129 (1956):

> It is the duty of the Commission to look to the *substance* of the complaint rather than its *form* and it is not limited in its action by the strict rules of pleading and practice which govern courts of law. (Emphasis added.)

In this regard, it is to be noted that TDK's May 1 and July 10 complaints, although defective because neither alleged a specific violation of the Shipping Act, did contain specific requests for reparation with supporting documentation. Therefore, we find that the May 1 and July 10 complaints, while possibly inadequate to apprise Respondents of specific charges against them, were sufficient to toll the statute of limitations.[7]

Verification

Neither the May 1 nor July 10 complaint was verified. However, subsequent verification was obtained as evidenced by the August 27 complaint. Generally, the lack of a supporting sworn statement is not a jurisdictional defect that would bar the tolling of the statute of limitations, but rather a technical flaw that can be cured subsequently even it the statute had run. *Gillen's Sons Lighterage, Inc. v. American Stevedores, Inc.*, 12 F.M.C. 325 (1969); *U.S. Borax and Chemical Corporation v. Pacific Coast European Conference*, 11 F.M.C. 451 (1968); *Oakland Motor Car Company v. Great Lakes Transit Corporation*, 1 U.S.S.B.B. 308 (1934).

For the foregoing reasons, the Commission finds the May 1 complaint adequate to toll the statute of limitations.

THEREFORE, IT IS ORDERED, That, except to the extent noted above, the Initial Decision in this proceeding is adopted by the Commission; and

IT IS FURTHER ORDERED, That the Exceptions of TDK Electronics Co., Ltd., are granted; and

IT IS FURTHER ORDERED, That Kawasaki Kisen Kaisha, Ltd. pay reparation to TDK Electronics Co., Ltd., in the amount of $7,565.70; and

[6] This holding parallels that in *Midland Metals Corp. v. Lykes Bros. Steamship Co., Inc.*, 19 S.R.R. 475 (1979), where an informal compluint was filed *incorrectly*, but acted to toll the statute of limitations.

[7] The Commission does not necessarily condone TDK's conduct, but under the particular circumstances of this proceeding, TDK's Exceptions should nonetheless be granted.

IT IS FURTHER ORDERED, That Japan Lines, Ltd., pay reparation to TDK Electronics Co., Ltd., in the amount of $8,945.06; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-87

TDK ELECTRONICS CO., LTD.

v.

JAPAN LINES, LTD. AND
KAWASAKI KISEN KAISHA, LTD.

Adopted May 20, 1980

Section 22, Shipping Act, 1916—

1. Where Complainant sought reparation under section 22 because two common carriers collected and received freight charges in excess of those specified in the pertinent tariff on file with the Commission, the Commission may not direct the payment of reparations for any shipments giving rise to a cause of action which accrued more than two years prior to the filing of the Complaint.
2. Where shipments of raw materials were by weight 90 percent iron oxide, the proper rate classification under the tariff was as Iron Oxide (Item No. 1945-00) rather than as charged, Chemicals, N.O.S. (Item No. 2520-05), and the Commission may direct payment of the overcharges as reparation where such action is not barred by the statutory two-year limitations period.

Heihachi Matsubara for Complainant TDK Electronics Co., Ltd.
David Snow for Respondent Japan Lines, Ltd.
Robert F. Edwards for Respondent Kawasaki Kisen Kaisha, Ltd.

INITIAL DECISION[1] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

On August 27, 1979, TDK Electronics Co., Ltd. (TDK) filed a complaint under section 22 of the Shipping Act, 1916, alleging that Japan Lines, Ltd. (JL) and Kawasaki Kisen Kaisha, Ltd. (KKK) had violated section 18(b)(3) by overcharging TDK and its subsidiary, TDK Mexico S.A. de C.V. (TDK Mexico) for certain shipments of iron oxide moving from Tokyo to Mexico via the Port of Los Angeles, between January 13, 1977, and August 31, 1978.[2] In

[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 C.F.R. §502.227).

[2] TDK Mexico has assigned its rights to its claim to TDK with respect to these shipments involving payments made by TDK Mexico. See *Trane Co. v. South African Marine Corp.*, 19 FMC 374 (1976).

filing its complaint, TDK requested that the case be handled under the Shortened Procedure.[3]

The Respondents agreed to the Shortened Procedure provided the time for filing answering memoranda was extended form 25 to 30 days. The extension was granted, and the Respondents have filed answering memoranda where they admit the substance of the complaint but make certain changes in the amounts involved. The Complainant failed to file a timely reply but has indicated by telex and by mail that it agrees with the corrections made in the Respondent's Answering Memoranda.

FINDINGS OF FACT

1. TDK is a Japanese corporation located in Tokyo, Japan, engaged in the manufacture and sale of electronic components and devices.

2. TDK Mexico is a subsidiary of TDK and is engaged in the production of ferrite magnets.

3. JL and KKK are Japanese carriers and common carriers by water as defined in the Shipping Act, 1916, and are engaged in transportation between Japan and the United States.

4. Beginning on January 13, 1977, and to August 31, 1978, TDK shipped the raw materials to be used for ferrite magnet production to TDK Mexico, from Japan to Mexico, via the Port of Los Angeles, in dry containers on vessels operated by JL and KKK. The raw materials are powdered materials, almost all of which are by weight 90 percent iron oxide, and are identified on pertinent invoices and bills of lading as Ferrite Powder (Iron Oxide: Dry Type). They were packed into craft paper bags, each containing 25 kilograms. In addition to the ferrite powder, a small, *de minimus* percentage of the material shipped was alundum powder.

5. The materials transported by JL and KKK moved under Trans-Pacific Freight Conference of Japan/Korea, Tariff No. 35, FMC-6. Item No. 2520-05 of the tariff was designated as Chemical—N.O.S. Item No. 1945-00 was identified as Iron Oxide.

6. The base rate in the pertinent tariff and the currency adjustment factor with regard to relevant item numbers from January 1, 1977, to August 31, 1978, is as follows:

(US$ PER RT)*

Date	*Item No. 2520-45*	*Item No. 1945-00*	*CAF (%)*
1/1/77	93.00	67.00	2.0
4/1/77	106.00	76.00	4.0
7/1/77	"	"	6.0
10/1/77	"	"	9.0
1/1/78	"	"	12.0
4/1/78	113.00	81.00	15.0
7/1/78	"	"	20.0

[3] The Commission's Rules of Practice and Procedure, Subpart K, sections 181 187 (46 C.F.R. §502.181-187), eliminate the need for oral testimony and hearings by providing that, if the parties agree, the case may be decided upon a record consisting of (1) the complaint and a memorandum of facts and argument together with supporting documents; (2) the respondent's answering memorandum and supporting documents; and (3) the complainant's memorandum of reply. Under the rules, the filing of the reply closes the record unless the Presiding Officer deems the record insufficient and requires additional evidence.

* RT (Revenue Tons)=1,000 Kgs or $1m^3$.

7. JL transported 19 shipments of ferrite powder to TDK Mexico, via the Port of Los Angeles, FOB Shimizu, Japan, between January 13, 1977, and July 20, 1977. It billed TDK Mexico at the rate applicable under Item No. 2520-05 (Chemicals N.O.S.). The freight charges were paid within ten days of the bill of lading date. Pertinent information including the difference between the rate charged and the rate that would have been applicable under Item 1945-00 (Iron Oxide) is as follows:

Vessel	B/L Date	B/L No.	Rates (US$) (Item No. 2520-05)			(Item No. 1945-00)			Balance (U.S.)
Japan Ace	1/13/77	J050-00008	93	2%	1,727.97	67	2%	1,244.88	483.09
America Maru	1/20/77	−10001	"	"	3,004.28	"	"	2,199.13	805.15
Queen's Way Br.	1/29/77	−10010	"	"	4,396.71	"	"	3,188.99	1,207.72
Pacific Arrow	2/26/77	−00142	"	"	5,879.76	"	"	4,296.31	1,583.45
America Maru	3/03/77	−10072	"	"	3,071.94	"	"	2,213.12	858.82
Japan Ace	3/15/77	−10085	"	"	3,964.26	"	"	2,890.73	1,073.53
Yamashin Maru	3/25/77	−00218	"	"	1,616.90	"	"	1,187.48	429.42
Asia Maru	4/10/77	−10131	106	4%	2,008.14	76	4%	1,439.79	568.35
Yamashin Maru	4/22/77	−10142	"	"	3,970.62	"	"	2,719.61	1,251.01
Queen's Way Br.	4/30/77	−10161	"	"	7,809.40	"	"	5,599.19	2,210.21
Kashu Maru	5/15/77	−10180	"	"	1,960.23	"	"	1,279.82	680.41
Yamashin Maru	5/20/77	−10185	"	"	2,789.07	"	"	1,999.71	789.36
Japan Ace	5/25/77	−10189	"	"	4,016.26	"	"	2,879.59	1,136.67
Queen's Way Br.	5/30/77	−10194	"	"	3,346.89	"	"	2,399.65	947.24
Kashu Maru	6/15/77	−10231	"	"	4,553.52	"	"	3,199.54	1,353.98
Japan Ace	6/23/77	−10247	"	"	3,346.89	"	"	2,399.65	947.24
Asia Maru	7/13/77	−10295	"	6%	2,240.56	"	6%	1,467.48	773.08
Yamashin Maru	7/20/77	−10307	"	"	3,411.25	"	"	2,445.80	965.45
Yamashin Maru	7/20/77	−10306	"	"	4,775.75	"	"	3,424.12	1,351.63
Total									19,415.81

8. KKK transported 41 shipments of ferrite powder to TDK Mexico, FOB Shimizu, Japan, between February 4, 1977, and March 19, 1978. It billed TDK Mexico at the rate applicable under Item No. 2520-05 (Chemicals N.O.S.). TDK Mexico paid the freight charges within ten days of the bill of

lading date. Pertinent information between the rate charged and the rate which would have been applicable under Item No. 1945–00 is as follows:[4]

[4] Included in 4 of the 41 shipments were small quantities of alundum powder which involve rate adjustments that are *de minimus* and are not reflected in the schedule. A detailed breakdown of the shipments involving alundum powder is as follows:

"Golden Gate Bridge" 1398A, 10/09/77, K052–52259

	Now Read	*Should Read*	*Balance*
a) Iron Oxide: Base Rate 30.360 KT	at $ 106.00/KT	at $ 76.00/KT	
0. Freight	$ 3,218.16	$2,307.36	
b) Alundum Powder: Base Rate 0.307 KT/0.714 M3	at $ 106.00/KT	at $ 132.00/M3	
0. Freight	$ 32.54	$ 94.25	
c) Camphor: Base Rate 0.968 M3	at $ 140.00/M3	at $ 140.00/M3	
0. Freight	$ 135.52	$ 135.52	
Total	$ 3,386.22	$2,537.13	
CAF 9%	$ 304.76	$ 228.34	
	$ 3,690.98	$2,765.47	$ 925.51

"Pacific Arrow" 2053A, 11/07/77, K052–52288

	Now Read	*Should Read*	*Balance*
a) Iron Oxide: Base Rate 34.408 KT	at $ 106.00/KT	at $ 76.00/KT	
0. Freight	$ 3,647.25	$2,615.01	
b) Alundum Powder: Base Rate 0.307 KT/0.166 M3	at $ 106.00/KT	at $ 166.00/KT	
0. Freight	$ 32.54	$ 50.96	
c) Camphor: Base Rate 0.968 M3	at $ 140.00/M3	at $ 140.00/M3	
0. Freight	$ 135.52	$ 135.52	
Total	$ 3,815.31	$2,801.49	
CAF 9%	$ 343.38	$ 252.13	
	$ 4,158.69	$3,053.62	$1,105.07

"Kashu Maru" 3001A, 12/22/77, K052–52325

	Now Read	*Should Read*	*Balance*
a) Iron Oxide: Base Rate 108.284 KT	at $ 106.00/KT	at $ 76.00/KT	
0. Freight	$11,478.10	$8,229.58	
b) Alundum Powder: Base Rate 0.256 KT/0.149 M3	at $ 106.00/KT	at $ 166.00/KT	
0. Freight	$ 27.14	$ 42.50	
c) Camphor: Base Rate 1.613 M3	at $ 140.00/M3	at $ 140.00/M3	
0. Freight	$ 225.82	$ 225.82	
Total	$11,731.06	$8,497.90	
CAF 9%	$ 1,055.80	$ 764.81	
	$12,786.86	$9,262.71	$ 3,524.15

"Asia Maru" 4571A, 02/26/78, K052–52607

	Now Read	*Should Read*	*Balance*
a) Iron Oxide: Base Rate 50.600 KT	at $ 106.00/KT	at $ 76.00/KT	
0. Freight	$ 5,363.60	$3,845.60	
b) Alundum Powder: Base Rate 0870 KT/0.505 M3	at $ 106.00/KT	at $ 166.00/KT	
0. Freight	$ 92.22	$ 144.42	
c) Camphor: Base Rate 1.530 M3	at $ 140.00/M3	at $ 140.00/M3	
0. Freight	$ 214.20	$ 214.20	
Total	$ 5,670.02	$4,204.22	
CAF 12%	$ 680.40	$ 504.51	
	$ 6,350.42	$4,708.73	$ 1,641.69

Vessel	B/L Date	B/L No.	Rates (US$) (Item No. 2520–05)			(Item No. 1945–00)			Balance (US$)
G.G. Bridge	02/04/77	K052–51399	93	2%	3,071.74	67	2%	2,213.12	858.82
Kashu Maru	03/17/77	–51723	"	"	1,535.98	"	"	1,106.56	429.42
Japan Ace	03/14/77	–51720	"	"	1,727.97	"	"	1,244.88	483.09
Pacific Arrow	03/30/77	–51735	"	"	3,071.94	"	"	2,213.12	858.82
Yamashin Maru	04/21/77	–51753	106	4%	4,239.39	76	4%	2,805.75	1,433.64
Asia Maru	05/11/77	–51775	"	"	4,016.26	"	"	2,879.58	1,136.68
Pacific Arrow	06/09/77	–52014	"	"	3,681.58	"	"	2,639.62	1,041.96
Q.W. Bridge	06/29/77	–51810	"	"	1,673.44	"	"	1,199.83	473.61
Q.W. Bridge	06/29/77	–51809	"	"	1,896.56	"	"	1,359.80	536.76
Q.W. Bridge	07/29/77	–51870	"	6%	3,638.66	"	6%	2,608.85	1,029.81
Pacific Arrow	07/07/77	–51852	"	"	2,046.75	"	"	1,467.49	579.26
Pacific Arrow	07/07/77	–51851	"	"	4,093.50	"	"	2,934.96	1,158.54
Asia Maru	08/13/77	–51878	"	"	5,685.42	"	"	4,076.34	1,609.08
Kashu Maru	08/17/77	–51886	"	"	4,402.45	"	"	4,402.45	–0–
America Maru	09/02/77	–52202	"	"	5,369.63	"	"	3,889.28	1,480.35
Pacific Arrow	09/05/77	–52214	"	"	3,866.09	"	"	2,771.91	1,094.18
G.G. Bridge	09/09/77	–52224	"	"	3,866.09	"	"	2,771.91	1,094.18
Yamashin Maru	09/21/77	–52235	"	"	6,283.90	"	"	4,546.10	1,737.80
America Maru	10/01/77	–52245	"	9%	1,819.33	"	9%	1,304.43	514.90
*G.G. Bridge	10/09/77	–52259	"	"	3,690.98	"	"	2,765.47	925.51
Kashu Maru	10/20/77	–52139	"	"	2,104.68	"	"	1,509.02	595.66
America Maru	10/29/77	–52277	"	"	3,507.79	"	"	2,515.03	992.76
*Pacific Arrow	11/07/77	–52288	"	"	4,158.69	"	"	3,053.62	1,105.07
Kashu Maru	11/21/77	–52294	"	"	8,184.85	"	"	5,868.39	2,316.46
Yamashin Maru	11/28/77	–52298	"	"	3,741.64	"	"	2,682.69	1,058.95
Japan Ace	12/01/77	–52308	"	"	4,209.35	"	"	3,018.02	1,191.33
America Maru	12/05/77	–52311	"	"	2,104.68	"	"	1,509.02	595.66

G.G. Bridge *Kashu	12/12/77	-52321	"	"	6,314.03	"	"	4,527.04	1,786.99
Maru Asia	12/22/77	-52325	"	"	12,786.86	"	"	9,262.71	3,524.15
Maru Japan	12/24/77	-52335	"	"	2,104.68	"	"	1,509.02	595.56
Ace Pacific	01/05/78	-52411	"	12%	8,418.70	"	12%	6,035.05	2,382.65
Arrow Kashu	01/12/78	-52347	"	"	10,813.02	"	"	7,752.73	3,060.29
Maru Asia	01/21/78	-52356	"	"	4,444.59	"	"	3,322.48	1,122.11
Maru G.G.	01/26/78	-52370	"	"	7,328.82	"	"	5,254.63	2,074.19
Bridge Pacific	01/29/78	-52381	"	"	4,325.20	"	"	3,101.09	1,224.11
Arrow G.G.	02/12/78	-52390	"	"	6,487.81	"	"	4,651.64	1,836.17
Bridge *Asia	03/03/78	-52632	"	"	8,289.98	"	"	5,943.76	2,346.22
Maru Yamashin	02/26/78	-52607	"	"	6,350.42	"	"	4,708.73	1,641.69
Maru Yamashin	03/11/78	-52640	"	"	4,482.53	"	"	3,360.43	1,122.10
Maru America	03/11/78	-52638	"	"	4,325.20	"	"	3,101.09	1,224.11
Maru	03/19/78	-52648	"	"	1,898.33	"	"	1,361.07	537.26
TOTAL									50,809.90

*These shipments contained small amounts of alundum powder.

9. KKK transported 10 shipments of ferrite powder to TDK Mexico via the Port of Los Angeles, FOB Shimizu, Japan, between April 22, 1978, and August 6, 1978. Freight was prepaid by TDK in Japanese yen at the rate applicable under Item No. 2520-05 (Chemicals N.O.S.). Pertinent information including the difference between the rate charged and the rate which would have been applicable under 1945-00 is as follows:[5]

[5] Included in 2 of the 10 shipments were small quantities of alundum powder which involve rate adjustments that are *de minimus* and are not reflected in the schedule. A detailed breakdown of the shipments involving alundum powder is as follows:

"Queen's Way Bridge" 5857A, 04/22/78, K052-52686

		Now Read	*Should Read*	*Balance*
a) Iron Oxide: Base Rate 35.015 KT		at $ 113.00/KT	at $ 81.00/KT	
0. Freight		$3,956.70	$2,836.22	
b) Alundum Powder: Base Rate 0.410 KT/0.269 M3		at 113.00/KT	at $ 174.00/KT	
0. Freight		$ 46.33	$ 71.34	
c) Camphor: Base Rate 3.302 M3		at $ 148.00/M3	at $ 148.00/M3	
0. Freight		$ 488.70	$ 488.70	
Total		$4,491.73	$3,396.26	
CAF 15%	$ 673.76	$ 509.44		
		$5,165.49	$3,905.70	$1,259.79
			at ex rate 225.40	Y283,957

Vessel	B/L Date	B/L No.	Rates (US$) (Item No. 2520–50)			Rates (US$) (Item No. 1945–00)			Balance (US$)	Exchange Rate (Y)	Exchange Rate (Y/US$)
*Q.W. Bridge	4/22/78	K052-52686	113	15%	5,165.49	81	15%	3,905.70	1,259.79	283,957-	225.40
Japan Ace	4/25/78	-52573	〃	〃	4,655.46	〃	〃	3,337.10	1,318.36	299,004-	226.80
Pacific Arrow	5/01/78	-52702	〃	〃	2,367.17	〃	〃	1,696.83	670.34	149,687-	233.30
*Q.W. Bridge	5/20/78	-52737	〃	〃	1,944.82	〃	〃	1,501.50	443.32	101,254-	228.40
Asia Maru	5/29/78	-52808	〃	〃	2,367.17	〃	〃	1,696.83	670.34	152,000-	226.75
Yamashin Maru	6/10/78	-52766	〃	〃	16,570.19	〃	〃	11,877.74	4,692.45	1,041,490-	221.95
Yamashin Maru	7/12/78	-52780	〃	20%	9,880.36	〃	20%	7,082.38	2,797.98	567,850-	202.95
Q.W. Bridge	7/18/78	-52785	〃	〃	7,410.26	〃	〃	5,311.79	2,098.47	427,983-	203.95
Asia Maru	7/26/78	-53002	〃	〃	4,940.18	〃	〃	3,541.19	1,398.99	275,321-	196.80
G.G. Bridge	8/06/78	-53013	〃	〃	1,509.50	〃	〃	1,082.03	427.47	81,903-	191.60
TOTAL									US$15,777.51	Y3,380,449-	

* These shipments contain small amounts of alundum powder.

10. For the period from September 1, 1979, to February 28, 1979, there were other shipments from TDK to TDK Mexico which were transported by JL and KKK, where the materials shipped were rates under Item No. 2520-05 rather than Item No. 1945-00. TDK has requested from the carriers that they reimburse the excess monies paid to them. In addition, as of February 28, 1979, such shipments have been rated on the basis of Item No. 1945-00 (Iron Oxide) rather than on the basis of Item No. 2520-05 (Chemicals N.O.S.).

11. The bills of lading in each instance involved herein were prepared by the Complainant's local fowarder in Japan. He placed on the bills of lading the rates specified thereon.

12. The complaint was filed on August 27, 1977.

Ultimate Findings of Fact

13. The raw materials shipped by TDK via JL and KKK was iron oxide and is properly rated as such under Item No. 1945-00 of the pertinent tariff.

14 JL and KKK collected and received amounts which exceeded the appropriate rates specified in the tariff on file with the Commission.

15. The Commission may not direct the payment of reparations by JL because none of the shipments involved gave rise to the accrual of a cause of action within two years from the date the complaint was filed.

16. The Commission may direct the payment of reparations by KKK to TDK and TDK Mexico for those shipments which gave rise to a cause of action accruing within two years of the date the complaint was filed. There are 37 shipments where reparation is warranted, beginning with the shipment evidenced by the bill of lading dated September 2, 1977.

Discussion and Conclusions

The Findings of Fact are a composite of the complaint of TDK and accompanying attachments, the Answering Memoranda of JL and KKK and accompanying attachments, and the ultimate stipulation of the parties as to what

[5] Footnote continued:
"Queen's Way Bridge" 6658A, 05/20/78, K052-52737

	Now Read	*Should Read*	*Balance*
a) Iron Oxide: Base Rate	at $ 113.00/KT	at $ 81.00/KT	
12.144 KT			
0. Freight	$1,372.27	$ 983.66	
b) Alundum Powder: Base Rate	at $ 113.00/KT	at $ 174.00/KT	
0.51 KT/0.025 M3			
0. Freight	$ 5.76	$ 8.87	
c) Camphor: Base Rate	at $ 148.00/M3	at $ 148.00/M3	
0. Freight	$ 244.25	$ 244.35	
d) Ferrite Magnet			
(Not Magnetized)	at $ 97.00/M3	at $ 97.00/M3	
0.709 M3			
0. Freight	$ 68.77	$ 68.77	
Total	$1,691.15	$1,305.65	
CAF 15%	$ 253.67	$ 195.85	
	$1,944.82	$1,501.50	$ 443.32
		at ex rate 228.40	Y101,254

TDK claims an overpayment of 3,387,751 yen based on the exchange rate between yen and dollars as of the preceding day of each shipment.

transpired.To the extent they are not specifically referred to in this portion of the decision, they are incorporated by reference. The Findings of Fact lead to two primary issues. First, does the Commission as to each shipment, have jurisdiction to grant the reparations requested by the Complainant?; second, have the shipments been misrated and, if so, what is the amount of reparation to be granted? With respect to both issues, the parties have agreed and it has been found as a fact that the raw material shipped by TDK to TDK Mexico was iron oxide, with the exception of a small amount of alundum powder, and that the correct rate applicable was that set forth under Item 1945-00 (Iron Oxide) rather than Item No. 2520-05 (Chemicals N.O.S.). The parties have also agreed and it has also been found as fact that, as corrected, the overcharge as to JL's shipments was $19,415.81 rather than $21,996.70; that the correct overcharge regarding the 41 shipments made via KKK and paid for by TDK Mexico was $50,809.90, rather than $58,116.48; and that the correct overcharge regarding the 10 shipments made by KKK and paid for by TDK was 3,380,449 yen rather than 3,387,751 yen. Further, it has been found as a fact that all of the shipments made via JL were shipped and paid for prior to August 27, 1977, and that 14 of the shipments made via KKK were shipped and paid for prior to that date.

Issue No. 1—Jurisdiction

Section 22 of the Shipping Act, 1916, provides:

> That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking for reparation for the injury, if any, caused thereby. . . . The board, *if the complaint is filed within two years after the cause of action accrued,* may direct the payment, on or before the day named, of full reparation to the complainant for the injury caused by such violation. (Emphasis supplied.)

The provisions of section 22 are clear and it is well settled that the two-year period of limitations is a jurisdictional impediment which cannot be waived by the Commission. *Carton Print Inc. v. The Austasia Container Express Steamship Co.,* Docket No. 74-27, served July 29, 1974, 17 SRR 571, 581 (1977) (determination by the Commission not to review, July 7, 1977); *U.S. Borax Chemical Corp. v. Pac. Coast European Conf.,* 11 F.M.C. 451, 471, 472, 10 SRR 75 (1968); *Aleutian Homes Inc. v. Coastwise Line, et al.,* 5 F.M.B. 602, 612 (1959). As to the date the cause of action accrues, it is equally well settled that a cause of action based upon a claim for reparation accrues at the time of shipment or upon payment of the freight charges, whichever is later. *U.S. ex rel Louisville Cement Co. v. ICC,* 296 U.S. 638, 644 (1917; *CSC International Inc. v. Orient Overseas Container Lines Limited,* 14 F.M.C. 255, 260 (1971); *Aleutian Homes Inc. v. Coastwise Line, et al., supra.* See also, Commission Rules of Practice and Procedure, section 502.302 (46 C.F.R. § 502.302). Applying that legal principle here, it is clear that any overcharges which may have occurred regarding the shipments made via JL cannot be cured by way of reparation. As to each such shipment, both the date of shipment and the date of payment were more than two years from the date the complaint was filed

and the cause of action could not have arisen within the two-year period.[6] Therefore, the Commission cannot direct the payment of reparation. Likewise, with respect to the first 14 shipments made by KKK, paid for by TDK Mexico. The shipments and payments were made more than two years before the filing of the complaint, and therefore the Commission cannot order that reparation be made.[7] As to the remaining KKK shipments, they began on September 2, 1977, and ended on August 6, 1978, so that the cause of action accrued within two years of the date of the filing of the complaint.[8] Under section 22 the Commission has the authority to direct the payment of reparations respecting those shipments.

Issue No. 2—Reparations

In considering whether or not reparations should be awarded, the threshhold question is whether or not there is a misrating and the amount of the resultant overcharge. The question is factual in nature and it has already been found that the materials should have moved under the rate applicable as Iron Oxide, rather than under the rate charged as Chemicals N.O.S. The Complainant has satisfied his burden of proof in this regard, and the Respondents agree that the finding of fact is correct. What remains is to determine the amount of the overcharge on shipments where reparations are not barred by the two-year limitation period set forth in section 22.

Beginning with the 15th of the 44 shipments made via KKK, the overcharges through the 41st shipment paid for by TDK Mexico total $39,180.41.[9] The overcharges paid by TDK respecting all of the 10 shipments made via KKK total Y3,380,449.[10]

Ultimate Conclusions

In view of the above facts and discussion, I hereby conclude

(1) With respect to all of the shipments from January 13, 1977, to August 6, 1978, JL and KKK collected and received amounts which exceeded the appropriate rates specified in the tariff on file with the Commission and which violated the provisions of section 18(b)(3).

(2) All of the shipments made via JL and the first 14 shipments made via KKK were made and paid for and the causes of action accrued more than two years from the date of the filing of the complaint and, therefore, the Commission does not have jurisdiction to direct the payment of reparations regarding such shipments.

(3) As to 27 shipments, KKK collected and received charges from TDK Mexico which were improperly rated as Chemicals N.O.S., rather than as Iron Oxide as follows:

[6] See the schedule accompanying Finding of Fact 7, where the latest bill of lading date is found to be July 20, 1977, which, even allowing 10 days for payment is more than two years from August 27, 1979, the date the complaint was filed.

[7] See the schedule in Finding of Fact 8.

[8] See the schedules in Findings of Fact 8 and 9.

[9] See the schedule in Finding of Fact 8.

[10] See the schedule in Finding of Fact 9.

Vessel	B/L Date	B/L No.	Rates (US$) (Item No. 2520–05)			(Item No. 1945–00)			Balance (US$)
America Maru	09/02/77	K052-52202	106	4%	5,369.63	76	4%	3,889.28	1,480.35
Pacific Arrow	09/05/77	-52214	"	"	3,866.09	"	"	2,771.91	1,094.18
G.G. Bridge	09/09/77	-52224	"	"	3,866.09	"	"	2,771.91	1,094.18
Yamashin Maru	09/21/77	-52235	"	"	6,283.90	"	"	4,546.10	1,737.80
America Maru	10/01/77	-52245	"	"	1,819.33	"	"	1,304.43	514.90
*G.G. Bridge	10/09/77	-52259	"	"	3,690.98	"	"	2,765.47	925.51
Kashu Maru	10/20/77	-52139	"	"	2,104.68	"	"	1,509.02	595.66
America Maru	10/29/77	-52277	"	"	3,507.79	"	"	3,515.03	992.76
*Pacific Arrow	11/07/77	-52288	"	"	4,158.69	"	"	3,053.62	1,105.07
Kashu Maru	11/21/77	-52294	"	"	8,184.85	"	"	5,868.39	2,316.46
Yamashin Maru	11/28/77	-52298	"	"	3,741.64	"	"	2,682.69	1,058.95
Japan Ace	12/01/77	-52308	"	"	4,209.35	"	"	3,018.02	1,191.33
America Maru	12/05/77	-52311	"	"	2,104.68	"	"	1,509.02	595.66
G.G. Bridge	12/12/77	-52321	"	"	6,314.03	"	"	4,527.04	1,786.99
*Kashu Maru	12/22/77	-52325	"	"	12,786.86	"	"	9,262.71	3,524.15
Asia Maru	12/24/77	-52335	"	"	2,104.68	"	"	1,509.02	595.56
Japan Ace	01/05/78	-52411	"	"	8,418.70	"	"	6,035.05	2,382.65
Pacific Arrow	01/12/78	-52347	"	"	10,813.02	"	"	7,752.73	3,060.29
Kashu Maru	01/21/78	-52356	"	"	4,444.59	"	"	3,322.48	1,122.11
Asia Maru	01/26/78	-52370	"	"	7,328.82	"	"	5,254.63	2,074.19
G.G. Bridge	01/29/78	-52381	"	"	4,325.20	"	"	3,101.09	1,224.11
Pacific Arrow	02/12/78	-52390	"	"	6,487.81	"	"	4,651.64	1,836.17
G.G. Bridge	03/03/78	-52632	"	"	8,289.98	"	"	5,943.76	2,346.22
*Asia Maru	02/26/78	-52607	"	"	6,350.42	"	"	4,708.73	1,641.69
Yamashin Maru	03/11/78	-52640	"	"	4,482.53	"	"	3,360.43	1,122.10
Yamashin Maru	03/11/78	-52638	"	"	4,325.20	"	"	3,101.09	1,224.11
America Maru	03/19/78	-52648	"	"	1,898.33	"	"	1,361.07	537.26
Total									39,180.41

(4) As to 10 shipments, KKK collected and received charges from TDK which were improperly rated as Chemicals N.O.S., rather than as Iron Oxide as follows:

Vessel	B/L Date	B/L No.	Rates (US$) (Item No. 2520-50)			(Item No. 1945-00)			Balance (US$)	Exchange Rate (Y)	(YUS$)
*Q.W. Bridge	4/22/78	K052-52686	113	15%	5,165.49	81	15%	3,905.70	1,259.79	283,957-	225.40
Japan Ace	4/27/78	-52573	〃	〃	4,655.46	〃	〃	3,337.10	1,318.36	299,004-	226.80
Pacific Arrow	5/01/78	-52702	〃	〃	2,367.17	〃	〃	1,696.83	670.34	149,687-	223.30
*Q.W. Bridge	5/20/78	-52737	〃	〃	1,944.82	〃	〃	1,501.50	443.32	101,254-	228.40
Asia Maru	5/29/78	-52808	〃	〃	2,367.17	〃	〃	1,696.83	670.34	152,000-	226.75
Yamashin Maru	6/10/78	-52766	〃	〃	16,570.19	〃	〃	11,877.74	4,692.45	1,041,490-	221.95
Yamashin Maru	7/12/78	-52780	〃	20%	9,880.36	〃	20%	7,082.38	2,797.98	567,850-	202.95
Q.W. Bridge	7/18/78	-52785	〃	〃	7,410.26	〃	〃	5,311.79	2,098.47	427,983-	203.95
Asia Maru	7/26/78	-53002	〃	〃	4,940.18	〃	〃	3,541.19	1,398.99	275,321-	196.80
G.G. Bridge	8/06/78	-53013	〃	〃	1,509.50	〃	〃	1,082.03	427.47	81,903-	191.60
TOTAL									US$15,777.51	Y3,380,449-	

* These shipments contain small amounts of alundum powder.

WHEREFORE, IT IS ORDERED that KKK shall pay as reparation to TDK, on behalf of TDK Mexico, $39,180.41 within 30 days from the date of the Commission's final order in this case; and it is,

FURTHER ORDERED that KKK shall pay as reparation to TDK Y3,380,449 within 30 days from the date of the Commission's final order in this case.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

WASHINGTON, D.C.
January 8, 1980

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-29

ANGEL ALFREDO ROMERO—INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND FOREIGN FREIGHT FORWARDERS, INC. POSSIBLE VIOLATIONS OF SECTION 44, SHIPPING ACT, 1916

Joseph B. Slunt and *William D. Weiswasser* for Bureau of Hearing Counsel.

ORDER ADOPTING INITIAL DECISION

May 22, 1980

BY THE COMMISSION: (Richard J. Daschbach, *Chairman,* Thomas F. Moakley, *Vice Chairman,* James V. Day, Leslie Kanuk, and Peter N. Teige, *Commissioners*).

Chief Administrative Law Judge John E. Cograve issued an Initial Decision on March 19, 1980 in which Angel Alfredo Romero was found to have violated section 44 of the Shipping Act, 1916 (46 U.S.C. §841b), by engaging in unlicensed forwarding activities. As a result, the Presiding Officer assessed a penalty of $2,500 against Mr. Romero, but left up to the Commission the setting of terms and conditions of payment (Initial Decision at 12). No exceptions were filed to this decision. The Commission has thoroughly reviewed the Initial Decision and adopts it as its own.

Generally, in those cases where a Presiding Officer assesses a civil penalty on the basis of a settlement or stipulation, the better course of action would be to have the Commission's Bureau of Hearing Counsel arrange payment terms with the respondent which could then be submitted to the Presiding Officer for approval. In this particular case, however, to avoid the unnecessary expense and effort which would occur upon a remand, the Commission will instead direct Mr. Romero to contact the Office of General Counsel to establish payment terms, including interest on any unpaid balance. If agreement is not reached within 30 days, the entire penalty amount shall become due.

THEREFORE, IT IS ORDERED, That the Initial Decision in this proceeding is hereby adopted; and

IT IS FURTHER ORDERED, That within 30 days of the date of this Order, Angel Alfredo Romero shall contact the General Counsel of the Federal Maritime Commission to arrange payment terms on the assessed penalty. If such arrangement is not reached within this time period, the entire penalty amount shall become due and payable; and

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

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-29

ANGEL ALFREDO ROMERO—INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND FOREIGN FREIGHT FORWARDERS, INC.—POSSIBLE VIOLATIONS OF SECTION 44, SHIPPING ACT, 1916

Adopted May 22, 1980

Applicant found to have violated section 44 of the Shipping Act, 1916. Civil penalty assessed.

Joseph B. Slunt and *William D. Weiswasser* as Hearing Counsel.

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

The Commission instituted this proceeding to resolve the following issues:

1. Whether Foreign Freight Forwarders, Inc., and/or Angel Alfredo Romero, as President and majority stockholder of Foreign Freight Forwarders, Inc., violated section 44(a), Shipping Act, 1916, by engaging in unlicensed forwarding activities;
2. Whether, on his application for a license as an independent ocean freight forwarder, Angel Alfredo Romero willfully concealed both his connection with Foreign Freight Forwarders, Inc. and the functions performed by him in regard to the activities of Foreign Freight Forwarders, Inc.;
3. Whether, in light of the evidence adduced, pursuant to the foregoing issues, together with any other evidence adduced, Angel Alfredo Romero is fit, willing and able properly to 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 issued thereunder.

Shortly after the institution of the proceeding, Romero withdrew his application[2] and sought permission to negotiate a settlement of all claims against him arising from any past violations of the Shipping Act under Part 505 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 505.1 *et seq.*). I

[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 C.F.R. § 502.227).

[2] Romero's withdrawal of his application makes it unnecessary to decide issue Number 3.

stayed the proceeding on July 2, 1979, pending outcome of the negotiations. On August 30, 1979, the Commission amended its Order of Investigation to provide for the assessment or compromise of civil penalties under section 32 of the Act (46 U.S.C. § 831). The order was amended by the addition of a fourth issue:

(4) whether civil penalties should be assessed against Angel Alfredo Romero and/or Foreign Freight Forwarders, Inc., pursuant to 46 U.S.C. 831(e) for violations of the Shipping Act, 1916, and if so the amount of such penalties. . . .

The Commission gave the parties until November 26, 1979, to conclude any settlement negotiations. Hearing Counsel on November 26, 1979, moved to reactivate the proceeding saying that despite the cooperation and best efforts of all concerned it had not been possible to reach a final settlement. On November 28, 1979, I scheduled a prehearing conference to be held on December 11, 1979. Hearing Counsel then advised me that the case could be submitted upon affidavits and memorandum. I canceled the prehearing conference and established a procedural schedule. The case is now ready for decision.

The parties have agreed by stipulation that the evidentiary record will consist of:

1. The affidavit of Angel Alfredo Romero . . .
2. The findings of fact proposed by Hearing Counsel in its memorandum of law filed June 8, 1979, and
3. The affidavits of Miguel Tello, Harry T. Statham, Charles L. Clow and Jules Z. Johnson.

The above are admitted into evidence as Exhibits 1, 2 and 3, respectively.

BACKGROUND[3]

On April 5, 1977, Angel Alfredo Romero applied for an independent ocean freight forwarder's license. The application was filed by Mr. Romero as an individual to be licensed as a sole proprietorship. On the next day Mr. Romero was contacted by telephone to confirm some of the information in the application and stated that he was then employed by WTC Air Freight and that he would leave WTC as soon as he obtained his license.

Following the April 6, 1977 phone conversation, a letter, also dated April 6, 1977, was sent to Romero specifically directing his attention to section 44 of the Shipping Act, 1916, which as the letter said "prohibits any person from engaging in the business of forwarding unless such person holds a license issued by the Federal Maritime Commission." Romero's attention was also directed to section 510.2 of the Commission's General Order 4 (46 C.F.R. § 510.1, Licensing of Independent Ocean Freight Forwarders). Section 510.2 defines "Carrying on the business of forwarding." A copy of General Order 4 was enclosed in the April 6th letter. By another letter dated April 6, 1977, the staff

[3] The proposed findings of Hearing Counsel do not give the full picture of the plight and activities of Angel Romero. The background statement comes from the affidavits comprising Exhibit 3.

requested additional information from Romero. He did not furnish the requested information and on May 13, 1977, Romero was told, by letter, that unless he did supply the information his application would be placed in an inactive status. On June 21, 1977, Romero was informed that his application had been placed in an inactive file due to a "lack of prosecution of [the] application on your part."

On December 23, 1977, the staff received a letter from Romero stating that he wished to reactivate his application. He explained that he had previously been unable to furnish the information requested by the staff because he was then "employed by a company which has been long established and which refused my affiliation." He went on to say, "I am now employed by a company to which I am affiliated and thus able to furnish all the required information." However, with the exception of one credit reference from the Intercontinental Bank of Miami, the staff received none of the information requested.

In April of 1978 Mr. Jules Z. Johnson, a District Investigator in the Commission's Gulf District office, visited Romero who was in the offices of a business entity called Foreign Freight Forwarders, Inc. When asked by Mr. Johnson if he had been carrying on the business of freight forwarding without a license, Romero said that Dade County, Florida, had issued Foreign Freight Forwarders, Inc. an occupational license. Mr. Johnson then explained to Romero that notwithstanding the Florida license, federal law required a license from the Commission before anyone could engage in forwarding activities. Romero then stated that it was his understanding that an FMC license was necessary only if he collected "commissions" from carriers, and that he had only booked shipments, prepared bills of lading and export declarations, and performed other forwarding functions necessary to move cargo.

After being advised that he was in violation of the law and of the possible consequences of his unlicensed activity, Romero agreed to give Mr. Johnson the documentation on each shipment he had handled. From the documents supplied by Romero, Mr. Johnson established that during the period December 10, 1976 to March 30, 1978, Romero under the name of Foreign Freight Forwarders, Inc., acted as forwarder on 74 shipments and collected forwarding fees of $1,875.00.

On 3 of the 74 shipments the shipper was named as "JEP Enterprises." The president of that company is one Joseph Pinder who until October of 1978 was Secretary-Treasurer of Foreign Freight Forwarders, Inc., and owned 225 shares of its common stock representing 45% of the corporation's equity.[4] Romero assured Mr. Johnson that the documents furnished represented all of the shipments on which he had acted as a freight forwarder. However, Miguel G. Tello also a District Investigator in the Gulf Office was to prove this statement false.

[4] While Mr. Johnson was conducting his investigation of Romero's activities, the latter on May 15, 1978, wrote to Mr. Charles L. Clow, Chief of the Commission's Office of Freight Forwarders, stating:

> I was informed by you that as long as I did not collect brokerage fees I was not in violation of any FMC regulations . . . however following your advice I have not asked for brokerage fees from shipping companies I have used.

Mr. Clow in an affidavit states that he did talk to Romero but did not at any time suggest that Romero could engage in the business of forwarding without a license so long as brokerage was not collected from carriers.

Mr. Tello's first contact with Romero came as a result of Mr. Tello's investigation of the use by Fast International Forwarding Corp. of the freight forwarding license of Land Joy International Forwarders, Inc. In reviewing some documents of Land Joy, Mr. Tello came across bills of lading which displayed five numbers preceded by the letters FFF. One Orlando Fernandez, President of Land Joy, first denied knowing what "FFF" referred to claiming he had not been with Land Joy during the period covered by the bills. However, Magali Fernandez, ex-wife of Orlando, who had been president during that time told Mr. Tello that the letters "FFF" referred to invoice numbers of Foreign Freight Forwarders, Inc. The former Mrs. Fernandez explained that Land Joy had been allowing Foreign Freight Forwarders Inc. to use Land Joy's name and license number (1768) and that Foreign Freight Forwarders Inc. billed the shippers for the forwarding fees while Land Joy charged the carriers brokerage. Magali Fernandez also stated that the arrangement began while Orlando Fernandez was President, the first shipment being made in March of 1977, and continued until June of 1977.

When confronted with the statements of his former wife Orlando admitted that his earlier denial was false and agreed to give Mr. Tello 16 bills of lading bearing the "FFF" reference. Mr. Tello next visited Romero who when faced with the evidence admitted that he had used Land Joy's license number and produced 26 more bills of lading on which Land Joy's number had been used.[5]

As if this were not enough, Mr. Tello in his continuing investigation of Romero's activities uncovered some 89 shipments on which Romero used the name and FMC license number of United Dispatch Services. Quite naturally Mr. Tello went to United Dispatch and there met a Mr. Lopez and a Mr. Romano, partners in that enterprise. They admitted that they had "loaned" Romero United's license but explained that they thought the only prohibition against such charity was the sharing with the borrower of compensation received from the carrier. It seems almost superfluous to say that when the results of the investigations of Romero's activities were gathered and analyzed, the Commission decided to issue the letter of intent to deny Romero a license, which ultimately led to this proceeding.

THE STIPULATED FACTS

A. *Violation of Section 44(a), Shipping Act, 1916.*

1. Angel Alfredo Romero applied as an individual to be licensed as an independent ocean freight forwarder on April 5, 1977.

2. Following receipt of Mr. Romero's application in April, 1977, the Office of Freight Forwarders sent him a letter warning him not to carry on the business of forwarding without a license.

[5] Mr. Tello went back to Orlando Fernandez with the additional bills of lading supplied by Romero. Fernandez said that the bills represented transactions which occurred after Magali Fernandez had told Romero to stop using Land Joy's license number. Eventually Mr. Tello obtained 42 bills of lading on which Foreign Freight Forwarders Inc. (Romero) used Land Joy's license number.

3. As of March 22, 1978, Mr. Romero held himself out to the public as able to provide ocean freight forwarding and all related services.

4. As of May 16, 1978, Mr. Romero was carrying on the business of freight forwarding without a license, under the name of Foreign Freight Forwarders, Inc. (FFF).

5. Mr. Romero failed to give investigator Johnson all the documentation which he requested of him in April, 1978, despite representing that he had.

6. Mr. Romero forwarded at least 42 shipments using the name and FMC license of Land Joy International Freight Forwarders, Inc. between March 2, 1977 and June 20, 1977. He did not disclose these shipments to Investigator Johnson.

7. On April 6, 1978, Mr. Romero was warned by Investigator Johnson to cease forwarding activities unless he obtained a license. Mr. Romero agreed that he would cease such activity.

8. Mr. Romero admits using the name and FMC license of United Dispatch Services to carry on the business of forwarding 89 shipments from March, 1978 through September, 1978.

9. United Dispatch Services, by its General Manager Rene Lopez, admitted having lent its FMC license to Mr. Romero.

10. United Dispatch Services collected ocean freight compensation from the carriers for the shipments which Mr. Romero d/b/a FFF forwarded using the name and license of United.

11. Records received from Mr. Romero reveal that, between August 15, 1978 and September 14, 1978, he, d/b/a FFF, charged $1,375.00 for "Shipping, handling and forwarding" and charged his customers a total of $980.23 for document preparation, banking arrangements and special fees. The shipments involved in number approximately 60 and include some of the 28 sampled by Investigator Tello.

12. Between December 10, 1976 and March 30, 1978 Mr. Romero d/b/a FFF, forwarded at least 74 shipments without an FMC license, which he admitted to Investigator Johnson and 42 more shipments under the name of Land Joy International Forwarders, Inc. which he later admitted to Investigator Tello.

13. Both Mr. Fernandez of Land Joy and Mr. Romero of FFF admit that Land Joy International Forwarders, Inc., a licensed independent ocean freight forwarder, allowed Foreign Freight Forwarders, Inc. to use its license to carry on the business of freight forwarding.

B. *Respondent's Concealment of FFF Connection and Fitness to be Licensed as an Independent Ocean Freight Forwarder*

14. On January 13, 1977, Fred Romero wrote the Gulf District Office requesting that application forms for a "FMC License Number" be sent to Foreign Freight Forwarders, Inc. (Exhibit T-1).

15. In response to Exhibit T-1, the Gulf District Office sent Exhibit T-2, a letter with application forms and copies of General Order 4 and sections 1 and

44 of the Shipping Act, 1916. The letter warned Mr. Romero and FFF not to engage in forwarding until being issued a license.

16. The application in question was filed by Mr. Romero as an individual to be licensed as a sole proprietorship.

17. Following receipt of Mr. Romero's application in April, 1977, he was warned not to carry on the business of forwarding and directed to report any changes in facts contained in his application.

18. Despite two requests in April and May of 1977 for further information and being advised that failure to provide it would result in his application being placed on inactive status, Mr. Romero failed to provide further information requested.

19. In May of 1978 Charles Clow received a letter from Mr. Romero wherein he claimed to have been informed by Mr. Clow that the only thing he could not do without a license was collect brokerage (sic) fees from carriers. Mr. Clow did not, in fact, ever so inform Mr. Romero.

20. In the above letter (Exhibit 6), Mr. Romero represented that the had indeed been forwarding (despite not having been issued a license) but that he had ceased.

21. Mr. Romero failed to reveal to the Office of Freight Forwarders that he had been operating as FFF.

22. On May 19, 1978, Mr. Clow wrote Mr. Romero, reiterating that Mr. Romero should not engage in any aspect of forwarding, regardless of whether he collected compensation.

23. Prior to May 22, 1978, the only information received by the Office of Freight Forwarders in support of Mr. Romero's application was a credit reference furnished by a bank which listed his name along with that of FFF. At that time, Mr. Romero had failed to inform the Office of Freight Forwarders that his application was other than as an individual.

24. Mr. Romero d/b/a FFF handled at least 18 shipments for a shipper (JEP Enterprises, Inc.) with whom he shared a postal box office number, telex number and cable address (JEPENTINC).

25. The President of JEP Enterprises, Inc. is a former Secretary/Treasurer and 45 percent shareholder in FFF.

26. Mr. Romero d/b/a FFF handled at least four shipments for a shipper (Mifac) with whom he shared quarters.

AFFIDAVIT OF ANGEL ALFREDO ROMERO

1. My name is Angel Alfredo Romero and I was the President of Foreign Freight Forwarders, Inc., in April, 1977 when I applied for an independent ocean freight forwarder license.

2. When I applied to the Commission for a license, I received warnings not to carry on the business of forwarding before I received my license. I also received such warnings from Gulf District Investigators Jules Johnson and Miguel Tello.

3. Foreign Freight Forwarders, Inc. was incorporated in the State of Florida in December of 1976. By mid-year of 1977 it was necessary for me to hire

my first employee. By the time of Investigator Johnson's visit in April, 1978, I had six full-time employees.

4. Despite earlier written warnings not to carry on the business of forwarding without a license, I was unaware of any violations on my part until the visit of Investigator Johnson in April, 1978. Although I sincerely hoped to conduct my business properly in all respect, I was unable to follow Mr. Johnson's advice to suddenly suspend the operations of my company because of what I felt to be a commitment to my six employees. Had I suspended operations, they would all have lost their livelihood and my own wife and two young daughters would have been deprived of their sole source of support. Because of this concern, and solely because of it, I continued to operate while awaiting the outcome of the investigation surrounding my application.

5. I eventually discovered that, in addition to being unfamiliar with the requirements of licensing, I was also unrealistic in my expectations regarding the timing and outcome of the investigation surrounding my application. As a result, I withdrew my application for an independent freight forwarder's license and, after looking for a buyer, was able to sell my interest in Foreign Freight Forwarders, Inc., in January, 1979. The company is now inactive and on the verge of dissolution.

6. It is my hope to resolve the problems stemming from the violations which are the subject of this proceeding. I am faced, however, with expenses which nearly exceed my income and, therefore, am not able to support payments on a large penalty. My current and anticipated obligations for mortgage, food, utilities, personal loan, auto loan and child support payments leave me $189.00 per month income over expenses. Although my personal loan ($167.00 per month) will be paid-off by June, 1980, I will incur new obligations on September 1, 1980, when I will begin paying my ex-wife $606.00 per month as part of my divorce settlement. That obligation will last for one year and then be succeeded by monthly payments of $692.00, also part of my divorce settlement. The latter obligation will also last 12 months. Both obligations are secured by mortgages on my house.

7. I currently hold a note in the sum of $9,960.00 which was given me in partial payment for the sale of Foreign Freight Forwarders, Inc. I did not include this as an asset in computing the figures in paragraph six because the maker of the note has suspended payment, claiming that corporate liabilities had been understated by approximately $14,000.00. The controversy may eventually be litigated. Until its resolution, I have an uncollectable note for $9,960.00 and a claim against me for approximately $14,000.00.

Discussion and Conclusion

The question which now arises is the level of penalty appropriate to the conduct which Respondent has admitted. Generally, the number of violations would indicate that a very high penalty should be assessed. The question is complicated by Mr. Romero's tenuous financial situation. By his affidavit, to which Hearing Counsel have stipulated, Mr. Romero has declared, subject to perjury, that his present and projected liabilities far exceed the resources

available to meet them.[6] Under the circumstances, it appears that even a penalty as low as $5,000 would be uncollectible.

The legislative history of Public Law 96–25, the source of the Commission's assessment authority, provides no guidance as to this problem; its insight as to penalty assessment is limited to problems related to rebating. The Commission's General Order 30 (46 C.F.R. § 505), titled *Compromise, Assessment, Settlement and Collection of Civil Penalties Under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933,* does not address the level of penalty to be imposed. It does, however, at § 505.1, refer to 4 C.F.R. Parts 101–105 as indicating criteria for the assessment of penalties. These regulations, the Federal Claims Collection Standards, were promulgated by the General Accounting Office and the Department of Justice pursuant to 80 Stat. 309 (31 U.S.C. § 952). They apply to the administrative collection, compromise, termination of agency collection action, and referral to the G.A.O. and the Department of Justice for litigation, of civil claims by the Federal Government for money or property. The concerns encompassed in the standards include one which would indicate a heavy penalty and several which would indicate a lesser one. Section 103.5 evidences a concern that compromise of a claim not impair the deterrent value of a penalty. Section 103.2, on the other hand, permits compromise of a Government claim if the debtor is unable to pay the full amount within a reasonable time. Determination of debtor's inability to pay may include the consideration of present and potential income and the availability of assets or income which may be realized upon by enforced collection proceedings. Such compromises "should be for an amount which bears a reasonable relation to the amount which can be recovered by enforced collection proceedings,[7] having regard for the exemptions available to the debtor and the time which collection will take." Also recognized as justifying a compromise are poor litigative probabilities and high cost of collection, 4 C.F.R. § 103.3, 103.4. Further, 4 C.F.R. § 102.9 requires compromise efforts "on all cases in which it can be ascertained that the debtor's financial ability will not permit payment of the claim in full, or in which the litigative risks or the costs of litigation dictate such action." Termination of collection efforts is indicated by "inability to collect any substantial amount" or if "cost will exceed recovery," 46 C.F.R. § 104.3. Hearing Counsel recognizes that the Federal Claims Collection Act and the regulations promulgated thereunder are strictly limited in scope to collection: but he also feels that they may aid in determining the amount of the penalty assessed.

While the violations of section 44, Shipping Act, 1916, here at issue, could result in high penalties, Hearing Counsel urges that the record indicates that

[6] At paragraph seven of his affidavit, Mr. Romero states that he holds an uncollectible note for $9,960 which is subject to an offsetting claim of approximately $14,000. Under the circumstances, it appears that this dispute may neither be litigated nor settled and that Mr. Romero will not be able to collect on the note. This assumption underlies Hearing Counsel's proposal.

[7] A realistic appraisal of the situation must include a recognition of the possibility of Mr. Romero's declaring bankruptcy. In such case, a governmental penalty claim would be excepted from discharge by 11 USC § 523(a)(7). Bankruptcy would trigger the priority granted federal claims by 31 U.S.C. § 191. This would have little practical effect, however. Mr. Romero's largest obligation is that to his former wife for alimony and child support and these are also excepted from discharge in bankruptcy by 11 USC § 523(a)(5). The preference under 31 USC § 191 would not prevail over the obligations to the former Mrs. Romero since they are secured by prior mortgages on Mr. Romero's condominium. Regardless of whether he declares bankruptcy Mr. Romero will shortly be insolvent in that he will be unable to meet his obligations.

such penalties would be uncollectible. Thus, according to Hearing Counsel the criteria discussed above would then become directly applicable. The question, as Hearing Counsel sees it then, is whether to assess a penalty virtually certain to be uncollectible and thus properly subject to compromise (or even suspension of collection efforts) pursuant to the Federal Claims Collection Standards (4 C.F.R. Parts 101-105); the alternative is to assess a penalty more related to Mr. Romero's ability to pay and thus realistically collectible. This would have the advantage of sparing the government an essentially redundant and futile effort at considerable administrative cost. Hearing Counsel therefore propose a civil penalty of $2,500 be imposed upon the respondent.

In response to Hearing Counsel's proposed penalty Romero says:

I AM MOST GRATEFUL TO YOU FOR CONSIDERING MY FINANCIAL POSITION AND REDUCING THE FINE TO THE AMOUNT OF $2500.00. I WOULD HOWEVER APPRECIATE THE TIME TO EXPLAIN SOME OF MY ACTIONS.

I AM WELL AWARE THAT IGNORANCE OF THE LAW IS NO EXCUSE, BUT WHEN YOU ARE TRULY UNINFORMED ONE DOESN'T REALLY THINK OF THEIR WRONG DOINGS AS PURE GUILT. IN THE YEARS THAT I WAS IN BUSINESS I BUILT A FINE REPUTATION IN THE FREIGHT FORWARDING INDUSTRY, AND HAD THE RESPECT OF NOT ONLY MY CLIENTS, BUT MY EMPLOYEES AS WELL. THIS REPUTATION WAS FOUNDED ON BEING AS HONEST AS ONE COULD BE AS WELL AS EFFICIENT. MY EMPLOYEES REGARDED OUR ASSOCIATION AS ONE FAMILY, AND I FELT THE SAME WAY, WHICH IS EXACTLY THE REASON WHY I TOOK THE TIME THAT I DID TO CLOSE MY OPERATION. I FELT OBLIGATED TO ALLOW MY FAMILY (EMPLOYEES) AS MUCH TIME TO FIND POSITIONS AS POSSIBLE. ALONG WITH YOUR UNDERSTANDING, I BEG ONE MORE REQUEST. IF THERE IS SOME WAY THAT I COULD BE GIVEN SOME SORT OF SCHEDULE AND TIME IN ORDER FOR ME TO PAY THE $2500.00. AGAIN I AM MOST GRATEFUL FOR THE REDUCTION AS OPPOSED TO THE ORIGINAL AMOUNT ANTICIPATED, BUT I TRULY DO NEED SOME TIME TO RAISE THE PENALTY AMOUNT.

YOUR HONOR, I AM MOST ANXIOUS TO CLEAR UP THIS MATTER, AND BEGIN ANEW, PROVING TO THE COMMISSION AND YOUR SELF THAT I CAN CONDUCT A FREIGHT FORWARDING BUSINESS IN THE PROPER MANNER.

On the basis of the record presented I feel that the $2,500 proposed is appropriate. I do not sense an intention on the part of Romero to defraud anyone. On the contrary my conclusion is that Romero's lack of understanding of just what was required of him was the basic cause of his troubles. Therefore I accept the proposal of Hearing Counsel and Romero and hereby order that a penalty of $2,500 be assessed Angel Alfredo Romero. The penalty is to be paid by Angel Alfredo Romero under such terms and conditions as the Commission shall impose.

(S) JOHN E. COGRAVE
Administrative Law Judge

WASHINGTON, D.C.
March 17, 1980

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-28

INDEPENDENT FREIGHT FORWARDER LICENSE NO. 1321—IKEDA INTERNATIONAL CORPORATION

Independent ocean freight forwarder found to have violated Commission General Order 4.

Carlos Rodriguez for Ikeda International Corporation.
John Robert Ewers, Joseph B. Slunt and *Charles C. Hunter* for Bureau of Hearing Counsel.

PARTIAL ADOPTION OF INITIAL DECISION

May 23, 1980

BY THE COMMISSION: (Richard J. Daschbach, *Chairman,* Thomas F. Moakley, *Vice Chairman,* James V. Day, Leslie Kanuk and Peter N. Teige, *Commissioners*).

This proceeding was initiated by Order of Investigation, served April 3, 1979, to determine whether Ikeda International Corporation violated section 18(b)(1) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(1)), and Part 510 of the Commission's Rules of Practice and Procedure (46 C.F.R. Part 510), and, if so, whether its independent ocean freight forwarder license should be revoked or suspended.[1] In his Initial Decision, served January 17, 1980, Administrative

[1] Specifically, the Order sets forth the following issues for determination:

(1) Whether Ikeda has violated section 510.23(i) of General Order 4 by failing to clearly identify receipts issued for cargo and distinguish such receipts from bills of lading.
(2) Whether Ikeda has violated section 510.23(k) of General Order 4 by failing to maintain records and books of account in the required manner.
(3) Whether Ikeda has violated section 510.23(1) of General Order 4 by failing to make its records and books of account promptly available for inspection upon the request of the Commission investigative staff.
(4) Whether Ikeda has violated section 510.5(c) of General Order 4 by failing to notify the Commission of a recent change of the firm's business address within 30 days after the occurrence of the change.
(5) Whether Ikeda has violated section 18(b)(1) of the Shipping Act, 1916 by performing as a nonvessel operating common carrier by water without having filed with the Commission a tariff showing its rates and charges.
(6) Whether Ikeda's independent ocean freight forwarder license should be revoked or suspended pursuant to:

a. section 510.9(a) of General Order 4 for violation of a provision of the Shipping Act, 1916;
b. section 510.9(b) of General Order 4 for failure to comply with the lawful inquiries, rules, regulations or orders of the Commission.
c. section 510.9(e) of General Order 4 for conduct which renders the licensee unfit to carry on the business of forwarding.

Law Judge William Beasley Harris found that Respondent had violated General Order 4 but that Ikeda's license should not be revoked or suspended. The Commission's Bureau of Hearing Counsel has filed Exceptions to the Initial Decision, to which Ikeda has replied.

DISCUSSION

Violations

Sections 510.23(i), 510.23(k), and 510.23(l). The Presiding Officer concluded that Ikeda violated sections 510.23(i), 510.23(k), and 510.23(l) of General Order 4, and Ikeda has not excepted to these findings. The Commission has determined that these findings are well supported by the record evidence and adopts them as its own.

Section 510.5(c). The Presiding Officer's conclusion that Ikeda did not violate section 510.5(c) of General Order 4 constitutes the basis for one of Hearing Counsel's exceptions. Hearing Counsel argues that Ikeda violated section 510.5(c) in failing to notify the Commission of a change of address.

In response to an April, 1972 Commission questionnaire, Ikeda informed the Commission that in addition to its main office, it operated a branch office at 1010 34th Avenue, New York, New York. In early 1978, it began using 1010 34th Avenue as its main office, but did not notify the Commission of this fact. Commission investigators were initially unsuccessful in contacting Ikeda, as they were unaware that it had moved from the address on file with the Commission. The investigators eventually located Ikeda at 1010 34th Avenue, after noting that Ikeda had once reported that address as a branch office.

Hearing Counsel argues that Ikeda's failure to notify the Commission in 1978 that it was using 1010 34th Avenue as its main office was a violation of section 510.5(c). Hearing Counsel notes that none of Ikeda's letterheads lists its 1010 34th Avenue address. This violation is a serious one, Hearing Counsel argues, because the rule is designed to allow the Commission ready access to a freight forwarder's operation.

Ikeda maintains that its failure to notify the Commission of its 1978 address change is insignificant because the Commission had been notified in 1972 that the 1010 34th Avenue address was a branch office, and that Commission personnel were in fact successful in locating Ikeda at that address.

The Presiding Officer found that because the investigators found Ikeda at the 1010 34th Avenue address and Ikeda had listed it six years previously as its branch office, Ikeda deserved the "benefit of the doubt." He concluded that Ikeda did not violate section 510.5(c).

The Commission disagrees. Even Ikeda had admitted that it committed a "technical violation" of the rule in this regard. Opening Brief of Respondent, at 9. Ikeda's failure to notify the Commission of its change of address thwarted that which the rule was intended to ensure—ready accessibility to the freight forwarder's operation. The Commission concludes that Ikeda's conduct in this regard constituted a violation of section 510.5(c).

Section 18(b)(1). No evidence was presented to support a finding of a violation of section 18(b)(1) of the Shipping Act. The parties agreed on this matter and the Presiding Officer properly found no violation.

Sanctions

The remaining issue is that of sanctions. The Presiding Officer concluded that Ikeda violated section 510.9(a) of General Order 4,[2] but that Ikeda was not unfit under section 510.9(e),[3] and that suspension or revocation of its license was unwarranted. Instead he ordered Ikeda to work closely with the Commission's Office of Freight Forwarders for six months, and to furnish that office monthly reports indicating conformity with General Order 4. Hearing Counsel excepts to the Presiding Officer's failure to revoke Ikeda's license, arguing that Ikeda is unfit to carry on the the business of forwarding.

Resolution of the sanctions issue involves not only the General Order 4 violations but also a series of complaints made by shippers. Since December, 1976, the Commission received ten complaints about Ikeda, seven of which were received within two years, an unusually high number. While a few complaints involved the quality of Ikeda's forwarding services (*e.g.*, improperly packed cargo), most involved time delays in transportation of property, and difficulty in contacting Ikeda or in getting telephone calls returned.

Hearing Counsel asserts that the number and nature of the complaints demonstrate the unfitness of Ikeda to operate as a freight forwarder. Hearing Counsel emphasizes that those registering complaints have all been shippers of household and personal goods, and are particularly susceptible to a forwarder's negligence and malpractice.

Ikeda notes that none of the complaints involves specific violations of the Shipping Act or of General Order 4, nor entails mishandling of shippers' funds, and that most of the complaints have had satisfactory conclusions.

The Commission finds that the major significance of the complaints is their number. None, however, was documented to an extent that any violations or improprieties were proven. It appears that the major cause of the complaints was Ikeda's sometimes negligent and irresponsible manner of communicating with its clients, rather than the actual forwarding services performed.

Nor have Ikeda's General Order 4 violations been shown to have caused any actual harm to a shipper. Ikeda has used forms entitled "Memorandum," "Shipping Order," and "Bill of Lading" as receipts, in violation of section 510.23(i) These forms might have caused some confusion, but the practice has been discontinued. Its records violations, involving sections 510.23(k) and 510.23(l), evidenced some degree of negligence as well as shortcomings in Ikeda's professional manner of operation, but not of fraud or improper han-

[2] Section 510.9(a) authorizes revocation of a license for violations of the Shipping Act. However, as the Presiding Officer made no findings of any violations of the Shipping Act, the conclusion that Ikeda violated section 510.9(a) is clearly unsupportable. Section 510.9(b), which the Presiding Officer found was not violated, is the applicable provision. That section authorizes revocation for violations of Commission rules and regulations. The Commission concludes, however, that revocation is too extreme a sanction under the circumstances in this proceeding.

[3] 510.9(e) authorizes revocation for conduct that renders the licensee unfit or unable to carry on the busines of forwarding.

dling of funds.[4] The failure to report the change of address does not appear to have been an attempt to evade shippers or the Commission, although it did confuse Commission investigators in their efforts to locate Ikeda.

On these facts, the Commission concludes that revocation or suspension of Ikeda's license would be an unnecessarily severe sanction. The seriousness of the violations, however, cannot be ignored. Accordingly, this proceeding is referred to the Commission's Office of General Counsel for assessment of a civil penalty pursuant to 46 C.F.R. Part 505.

Additionally, the Commission will impose on Ikeda a monthly reporting requirement for a period of twelve months. These monthly reports should be directed to the Commission's Secretary and should list each complaint received from Ikeda's customers, describing the nature and resolution of each complaint.

THEREFORE, IT IS ORDERED, That the Exceptions of Hearing Counsel are granted to the limited extent indicated and denied in all other respects; and

IT IS FURTHER ORDERED, That Ikeda International Corporation shall file monthly reports as indicated above, beginning not later than 30 days from date of service of this Order; and

IT IS FURTHER ORDERED, That the Initial Decision is adopted by the Commission except as indicated; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[4] The section 510.23(k) violation involved failure to maintain records properly. The section 510.23(l) violation involved Ikeda's *failure to submit* to a records inspection. When contacted by Commission staff, Ikeda was in the process of moving and had promised to call the staff when its records were unpacked. It did not do so.

FEDERAL MARITIME COMMISSION

No. 79-28

INDEPENDENT FREIGHT FORWARDER LICENSE NO. 1321— IKEDA INTERNATIONAL CORPORATION

Partially Adopted May 23, 1980

Independent Freight Forwarder License No. 1321 is not to be suspended or revoked in this proceeding.

The respondent is to cooperate closely with the Commission's Office of Ocean Freight Forwarders for a six-month period, submitting monthly reports, and receiving directions and close supervision. This will serve, hopefully, an "underlying remedial public interest purpose."

Charles C. Hunter, Joseph B. Slunt and *John Robert Ewers,* Director, Bureau of Hearing Counsel, for Commission's Bureau of Hearing Counsel.
Carlos Rodriguez, for respondent.

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

This proceeding, pursuant to sections 18, 22 and 44 of the Shipping Act, 1916 (46 U.S.C. §§817, 822 and 841b) was instituted by Commission Order of Investigation served April 3, 1979 (published in the *Federal Register* Vol. 44, No. 68, Friday, April 6, 1979, pages 20790-29791), to determine:

1. Whether Ikeda has violated section 510.21(i)[2] of General Order 4 by failing to clearly identify receipts issued for cargo and distinguish such receipts from bills of lading.
2. Whether Ikeda has violated section 510.23(k) of General Order 4 by failing to maintain records and books of account in the required manner.
3. Whether Ikeda has violated section 510.23(1) of General Order 4 by failing to make its records and books of account promptly available for inspection upon the request of the Commission investigative staff.

[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 C.F.R. §502.227).

[2] This undoubtedly is a typo as section 510.21(i) defines "brokerage" while section 510.23(i) provides "Any receipt issued for cargo by a licensee shall be clearly identified as a 'Receipt for Cargo,' and shall be in a form readily distinguishable from a bill of lading."

4. Whether Ikeda has violated section 510.5(c) of General Order 4 by failing to notify the Commission of a recent change of the firm's business address within 30 days after the occurrence of the change.
5. Whether Ikeda has violated section 18(b)(1) of the Shipping Act, 1916 by performing as a nonvessel operating common carrier by water without having filed with the Commission a tariff showing its rates and charges.
6. Whether Ikeda's independent ocean freight forwarder license should be revoked or suspended pursuant to:
   a. section 510.9(a) of General Order 4 for violation of a provision of the Shipping Act, 1916;
   b. section 510.9(b) of General Order 4 for failure to comply with the lawful inquiries, rules, regulations or orders of the Commission;
   c. section 510.9(e) of General Order 4 for conduct which renders the licensee unfit to carry on the business of forwarding.

Prehearing Conferences, pursuant to notices served April 3, 1979, and May 7, 1979, were held herein on April 25, 1979, and May 22, 1979, respectively. Hearing in the proceeding began and concluded on September 25, 1979.

The official transcript of the April 25, 1979, Prehearing Conference consists of one volume of 15 pages; the May 22, 1979, Prehearing Conference transcript consists of one volume (designated II) of 17 pages (numbered 16 thru 32); the hearing of September 25, 1979, consists of one volume of 157 pages. The three volumes total 189 pages. Eighteen (18) exhibits were presented, of which one (Exh. No. 8 for Identification) was withdrawn, one (Exh. No. 5 for Identification) was denied receipt into evidence, and all the rest were received into evidence (including No. 18, a late-filed exhibit). (Note: No. 11 for Identification was withdrawn when inadvertently used (Tr. 112) and then No. 11 used (Tr. 120) for next exhibit and received in evidence as Exh. No. 11 (Tr. 125).

At the hearing the briefing schedule was developed: Hearing Counsel to submit its opening brief on or before October 29, 1979 (Tr. 154), respondent's reply brief to be submitted on or before November 23, 1979 (Tr. 156) and Hearing Counsel's closing brief to be submitted on or before December 3, 1979 (Tr. 156). Subsequently by notice served November 20, 1979, the briefing schedule was changed, the counsel for the parties being notified by telephone as well on November 20, 1979, that respondent's reply brief would be due by November 26, 1979, and Hearing Counsel's closing brief would be due by December 6, 1979.

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

In its opening brief Hearing Counsel proposed 52 findings of fact. The respondent in its reply brief (designated opening brief of respondent) disputes 4 (Nos. 5, 40, 41 and 52) findings of fact proposed by Hearing Counsel. The Respondent proposed 30 findings of fact. Hearing Counsel in its reply brief disputes 13 (Nos. 4, 8, 10, 11, 12, 13, 15, 17, 18, 19, 22, 23 and 25) of the findings of fact proposed by respondent. The Presiding Administrative Law

Judge has considered all of the proposed findings of fact as well as the disputes thereto. To avoid duplication, proposed facts, already covered by stipulation of the parties, are not accepted. The proposed findings of fact have been granted, granted in substance or denied as shown by the Presiding Administrative Law Judge's following findings of fact:

FACTS

1. Respondent and Hearing Counsel entered into fourteen (14) stipulations (Exh. No. 1, Tr. 1): (Rearranged by the Presiding Administrative Law Judge, using alphabet instead of numbers, yet identifying each stipulation by number given it in Exhibit 1.)

(a) In its original application for an Independent Ocean Freight Forwarder License, dated April 29, 1969, Ikeda listed 74 West 47th Street, New York, New York, as its principal office (Exh. No. 1 at 2, Stip. 5).

(b) On the letterhead of the letter, dated July 21, 1970, by which it reapplied for an Independent Ocean Freight Forwarder License, Ikeda listed its address as 29 West 47th Street, New York, New York (*Id.,* Stip. 6).

(c) On April 28, 1971, Ikeda received Independent Ocean Freight Forwarder License No. 1321 (*Id.,* Stip. 7).

(d) In response to an April 1972 Commission questionnaire issued to all independent freight forwarders, Ikeda indicated that its current address was 29 West 47th Street, New York, New York, and that it maintained a branch office at 10–10 34th Avenue, New York, New York (*Id.,* Stip. 8).

(e) By a letter received by the Commission on May 1, 1973, Timothy M. Ikeda, President, advised that Ikeda had moved to a new address at 30 West 47th Street, New York, New York (*Id.,* Stip. 9).

(f) The Commission has been informed of complaints made by the following individuals against Ikeda:

Date Received	*Name of Shipper*	*Name of Complainant*
November, 1972	American Trading Co., Inc.	—
March, 1973	Herminio S. Cabot	—
March, 1975	Mrs. Seigi Teruza	Mrs. Ruth T. Kaneshire
December, 1976	Divina S. Valdez*	—
September, 1977	Kanjana Kongkatong*	Represented by Donald Sussman
March, 1978	Nekati Cetin*	—
March, 1978	Marlene Thomas*	Roger Thomas
May, 1978	Dr. Seiji Niimi*	Haskins Laboratory
May, 1978	Maxwell Carter*	—
July, 1978	Mrs. John Fischer*	—
May, 1979	Nanni Shield*	—
June, 1979	Sammy Arthur, Jr.*	—
June, 1979	Vincent Ho*	—

*Further information below. (*Id.* at 2, 3, Stip. 12)

(g) The Commission staff has not issued any *written* requests for the production of Ikeda's ocean freight forwarding records (*Id.* at 1, Stip. 1).

(h) On at least one occasion in 1978, July 7, 1978, Francis P. Connolly and Louis J. Catalano, Investigators from the Commission's Atlantic District Office, requested that Timothy M. Ikeda, President, produce all of the ocean freight forwarding records of Ikeda International Corporation (*Id.* at Stip. 1).

(i) Ocean freight forwarding records produced by Ikeda in response to Hearing Counsel's Request for Production of Documents were divided, in part, into separate files for each shipment handled. The individual files produced did not contain copies or notations of all documents prepared, processed or obtained by Ikeda for each shipment handled. Additional ocean freight forwarding records were maintained in stacks of like documents (e.g. ocean bills of lading) (*Id.* at 1, Stip. 4).

(j) For at least the last three years, on its invoices or other forms of billing, Ikeda did not state separately as to each shipment the charges for each service rendered (*Id.* at 2, Stip. 10).

(k) Prior to the institution of the present investigation, Ikeda did not as a rule maintain its ocean freight forwarding records in separate files for each shipment handled (*Id.* at 1, Stip. 3).

(l) On its invoices or other forms of billing, Ikeda does state separately as to each shipment the various services performed by it (*Id.* at 2, Stip. 11).

(m) The Commission has no names of persons or corporations solicited by respondent for the purpose of providing ocean transportation (*Id.* at 3, Stip. 14).

(n) Ikeda does not maintain a Nonvessel Operating Common Carrier Tariff on file with the Federal Maritime Commission (*Id.* at Stip. 13).

2. Investigator Francis P. Connolly of the Commission's Atlantic District office in New York, had been on this investigation since 1978, working with the assigned investigator Louis Catalano. Mr. Connolly was assigned personally to this investigation June 4, 1979. Investigator Connolly, a witness in this proceeding, testified he has been employed for 2 plus years by the Commission as an investigator; his prior employment, for a period of 21½ years, was as a New York City police officer (Tr. 23).

3. Complaints from shipper clients who were having difficulty with respondent Ikeda International Corporation, the witness Connolly testified, prompted the inspection try of the records of the respondent (Tr. 14).

4. Of the 13 complaints listed above (Fact 1(f)) testimony concerning some of them was given as follows:

(a) Thomas (Tr. 38). Movement was of household personal effects from the New York area to Haiti. Ikeda gave price of $2,000 to move the shipment, then brought it down to $1,500; $500 was paid in advance by check. The shipment did arrive in Haiti and was taken to where the shipper was residing. The shipper found her glassware was damaged and broken; the shipment had not been packed for ocean transport (Tr. 39). Mr. Ikeda testified that shipper Thomas did not notify him by letter that the cargo had been received (Tr. 120); Mrs. Thomas came back to New York. Mr. Ikeda had shipped the freight on the Royal Netherlands Steamship Company and had paid the ocean freight charges (Exh. No. 11, B/L No. 112 of Royal Netherlands Steamship Co., Tr. 121, 122).

(b) Vincent Ho (Tr. 45). Exhibit No. 7, a letter dated March 27, 1978, from attorney representing Vincent Ho to Ikeda International Corp., complaining that shipment of certain goods never arrived at its destination; that Mr. Ho had paid $505.00 for transportation of the goods.

(c) Alice Dadourian (Administrative Secretary for Haskins Laboratories) (Exh. No. 6). Sent letter dated May 3, 1978, to Commission's Office of Freight Forwarders, re Dr. Seiji Niimi, a Research Scientist on the staff of Haskins Laboratories who shipped personal effects to Japan through Ikeda International Corp., but had not received them (Tr. 43). Mr. Ikeda testified as to the Dr. Niimi shipment there was no excuse; but in New York there was a dock strike in October and November. Ikeda company picked up the shipment in January; the warehouse was full; also in the New York area there were 4 snowstorms, the worst in 80 years; his trucks could not move (Tr. 123).

(d) Mrs. John Fisher. Her father had moved to Hungary, request Ikeda International to transport his household and personal effects to Hungary (Tr. 53). The son, Mr. Fisher, Jr., according to witness Connolly, advised it took 12 months from the date of the contract until the shipment arrived (Tr. 54). Mr. Ikeda testified the Fisher Goods were picked up in December. In January or February Mrs. Fisher aged about 75 or 76 asked that all of the furniture be brought back; it was brought back to the warehouse; didn't hear from Fishers again until June or July; he did not charge storage (Tr. 124) as Mrs. Fisher is an old lady.

(e) Investigator Connolly testified he was made aware of complaints from Maxwell Carter, Nekati Cetin, Sammy Arthur and Nannie Shield (Tr. 54). Mr. Ikeda testified he has letter from Nannie Shield that she received everything fine (Tr. 129, Exh. No. 13).

(f) Donald Sussman. Shipment involved movement of certain merchandise to Thailand for which $800 was the charge paid to Ikeda International (Tr. 52). The cargo subsequently was released back to Mr. Sussman; $100 demurrage fee had been paid by Ikeda. Request was made to Ikeda International for return of goodly portion of $800 advanced initially for the shipments. Ikeda International and Mr. Sussman came to an agreement wherein $500 would be returned to Mr. Sussman (Tr. 53). Mr. Ikeda testified that Mr. Sussman is a representative of Ms. Kongatong. Ms. Kongatong asked Ikeda International to ship a refrigerator she had bought from a store; the refrigerator was brought to Ikeda International with the instruction to hold on until Ms. Kongatong was ready (Tr. 125). Mr. Sussman advised them not to ship, so the intended cargo was delivered to Maersk Line. Mr. Ikeda had been paid $800; Mr. Sussman agreed to accept $500 consolation and Mr. Ikeda returned $500 to Mr. Sussman (Tr. 126, Exh. No. 12, Tr. 128).

(g) Divina S. Valdez (Tr. 131, Exh. 14). Mr. Ikeda testified the first available ship was Oriental Overseas Container Line. Ms. Valdez wanted the shipment to go by Maersk Line. Without charge Mr. Ikeda picked up the shipment from Oriental Overseas Container Line and delivered it to Maersk Line (Tr. 131). Ms. Valdez had wanted shipment to arrive before Christmas, but Mr. Ikeda stated it arrived a few days later, maybe Christmastime (Tr. 132; see Exh. No. 14).

5. Timothy M. Ikeda is president and treasurer and ninety percent stockholder in Ikeda International Corporation. The business began as a trucking business June 28, 1965 (Tr. 105). The corporation is engaged in carrying on the business of ocean freight forwarding.

6. Ikeda holds Interstate Commerce Commission licenses to carry household goods in eight states; Ikeda additionally is a United States Customs Service bonded common carrier and is licensed to move household goods within New York City. Further, Ikeda is a local drayman, export packer and warehouseman.

7. The standard procedure for a Commission compliance check is for notification by the Commission investigators of the Commission's intention to conduct such a check, the notification to be given by either registered or hand-delivered letter. The standard procedure was not followed in this case (Tr. 72).

8. Respondent has not violated section 18(b)(1) of the Shipping Act, 1916, by performing as a nonvessel operating common carrier by water without having filed a tariff showing its rates and charges.

DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

Hearing Counsel in its opening brief argues that the respondent has violated section 510.23(i) (p. 9), section 510.23(k) (p. 11), section 510.5(c) (p. 13), section 510.23(i) (p. 15), respectively, as follows:

510.23(1),[3] by failing to make available promptly all records and books of account maintained in connection with carrying on the business of forwarding for inspection upon request of an authorized representative of the Commission.

510.23(k),[4] by failing to maintain in an orderly, systematic, and convenient manner and to keep current and correct all records and books of account kept in connection with carrying on the business of forwarding.

510.5(c),[5] by failing to submit to the Commission each change of business address within thirty days after such changes occurred.

510.23(i),[6] by issuing receipts for cargo which are not in a form readily distinguishable from bills of lading.

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[3] 46 C.F.R. §510.23(1) provides "Each licensee shall make available promptly all records and books of account in connection with carrying on the business of forwarding, for inspection or reproduction or other official use upon the request of any authorized representative of the Commission.

[4] 46 C.F.R. §510.23(k) provides "Each licensee shall maintain in an orderly, systematic, and convenient manner, and keep current and correct, all records and books of account in connection with carrying on the business of forwarding. These records must be kept in such manner as to permit authorized Commission personnel to determine readily the licensee's cash position, accounts receivable and accounts payable. As a minimum requirement, the licensee must maintain the following records for a period of 5 years:

(1) A current running account of overall cash receipts, disbursements and daily balance. This account must be supported by bank deposit slips, paid checks, and a monthly reconciliation of the bank statement.

(2) A separate file for each shipment, to include a copy or notation of each document prepared, processed, or obtained by the licensee with respect to each individual shipment or files which will make readily available such copies or notations with respect to each individual shipment. Records must be maintained which show the date and amount for payments received and disbursed by the licensee for the performance of services rendered or reimbusement for advance of out-of-pocket expenses.

[5] 46 C.F.R. §510.5(c) provides "Each applicant for a license and each independent ocean freight forwarder to whom a license has been issued, shall submit to the Commission each change of business address, and any other changes in the facts called for in Form FMC-18, within 30 days after such changes occur, and any other additional information required by the Commission.

[6] 46 C.F.R. §510.23(i) provision is set forth above in footnote above as to typo.

The respondent replied (Opening Brief of Respondent at 15) that there is no substantial evidence in the record of such activities and that they do not appear in the Commission's Order of Investigation as subject of this proceeding. Respondent urges that these unsubstantiated accusations are submitted in an inflammatory vein and are not part of this proceeding.

Suffice it to say that the Order of Investigation on the first page, second paragraph, states "Information has been developed which indicates that Ikeda is apparently operating in violation of sections 510.5(c), 510.23(i), 510.23(k) and 510.23(l) of the Commission's General Order 4. . . ." Further reference is made on page 2 of the Order to section 510.23(k), 510.5(c), and 510.23(i) as well as on page 3 of the Order where the Commission ordered, pursuant to sections 18, 22 and 44 of the Shipping Act, 1916, that this proceeding be instituted to determine whether Ikeda violated sections 510.21(i),[7] 510.23(k), 510.23(l) and 510.5(c), section 18(b)(1) of the Shipping Act, 1916.

On the other hand, as to substantial evidence to support the above allegations, it is stipulated (Facts 1(h) and 1(i) above) as to the Commission's request for the respondent records and those produced.

Respondent urges that the violation above and others are technical in nature, and readily remediable short of loss of respondent's ocean freight forwarding license no. 1321. Hearing Counsel has asked that said license be revoked (Reply Brief at 16, Opening Brief at 27). The respondent argues that the Commission as well as the Courts, have recognized that section 44, Shipping Act, 1916, as amended, calls for remedial rather than punitive action in applying sanctions relating to that Act. The emphasis is on correcting abuses in the industry and not punishment. The respondent cites: *Dixie Forwarding Co., Inc.—Application for License,* Docket No. 1115, 8 F.M.C. 109, 117–118 (1964); *Hugo Zanelli d/b/a Hugo Zanelli § Co.,* Docket No. 74–6, 18 F.M.C. 60, 73–74 (1974), *aff'd sub nom. Zanelli v. Federal Maritime Commission,* 524 F.2d 1000 (5th Cir. 1975).

Hearing Counsel states (Reply Brief at 7) it is "well aware that section 44 of the Shipping Act, 1916, is a remedial, as opposed to a punitive, statute."

Hearing Counsel (*Id.,* at 2), citing *Dixie Forwarding Co., supra,* argues that the "Congress . . . directed the Commission to administer the program for licensing enacted (as section 44 of the Shipping Act, 1916, 46 U.S.C. 841(b) and . . . to prescribe rules and regulations governing the industry's conduct." *Dixie Forwarding Co., supra,* at 117–118. The Presiding Administrative Law Judge finds that *Dixie Forwarding Co.* supports Hearing Counsel's position as to administration of the licensing program, however, disagrees and does not find similar support for the contentions of Hearing Counsel or the respondent as to section 44 of the Act being remedial as opposed to punitive or that *Zanelli, supra,* supports those contentions.

The respondent argues also that the Commission again most recently recognized that sanctions are to be corrective and not punitive, citing *Independent Ocean Freight Forwarder License E. L. Mobley, Inc.,*[8] Docket No. 77–26,

[7] Typo is explained in footnote above.

[8] Presiding Judge Cograve 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

Commission Report served March 12, 1979, 19 SRR 39. The Commission did make this statement, "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. Section 44 and its regulations are based on an underlying remedial public interest purpose (citing the *Dixie Forwarding Co., Inc.* case) and the sanctions imposed must serve such a purpose and not be punitive in character." 19 SRR at 41.

The Presiding Administrative Law Judge deems that an "underlying remedial public interest purpose" does not equate to the view that "sanctions are to be corrective and not punitive." It could be an excursion into semantics, still it could, and well may be that the underlying remedial public interest purpose will be served best by punitive action.

The respondent contends that when Ikeda was visited by Commission investigators in April and July 1978 who requested Ikeda's records for purpose of a compliance check,[9] such was an arbitrary and capricious action when no prior notice had been given. Respondent says that at no time was the Commission's authority to review any and all documents relating to the act of ocean freight forwarding denied or challenged. When he was approached, Ikeda was in the process of moving and his documents were at that time in packed boxes and unavailable. The normal procedure of a registered letter or a hand delivered letter was not followed in this instance.

Hearing Counsel counter that rather than providing written notice, Commission investigators orally informed respondent of their intent to conduct a compliance check during their April and July 1978 visits. Also that by accepting License No. 1321 respondent indicated its intent to conform the conduct of its business to the rules and regulations promulgated by the Commission for the governance of the ocean freight forwarding industry. Thus, says Hearing Counsel, respondent's argument that it was the victim of an arbitrary and capricious action cannot be lent any credence.

Hearing Counsel contends that given respondent's numerous, willful, and repeated violations of the Commission's rules and regulations, revocation of its license is the only appropriate and effective sanction.

Much of this case has been stipulated (See Facts 1 (a through n)). The crux of the matter then boils down to whether under the circumstances of this case

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ensure they would not recur; thus he found that Mr. Mobley continued 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.

The Commission stated, "While we concur in the Presiding Officer's finding that the individual act of Mr. E. L. Mobley and the nature of the violation 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."

The Commission sat Mobley down for 6 months and ordered that he submit monthly financial accounts as to his full compliance with payover rule.

[9] A compliance check consists of:

1. A normal interview to determine who the officers of the corporation are. If there are any changes from the original application to determine who the stockholders of 5% or more are (Tr. 71); to determine the addresses, branch offices, any administrative changes, financial statements about the company itself.
2. Review all records pertaining to shipments, cash disbursements, accounts receivable. Go through files and examine each individual shipment; compare rates and charges listed in those files against disbursements that are made.
3. Review of insurance procedures.

Such a procedure in Mr. Ikeda's case would take a day and a half.

the respondent should be permitted to retain Independent Freight Forwarder License No. 1321 which he received April 28, 1971.

It will be noted from the record herein that the respondent gave an explanation for some but not all of the complaints indicated. Accepting fully the explanations given, the Presiding Administrative Law Judge is left with those unexplained, the stipulations, and other factors in this record which enables him to *find* and *conclude* by a preponderance of the evidence that the respondent has committed the violations of sections 510.23(i), 510.23(k), 510.23(l) of General Order 4. As to violation of section 510.5(c) of General Order 4, since the respondent has had the address 1010–34th Avenue, New York, N.Y., apparently since 1972, and was found at that address, the benefit of any doubt is to be given to the respondent and the Presiding Administrative Law Judge does not find the respondent in violation of this section.

The respondent has not violated section 18(b)(1) of the Act.

The facts and circumstances of this case causes the Presiding Administrative Law Judge also to *find* and *conclude* that:

The respondent has violated section 510.9(a) of General Order 4.

The respondent has not been proved by a preponderance of the evidence to have violated section 510.9(b) and 510.9(e) of General Order 4.

The respondent asks for a second chance to correct violations, short of loss of license (Brief at 13) and that the respondent be found fit, willing and able to carry on the business of forwarding (*Id.*, at 16). Hearing Counsel urges that the respondent's numerous, willful and repeated violations of the Commission's General Order 4, as well as the numerous complaints registered against the respondent by the shipping public demonstrates that the respondent lacks the requisite fitness to carry on the business of forwarding (Opening Brief at 21). Hearing Counsel says respondent's independent ocean freight forwarder license should be revoked (*Id.*, at 27). Repeated in Reply Brief at 16. Hearing Counsel contends that revocation of the respondent's license is the only appropriate and effective sanction (Reply Brief at 7, 11).

Hearing Counsel (*Id.*, at 8) points out it should be noted that respondent has offered no substantiate for its claim that it now operates in comformity with the Commission's General Order 4. The Presiding Administrative Law Judge finds this point well taken. Perhaps the respondent will benefit from a period of close cooperation, instruction and supervision from the Commission's Office of Ocean Freight Forwarders. It is deemed by the Presiding Administrative Law Judge that for a period of six (6) months the respondent should be required to work closely with the Commission's Office of Ocean Freight Forwarders during which time the respondent will demonstrate through copies of its monthly reports just how the respondent is operating, and the Commission's Office of Ocean Freight Forwarders will inspect and where necessary instruct whether the respondent needs to make changes or other suggestions.

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

(1) The license of the respondent should not be revoked.

(2) The respondent shall substantiate that it now operates in conformity with the Commission's General Order 4, by submitting to the Commission's Office of Ocean Freight Forwarders, information as to respondent's method of operation. There is to be close cooperation between respondent and said office, the latter giving direction and instructions to respondent when deemed necessary. The respondent, for a period of six (6) months, beginning with the date of this Initial Decision shall submit to the Office of Ocean Freight Forwarders, each month thereafter, a copy of the respondent's monthly report or such reports the said Office of Ocean Freight Forwarders need in the situation to be most helpful. This will serve, hopefully, an "underlying remedial public interest purpose."

Wherefore, *it is ordered*, subject to review by the Commission, as provided in the Commission's Rules of Practice and Procedure, that:

(1) Respondent's Ocean Freight Forwarder License No. 1321 shall not be suspended or revoked in this proceeding.

(2) The respondent shall cooperate with the Commission's Office of Ocean Freight Forwarders as described in (2) above.

(3) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON, D. C.
January 15, 1980

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 666(I)

FMC CORPORATION

v.

ARGENTINE LINE

NOTICE OF ADOPTION

May 27, 1980

Upon review, the Commission has determined to adopt the decision of the Settlement Officer in this proceeding served March 17, 1980.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 666(I)

FMC CORPORATION

V.

Argentine Line

DECISION OF TONY P. KOMINOTH, SETTLEMENT OFFICER:[1] DISMISSAL OF PROCEEDING.

Adopted May 27, 1980

FMC Corporation (complainant), a multinational manufacturer of machinery and chemicals for industry and agriculture, alleges an improper rate application by Argentine Line (respondent), a common carrier engaged in the trade between Philadelphia, Pennsylvania and Buenos Aires, Argentina.

According to complainant, on March 9, 1977, Argentine Line, as a member of the Inter-American Freight Conference, (IAFC) handled a shipment of "Wood Cellulose Flock" for complainant with port of origin at Philadelphia and port of destination, Buenos Aires. The rate assessed was $3,437.44 computed as follows:

873 cu. ft. @ 147.50 per 40 cu. ft.	=	$3,219.19
Bunker surcharge @ $10.00 per 40 cu. ft.	=	218.25
Total	=	$3,437.44

While the source for this rate is not identified, complainant asserts that a specific commodity rate was in effect at the time of the shipment, which rate, on a weight basis, would have resulted in a total freight charge of $766.89 computed as follows:

17,440 lbs. @ $87.50 per 2240 lbs.[2]	=	$681.25
Bunker surcharge @ $10.00 per 2240 lbs.	=	85.64
Total	=	$766.89

Complainant alleges a violation of section 18(b)(3) in that respondent collected and received $2,670.55 in excess charges by assessing improper rates.

[1] Both parties having consented to the informal procedure of 46 C.F.R. § 502.301-304, (as amended), this decision will be final unless the Commission elects to review it within 30 days from the date of service thereof.

[2] Source—Inter-American Freight Conference Tariff No. 7. (FMC No. 14) Section D 1st. rev. at 112.

In its reply, respondent acknowledges that a mistake was made in the tariff rate as claimed by complainant. However, respondent also makes the following "observations":

1. The IAFC Tariff provides that all claims for adjustments in freight charges must be presented to the carrier within six months after the date of shipment. Section D, rule 3, 2nd rev. at 25.
2. In FMC's complaint it is stated that freight payment was made by W. M. Cook & Company (complainant's agent) whereas the relevant bill of lading states that the freight was payable at destination.

Respondent asks for advice on these two matters.

With respect to the IAFC six month rule, it is well established that carrier published tariff rules cannot act to bar recovery of an otherwise legitimate overcharge claim when filed within the two (2) year time limit specified in section 22, Shipping Act, 1916. The instant complaint was filed with the Commission within the two year period.

The matter of complainant's standing to pursue this action with the Commission was the subject of correspondence between complainant and the Settlement Officer.

On December 13, 1979, complainant acknowledged that the shipment had moved "Freight Collect" and that the consignee had paid the ocean freight charges. However, the consignee had authorized complainant to proceed on its behalf to collect the overcharge. This communication was subsequently followed by a formal assignment of the claim to complainant dated January 3, 1980.

The Commission has held that in a claim for refund or overcharges the complainant must show that it has paid the freight or has succeeded to the claim by assignment or other legitimate means.[3] Here, complainant has admitted that the freight charges were paid by the consignee, but that it has succeeded to the rights of the consignee through the execution of the assignment. However, the assignment, by transferring the consignee's legal interest or right in the claim to complainant, results in the substitution of a different party to the complaint. As such, it is in reality a new complaint and must meet the two year time limit as set forth in section 22. A complaint cannot be amended to name the proper party nor can an assignment of a claim be obtained after the two year time limit has expired.[4]

The original claim filed by complainant was improper in that complainant did not have standing to seek reparations. The assignment, which would have conferred standing on complainant, was executed well outside the two year statute of limitations and is time-barred.

Accordingly, there is no basis to address the merits of this case and the complaint is hereby dismissed.

(S) TONY P. KOMINOTH
Settlement Officer

March 27, 1980

[3] *Trane Company v. South African Maritime Corp.* (N.Y.), 19 F.M.C., 374 (1976). *Ocean Freight Consultants, Inc. v. The Bank Line, Ltd.*, 9 F.M.C. 211, 212-213 (1966).

[4] *Carton-Print, Inc. v. The Austasia Container Express Steamship Company*, 20 F.M.C. (1977).
Informal Docket No. 623(I), *E.S.B. Incorporated v. Springbok Line, Ltd.*, Complaint dismissed January 22, 1980, 19 SRR 1342.

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-2

ORGANIC CHEMICALS (GLIDDEN-DURKEE)
DIVISION OF SCM CORPORATION

v.

ATLANTRAFIK EXPRESS SERVICE

DENIAL OF PETITION FOR RECONSIDERATION

May 30, 1980

By Petition filed March 10, 1980, Complainant requested reconsideration of the Commission's denial of its motion for an order requiring Respondent to pay expenses incurred in making proof of matters Respondent failed to admit.

In denying Complainant's motion as untimely under Rule 208(c) of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.208),[1] the Commission, in its Order served February 6, 1980, noted that Complainant could have made its motion at the close of evidence which would have allowed the Presiding Officer to rule on the motion at the time he issued his Initial Decision.

Complainant contends in its Petition for Reconsideration that Rule 208(c) does not authorize, much less require the course of action suggested by the Commission. Complainant argues that a motion for payment of expenses can be made only after the party seeking relief has proven the truth of the matters the other party failed to admit. In Complainant's words:

> He can never be stated to have made that proof, even initially or tentatively, until the presiding officer issues an initial decision which embodies a finding that the matter has been so proved; and it cannot finally and firmly be stated that he has made that proof until the presiding officer's initial decision has become final through action (or inaction) by the full Commission.

Citing Rule 73, Complainant submits that once an initial decision has been issued the presiding officer no longer has jurisdiction over the proceedings.[2]

[1] This rule provides that a motion for the payment of expenses may be made to the presiding officer.

[2] Rule 73 reads in part:

> After the assignment of a presiding officer to a proceeding and *before the issuance of his recommended or initial decision*, all motions shall be addressed to and ruled upon by the presiding officer . . . . If the proceeding is not before him motions shall be addressed to . . . the Commission . . . . (Emphasis added).

46 C.F.R. § 502.73.

Complainant therefore maintains that rule 73 read with Rule 208(c) creates an ambiguity which can only be resolved by reasonably construing "presiding officer" as used in Rule 208(c) to mean "the Commission."

Complainant further argues that even though Rule 208(c) was patterned after Rule 37 of the Federal Rules of Civil Procedure, the court decisions cited in the Commission's Order are not controlling here as Rule 37 applies to court proceedings, where the trial judge retains jurisdiction over certain matters after judgment is issued, whereas the presiding officer in Commission proceedings is deprived of any jurisdiction after the issuance of an initial or recommended decision.

Finally, Complainant maintains that the proceeding is still pending, and the motion, therefore, is properly before the Commission.

DISCUSSION

While Rule 208(c) gives a party the option whether or not to apply for the reimbursement of expenses, it directs that such a motion be addressed to the presiding officer. The rule does not present any conflict with Rule 73 as the latter simply provides that motions to the presiding officer must be made before an initial decision is issued.[3]

In any event, Rule 261(a) of the Commission's Rules requires that a petition for reconsideration will be rejected unless it:

> (1) specifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order; (2) identifies a substantive error in material fact contained in the decision or order; or (3) addresses a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party. Petitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received. . . .

The petition here alleges no change or error in material fact or change in the applicable law. None of Complainant's arguments presents a basis under Rule 261(a) for a reconsideration of the Commission's decision that Complainant's motion made after the issuance of the Presiding Officer's Initial Decision was untimely. Complainant's Petition for Reconsideration is therefore denied.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[3] Rule 208(c) has since been amended to specify that motions for payment of expenses be made before the issuance of the initial decision. In this instance Complainant filed its brief in the case on March 19, 1979. The Presiding Officer's Initial Decision was issued on May 4, 1979 and that decision became administratively final on June 11, 1979. Respondent paid the amount awarded in reparation some time in August, 1979. Complainant did not file its request for expenses until December 12, 1979.

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV

FEDERAL MARITIME COMMISSION

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

(GENERAL ORDER 14, AMDT. 6; DOCKET NO. 80-11)

PART 527—SHIPPERS' REQUESTS AND COMPLAINTS

May 30, 1980

ACTION: Final Rule

SUMMARY: This amends the Commission's regulations by reducing the frequency of filing reports of Shippers' Requests and Complaints from quarterly to annually.

EFFECTIVE DATE: June 4, 1980

SUPPLEMENTARY INFORMATION:

This proceeding was instituted by notice of proposed rulemaking published in the *Federal Register* on March 10, 1980, (45 Fed. Reg. 15229) to amend section 527.4 of the Commission's regulations (General Order 14, 46 C.F.R. 527.4), reducing the frequency of filing of reports of shippers requests and complaints from a quarterly to an annual basis. The proposal provides that by January 31 of each year, each conference and each other body with rate-fixing authority under an approved agreement shall file with the Commission a report covering all shippers' requests and complaints received during the preceding calendar year or pending at the beginning of such calendar year.

By way of background, section 15 of the Shipping Act, 1916 (the Act), requires that the Commission shall disapprove any such agreement [conference or ratemaking] after notice and hearing, on a finding of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints. Part 527.4 of Title 46, Code of Federal Regulations, presently requires the quarterly filing of reports of shippers' requests and complaints by each conference and ratemaking agreement.

Two party ratemaking agreements are required to file only an annual report.

An annual submittal will reduce the workload of the regulated parties. During the fiscal year from October 1978 through September 1979, 349 such reports were received at the Commission. If reported on an annual basis only, 87 reports would have been prepared and filed for the above period and the reporting and carry over of "pending" complaints reduced by three-fourths.

Comments from interested parties were invited with respect to the proposed rule. A total of 8 comments were filed on behalf of 39 representative commentators, all conferences and rate agreements:

Position of the Commentators

Twenty-seven of the commentators were in total agreement with the rule change as proposed. They all emphasized that the change will significantly reduce the workload of their staffs as well as the Commission's staff and in no way hamper the promptness with which shippers' requests and complaints are handled by them and that the Commission's regulatory responsibility to oversee would not be affected.

The twelve other commentators generally stated that the proposed rule change had no particular significance to them in that the number of complaints requires them to maintain a continuous procedure of clerical recording for eventual dispatch to the Commission and that the proposed reporting schedule did not change this. It was pointed out that the proposal will not appreciably reduce the volume of material required to be shown by a conference to establish that it maintains reasonable procedures for processing shippers' requests and complaints. However, they did say they had no objections to the proposed regulation change.

The Commission has considered all of the filed comments in this rulemaking proceeding and has determined it appropriate to reduce the reporting requirements set forth under section 527.4 from a quarterly requirement to an annual requirement.

Enactment of the regulation will do no disservice to the promptness with which shippers' requests and complaints are dealt and will not hamper the Commission's regulatory responsibility to oversee this area. The relaxation of reporting requirements does not relieve carriers of their statutory duty to promptly and fairly hear shippers' requests and complaints.

Accordingly, pursuant to section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, and sections 15, 21 and 43 of the Shipping Act, 1916, 46 U.S.C. § 814, 820 and 841a, the Federal Maritime Commission hereby revises section 527.4 of Title 46 C.F.R. (General Order 14) to read as follows:

§ 527.4 Reports.

By January 31 of each year, each conference and each other body with rate-fixing authority under an approved agreement shall file with the Commission a report covering all shippers' requests and complaints received during the preceding calendar year or pending at the beginning of such calendar year. The

first such report shall be filed by January 31, 1981. All such reports shall include the following information for each request or complaint:

(a) Date request or complaint was received.
(b) Identity of the person or firm submitting the request or complaint.
(c) Nature of request or complaint, i.e., rate reduction, rate establishment, classification, overcharge, undercharge, measurement, etc.
(d) If final action was taken, date and nature thereof.
(e) If final action was not taken, an identification of the request or complaint as "pending."
(f) If denied, the reason.

By the Commission

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-4

MATSON NAVIGATION COMPANY—
PROPOSED 5.67 PERCENT BUNKER SURCHARGE
IN THE HAWAIIAN TRADE

ORDER APPROVING SETTLEMENT OF PROCEEDING

June 3, 1980

The Commission has before it an Offer of Settlement and Motion to Terminate this proceeding filed by Matson Navigation Company, to which the State of Hawaii, Oscar Mayer & Co., Inc., and the Commission's Bureau of Hearing Counsel have replied.[1]

The proceeding was instituted by an Order of Investigation (Order), issued January 17, 1980, to determine the lawfulness of a Matson cumulative 5.67 percent bunker surcharge. This surcharge which was filed on December 14, 1979 with an effective date of January 14, 1980 represented a reduction of .99 percent from the prior Matson surcharge in the Hawaii Trade.[2]

The Commission's Order limited the investigation to the following:

(1) Should the methodology found to be appropriate in Docket No. 79-55 be applied retroactively to Matson bunker surcharges in effect prior to the effective date, May 30, 1979, of the surcharge that was the subject of that investigation?

(2) Should an allocation be undertaken between Trade and non-Trade cargo in order to ascertain the amount of increased fuel cost that should be recovered by Matson's proposed bunker surcharge?

[1] Matson also filed a Motion to Stay Briefing Schedule which was granted on April 30, 1980.

[2] Two Matson tariffs, FMC-F Nos. 168 and 169 (eastbound bulk sugar and molasses), were not subject to prior bunker surcharges under Domestic Circular Letter 1-79. These commodities moved under negotiated freight agreements which included fuel cost escalation clauses imposing a flat per-ton fuel surcharge of 69¢ on sugar and 23¢ on molasses. These charges compute to 7.57 percent and 5.67 percent of the respective free in and out rates for these items. Direct Testimony of Oscar Mayer § Co., Inc. at 3; Docket No. 79-55 *Matson Navigation Company—Proposed Bunker Surcharge in the Hawaii Trade,* Initial Decision at 19, n.7, 19 S.R.R. 793, 801, n.7 (1979). Accordingly, the 5.67 percent surcharge in this proceeding represents a reduction of 1.90 percent in the fuel charge for sugar and no change in the fuel charge for molasses.

The Commission noted in its Order, however, that these issues might be determined in pending investigations[3] and that in any event a full evidentiary hearing with cross-examination would not be necessary to properly decide these issues. Accordingly, the matter was not referred to an Administrative Law Judge and the hearing was limited to the submission of written testimony, exhibits and briefs to the Commission for decision under an expedited procedural schedule.

On March 20, 1980, the Commission allowed the State of Hawaii and Oscar Mayer leave to intervene and delayed the procedural schedule to permit the filing of submissions by these intervenors. All parties except Hawaii have filed testimony and exhibits.

POSITIONS OF THE PARTIES

Matson's Offer of Settlement concedes all substantive issues in the proceeding. It notes that the Commission's March 28, 1980 decision in Docket No. 79-92—*Matson Navigation Company (Matson)—Proposed 6.66 Percent Bunker Surcharge Increase In Tariffs FMC-F nos. 164, 165, 166 and 167,* 22 F.M.C. ___, 19 S.R.R. 1525, is dispositive of the trade/nontrade allocation issue in this proceeding.[4] Matson also states that it has already represented in this proceeding that it would retroactively apply to any subsequent bunker surcharge the methodology found appropriate in Docket No. 79-55—*Matson Navigation Company—Proposed Bunker Surcharge In The Hawaii Trade,* Report and Order Adopting Initial Decision, 22 F.M.C. ___, 19 S.R.R. 1065 (1979); that it had in fact previously filed such a surcharge to which it retroactively applied such methodology;[5] and, that it would recompute the surcharge presently under investigation in the same manner. Matson submitted exhibits computing the correct surcharge at 5.42 percent.

Matson therefore urges the Commission to approve the offer of settlement and discontinue the investigation on the basis that no material issues of fact or law remain to be decided and any overrecovery of fuel costs in this proceeding will be remedied in future surcharges by operation of Line 7 of Form FMC-274.

Hearing Counsel agrees with Matson's position as to all relevant matters. It is of the opinion that no material issues remain to be determined in this

[3] The Commission advised that the question of retroactive application of methodology might be resolved by the then pending Petition for Clarification in Docket No. 79-55, *infra,* Order of Investigation at 2, and that the issue of Trade/non-Trade allocations might be disposed of in Docket No. 79-84—*Matson Navigation Company—Proposed 5.90 Percent Bunker Surcharge Increase in Tariffs FMC-F Nos. 164, 165, 166 and 167,* Order of Investigation at 3. However, the Trade/non-Trade allocations issue was not decided until the Commission issued its Report and Order in Docket No. 79-92, *infra,* and the issue of the retroactive application of methodology, although conceded by Matson in this proceeding, has yet to be formally resolved.

[4] In Docket No. 79-92, *supra,* the Commission held that "cargo moving under a carrier's tariffs containing bunker surcharge provision can only be required to bear those fuel costs associated with the movement of that cargo. . . ." and that any "nontrade" cargo or other cargo not subject to bunker surcharges, without exception, must be allocated out of the fuel cost and bunker surcharge computations. Slip opinion at 11-12, 19 S.R.R. 1528-1529.

[5] On April 11, 1980, Matson filed a 4.60 percent surcharge, effective May 13, 1980, applicable to the same tariffs under investigation in this proceeding. The justification submitted with that surcharge included a retroactive application of methodology prescribed in Docket No. 79-55, *supra.*

proceeding, that no regulatory purpose will be served by continuing the proceeding and that Matson's offer of settlement should be approved. Hearing Counsel notes that section 5 of the Administrative Procedure Act (5 U.S.C. §554(c)) provides for the consideration of offers of settlement and submits that while Oscar Mayer had not specifically agreed to the settlement at the time Hearing Counsel filed its reply, unanimous consent of all parties to an offer of settlement is not required if the proposed settlement is found to be in the public interest.[6]

Hawaii is also not opposed to the Commission accepting Matson's Offer of Settlement and dismissing the proceeding.

Oscar Mayer takes the position that the settlement offer is reasonable and satisfies the two questions posed in the Order of Investigation. However, Oscar Mayer argues that the inclusion of the sugar and molasses freighting contracts under the bunker surcharge violates "the essence" of the Commission's findings in Docket No. 79-55, *supra,* and requests a Commission decision on this issue.

DISCUSSION

Based on the submission of the parties and after an examination of the testimony and exhibits submitted to date, the Commission finds that there remain no material issues of fact to be resolved in this proceeding.[7] The calculation of the alleged proper surcharge submitted by Matson and agreed to by all parties appears to be accurate and, with certain minor exceptions noted below, supported by evidence of record. Therefore, the continuance of this proceeding would not appear to serve any regulatory purpose. The Commission is therefore approving Matson's offer of settlement and granting its motion to discontinue this proceeding.

The evidentiary state of the record of this proceeding and the ambiguous position of Oscar Mayer, warrant some further discussion, however.

The calculation of the proper bunker surcharge is presented as an exhibit attached to Matson's Offer and Motion. This exhibit is essentially argument and is not independent evidence that can be used to alone support a finding that a 5.42 percent bunker surcharge is just and reasonable. However, because each party has had an opportunity to object to this factual data and has failed to do so, its use in merely determining whether to approve the settlement offer does not constitute a denial of due process. *See Giant Food, Inc. v. Federal Trade Commission,* 322 F.2d 977, 984 (D.C. Cir. 1963). The Commission will accept the document as a factual proffer and look to other corroborating evidence of record to support its use as a basis for the calculation of the proper surcharge.[8]

[6] Hearing Counsel cites *Pennsylvania Gas & Water Co. v. Federal Power Commission,* 463 F.2d 1242 (D.C. Cir. 1972).

[7] While the matter of the retroactive application of bunker surcharge decisions has not been resolved, it is unnecessary to do so in light of Matson's offer to voluntarily apply these decisions retroactively.

[8] The Commission notes that although Matson has cast its Motion in "offer and acceptance" terminology, the Commission is *not* a party to the settlement agreement. Such agreements are among the litigants to a proceeding with the Commission sitting in judgment of its acceptability in terms of the public interest. *See Texas Eastern Transmission Corp. v. Federal Power Commission,* 306 F.2d 345 (5th Cir. 1962).

Essentially, all of the basic data appearing in Matson's final calculations are contained in its direct testimony. The only exception is that data contained in Matson's answers to Hearing Counsel's Interrogatories which form the basis of certain elements of the surcharge calculations proffered as part of the settlement offer.[9] However, this same data has been incorporated into the exhibit attached to Matson's settlement proposal and as has been already noted, no party has challenged the 5.42 percent surcharge figure. Therefore, it does not appear that this failure to follow formal evidentiary procedures in this particular proceeding is of such significance so as to impeach the overall reliability of the surcharge calculations or deprive any party of procedural due process. Nor does the Commission view it as of such significance so as to prevent a final disposition of the proceeding.[10]

Oscar Mayer's objection does not go to the settlement of this case, but goes to the application of the bunker surcharge to bulk sugar and molasses moving under Tariffs FMC-F Nos. 168 and 169.[11] Oscar Mayer has agreed to the settlement offer and further resolution of this admittedly collateral issue is not necessary to the disposition of this proceeding. Moreover, this matter was not noted in the original Order of Investigation and under the strictures of section 3 of the Intercoastal Shipping Act it may not be litigated in this investigation.[12]

THEREFORE, IT IS ORDERED, That Matson Navigation Company's Offer of Settlement and Motion to Terminate Investigation is granted; and

IT IS FURTHER ORDERED, That the correct computation of the level of bunker surcharge in this proceeding is found to be 5.42 percent; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[9] The data in question is the projected transshipment cargo measurement tons for the period February-May 1980, the actual transshipment cargo measurement tons for the period April-November 1979 and the revenues derived from these movements. The answers to Hearing Counsel's Interrogatories have not been formally proffered as evidence and are entered in the Commission's docket book under the "correspondence" section.

[10] Settlements of administrative proceeding are viewed as a form of administrative summary judgments by reviewing courts. *Pennsylvania Gas & Water Co. v. Federal Power Commission, supra.* Accordingly, it is encumbant upon the Commission to ensure that there is a proper factual basis to support the offered settlement. Parties to any settlement offer should submit a factual stipulation with any such offer to facilitate its disposition.

[11] Formerly, Matson recovered excess fuel costs applicable to these commodities through fuel cost escalation clauses in negotiated freight agreements. See footnote 2.

[12] *See* Docket No. 79-48—*Trailer Marine Transport Corp. Proposed General Increase In Rates,* Report and Order Partially Adopting Initial Decision, 19 S.R.R. 985 (1979).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 710

APPLICATION OF JAPAN LINE (U.S.A.) LTD.
FOR JAPAN LINE LTD. FOR BENEFIT OF
NOMURA (AMERICA) CORPORATION

ORDER ADOPTING INITIAL DECISION

June 12, 1980

This proceeding was instituted upon the application of Japan Line (U.S.A.), Ltd. and the Pacific Westbound Conference (PWC) on behalf of Nomura Corporation requesting permission to refund a portion of freight charges paid by Nomura in connection with one shipment of Butyl Motor Tube Scrap (Butyl), carried on February 6, 1980, from Los Angeles, California to Osaka, Japan.

Administrative Law Judge Joseph N. Ingolia issued an Initial Decision in which he concluded that the applicant had substantiated its claim and was, accordingly, entitled to refund a portion of its freight charges. However, the amount of refund granted was less than the amount sought by PWC and Japan Line. Japan Line filed Exceptions to the Initial Decision.

BACKGROUND

Japan Line is a member of the Pacific Westbound Conference. Effective March 28, 1979, PWC established a *special rate* of $70 WT on Butyl from the Pacific Coast to Japan Base Ports.[1] This rate item was originally set to expire on September 30, 1979.[2] This expiration date was subsequently extended to December 31, 1979.[3] On December 1, 1979, PWC decided to maintain the special rate beyond the December 31 expiration date and make the then existing rate ($70 WT) subject to the February 1, 1980 announced general rate increase. However, through administrative inadvertence the December 31, 1979 expiration date symbol was *not* removed from the commodity item

[1] Pacific Westbound Conference Local and Overland Freight Tariff No. 11 FMC-19, 3rd Rev. Page 742, Commodity Item No. 771.1440.40.

[2] *See* 6th Rev. Page 19 of the tariff.

[3] *See* 14th Rev. Page 19 of the tariff.

number. This oversight was further compounded when the commodity description for Butyl Motor Tube Scrap was inadvertently deleted on January 1, 1980.[4] These errors resulted in Nomura being assessed a rate of $133 WT under item 771.1440.20 (Waste and Scrap of Rubber or Plastic) of the tariff on its February 6th shipment.

On February 21, 1980, the Conference amended its tariff, instituting a freight rate of $77 WT for Butyl with a caveat noting that:

[I]tem 771.1440.40 failed to be maintained in the tariff effective January 1, 1980 thru February 20, 1980 with a contract rate to Japan Base Ports of $70.00 WT increasing to $77.00 WT on February 1, 1980.[5]

Applicant now seeks to refund $3,566.95 to Nomura, which it states is the difference between what was paid ($133 WT) and what should have been paid had the $70 WT rate been applied.

INITIAL DECISION

The Presiding Officer found an inadvertent failure by PWC to file a new tariff item covering Butyl and concluded that a refund was in order. However, the Presiding Officer based the refund on the $77 WT rate rather than $70 rate, because: (1) the shipment of Butyl was carried on February 6, 1980—six days after a general rate increase went into effect; and (2) the $77 rate conformed to the amended tariff filed with the Commission on February 21, 1980. The amount permitted to be refunded by Japan Line and PWC to Nomura was $3,230.18, which represents the difference between what was paid and the $77 WT rate.

POSITION OF JAPAN LINE AND PWC

PWC claims that the Presiding Officer erred in reducing the refund to Nomura from $3,566.45 to $3,230.18. PWC argues that Rule 3.1.2 of its Local/Overland Tariff on file with the Commission, dictates that the greater amount be refunded. This provision provides that:

All local cargo in ordinary stowage will qualify for rates or charges applicable *prior* to the effective date of an increase if (a) it is received by a carrier prior to the effective date of the increase and if (b) it is loaded to a vessel scheduled to sail within ten (10) days *after* the effective date of the increase. (Emphasis added.)[6]

In this instance, it is alleged that the containers of Butyl were received by Japan Line between January 25, 1980 and January 30, 1980, and that the vessel carrying these containers sailed on February 6, 1980. Hence, PWC contends that the shipment, having complied with Rule 3.1.2, should have been rated at $70 WT. PWC therefore submits that the amount indicated in its application for refund was proper.

[4] *See* 7th Rev. Page 742 of the tariff.

[5] *See* 9th Rev. Page 472 of the tariff.

[6] *See* 5th Rev. Page 58 of the tariff. It is noted that this item was not brought to the Presiding Officer's attention during the proceeding below.

DISCUSSION AND CONCLUSION

A special docket application seeking a refund or waiver must meet certain requirements as set forth in section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817(b)(3)), and section 502.92(a) of the Commission's Rules (46 C.F.R. §502.92(A)). Included among these are the requirements that the error be *bona fide* and of the type contemplated by the statute, that applicant, prior to submitting the application, has filed a corrective tariff setting forth the rate on which the refund would be based,[7] that the application be filed within 180 days of shipment, and that no discrimination among shippers result from the grant of the application.

The corrected tariff filed by Japan Line here does, indeed, conform with the requirements of section 18(b)(3). Applicant's amended February 21, 1980 tariff sets forth the $70 WT rate that was intended to be applied from January 1, 1980 through January 31, 1980 and the $77 WT rate in effect after that date, which rate includes an amount required by the February 1, 1980 general rate increase.[8]

Here, the rate applicable to the shipment is not the $77 WT rate, as found by the Presiding Officer, but rather the $70 WT rate. The containers of Butyl were *received* by Japan Line between January 25, 1980 and January 30, 1980, and the containers were *loaded* onto the vessel within 10 days after the February 1, 1980 general rate increase. Hence, applying the provisions of Rule 3.1.2, the rate upon which the refund must be based is the rate in effect prior to February 1, 1980, *i.e.,* $70 WT.

THEREFORE, IT IS ORDERED, That the Exceptions of Japan Line and PWC are granted; and

IT IS FURTHER ORDERED, That except to the extent noted above, the Initial Decision served in this proceeding is adopted by the Commission; and

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

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 710, that effective January 1, 1980, the rate on Butyl Motor Scrap is $70 WT through January 31, 1980, and $77 WT from February 1, 1980 through February 20, 1980 for purposes of refund or waiver of freight charges, subject to all other applicable rules, regulations, terms and conditions of said rate and this tariff.

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

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[7] Section 18(b)(3) requires, in relevant part:

[T]hat the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which *sets forth the rate on which such refund or waiver would be based.* [Emphasis added]

[8] This corrected tariff parallels the corrected tariff found acceptable by the Commission in *Application of Yamashita-Shinnihon Line for the Benefit of Nissho-Iwai American Corporation,* Special Docket No. 678, served February 25, 1980, 19 SRR 1407. In that case it was held that a refund could be based on a filed corrective tariff which includes an amount attributable to an intervening general rate increase.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 710

APPLICATION OF JAPAN LINE (U.S.A.) LTD. FOR JAPAN LINE LTD. FOR BENEFIT OF NOMURA (AMERICA) CORPORATION

Adopted June 12, 1980

Permission is granted to Japan Line and Pacific Westbound Conference to refund a portion of the freight charges to Nomura (America) Corporation in the amount of $3,230.18.

Held:

(1) Where a Conference intended to extend a particular rate in a tariff if a significant amount of tonnage were carried, and where the Conference staff became aware that such tonnage was carried and had authority to file a new, corrected tariff, and attempted to do so but through mistake and inadvertence failed to delete the expiration date; a mistake occurred within the meaning of section 18(b)(3), Shipping Act, 1916.

(2) Where a new tariff was filed prior to the application for refund, setting forth the basic corrected rate without expiration, as well as an intervening general rate increase, and where the tariff also contained an appropriate notice to all shippers, the tariff satisfied the requirements of section 18(b)(3) and is distinguishable on the facts from the tariff filed in *Munoz y Cabrero v. Sea-Land Service, Inc.*, 20 F.M.C. 152 (1977) and does not fall within the ambit of the holding in that case.

INITIAL DECISION[1] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

This is a special-docket application filed on March 13, 1980, by Japan Line (U.S.A.) Ltd. (Japan Line) and the Pacific Westbound Conference (PWC) on behalf of Nomura Corporation (Nomura) wherein they seek permission to refund a portion of freight charges paid by Nomura in connection with one shipment of Butyl Motor Tube Scrap (Butyl), which Japan Line carried from Los Angeles, California, to Osaka, Japan.

FACTS

At all pertinent times, Japan Line was a member of PWC. Effective March 28, 1979, the Conference tariff established a special rate of $70.00 WT

[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 C.F.R. §502.227).

from Pacific Coast to Japan Base Ports on Butyl.[2] Originally, the special rate was to expire on September 30, 1979,[3] and then, effective September 12, 1979, was to expire on December 31, 1979.[4]

During October of 1979, the Conference Ad Hoc Rate Committee reviewed all commodity items which were scheduled to expire on December 31, 1979. Its recommendations were based on the following considerations:

1. Maintain without expiry, special rate items showing approximately 25 tons or more via PWC through June.
2. Allow to expire on 12/31/79, special rate items showing minimal or no tonnage through June with notification to be made in individual commodity items. Many of these items are to remain under study by the committee for more in-depth review. As the deletion of many special rate items results in a substantial increase to the "NOS" level, staff to research reducing the NOS levels to a more reasonable level.
3. On 90-days notice delete all regular/special rates showing no tonnage through June via PWC, supported by no tonnage through June as shown in West Coast/USA export statistics, with notification to be made in individual commodity items.
4. Extend through January 31 or March 31, 1980, special rate items showing minimal or no tonnage through June recognized as being newly established in 1979 by the Conference in response to shippers requests.

In the application submitted in support of the refund, D. P. Griffith, the Exeuctive Assistant of PWC states in pertinent part:

2. In October, 1979, the Conference established four criteria as to whether or not Special Rates were to expire from our tariff on December 31. The criteria are enumerated in our submission to Administrative Law Judge Ingolia dated March 24, 1980.
3. While tariff Item No. 771.1440.40, by Conference action, was scheduled to expire on December 31, 1979, this commodity was to undergo continued staff study for possible cargo movement between October and December.
4. The staff discovered that 87 tons of Butyl Motor Tube Scrap moved through November 1979, making this item qualified under one of the criteria that such commodity items be extended beyond December 31, 1979 without a further expiration date.
5. In matters where the Conference adopted criteria or guidelines of the nature described in this application, the staff has the authority to implement them by tariff revision.
6. The staff person did implement the Conference criteria by issuing 6th Revised Page 742 indicating that the $70.00 Wt. rate in item number 771.1440 was to be in effect through January 31, 1980, then increased to $77.00 Wt. effective February 1, 1980.[5] Unfortunately the December 31, 1979 expiration symbol indicated under the commodity item number was not removed and when another staff person revised Page 742 again on January 1, 1980, the commodity item was inadvertently deleted.[6] (Footnotes supplied.)

In addition to the above, on February 14, 1980, a member line of the Conference notified it that on December 18, 1979, a shipper checked with the

[2] Pacific Westbound Conference Local and Overland Freight Tariff No. 11 FMC 19, 3rd Rev. Page 742, Commodity Item No. 771 1440 40.

[3] See 6th Rev. Page 19 of the tariff.

[4] See 14th Rev. Page 19 of the tariff.

[5] See 6th Rev. Page 742 of the tariff.

[6] See 7th Rev. Page 742 of the tariff.

Conference staff and was quoted the $70.00 WT rate on Butyl (increased to $77.00 WT on 2/1/80). It requested that the Conference "reinstate" the old rate on Butyl, pointing out that the shipper was charged a rate of $133.00 WT under item 771.1440.20 (Waste and Scrap of Rubber or Plastic, etc.) of the tariff. As a result of the request, the Conference met and agreed to "reinstate" the rate subject to the following note:

Account administrative inadvertence by tariff publisher, Special Rate Item 771.1440.40 failed to be maintained in the tariff effective January 1, 1980 thru February 20, 1980 with a contract rate to Japan Base Ports of $70.00 WT increasing to $77.00 WT on February 1, 1980. Pacific Westbound Conference will be make [sic] special docket application to the Federal Maritime Commission in accordance with Section 18(B)(3) of the shipping act seeking appropriate refunds or waivers of charges to those shipments involved in the movement of this cargo between and including the dates of January 1, 1980 thru February 20, 1980. Refunds or waivers of charges will only be accomplished upon approval by the Federal Maritime Commission and duly published herein as ordered by the Commission.

On February 21, 1980, the Conference amended the tariff,[7] inserting the above note.

On February 6, 1980, a shipment of Butyl weighing 115,560 lbs. (52,417 kgs.) moved from Los Angeles, California, to Osaka, Japan. The bill of lading indicates that it was transported by Japan Line and that the shipper (Nomura) paid freight and charges as follows:

Freight and Charges		*Rate*	*Per*	*Prepaid*
FRT:	52.417	$133.00	KT	$6971.46
CAF:		8%		557.72
BSC:	52.417	11.50	KT	602.80
TRC:	52.417	6.75	KT	353.82
			Total Amount of Charges	$8485.80

The applicant now seeks permission to refund $3,566.45 to Nomura, which he states is the difference between what was paid and what would have been due had the $70.00 WT rate been applied.

Section 18(b)(3) of the Shipping Act, 1916, and Rule 92 (Special Docket Applications) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.92, permit the Commission to allow refund of a portion of freight charges when it appears there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff, provided that the application for refund was filed within 180 days of the pertinent shipment, that prior to the filing of the application a new, corrected tariff is filed setting forth the rate on which the refund should be based, and that the refund will not result in discrimination amongst shippers.

Here, the ultimate question to be decided is whether or not there was an error of the kind contemplated by Congress in enacting the statute. While the evidence originally submitted with the application does raise some question as to exactly what transpired and why, Mr. Griffith's later sworn statement of fact and supplemental submission does establish that the error under consideration here is within the ambit of the statute. It indicates that the Conference staff had

[7] See 9th Rev. Page 472 of the tariff.

authority to file a new tariff, that it did so on December 1, 1979, but mistakenly failed to delete a code letter denoting a December 31, 1979, expiration date, and that a second corrected tariff was filed which mistakenly deleted the item altogether.

It should be noted that the application requests a refund based on the difference between the rate charged ($133.00 WT) and the $70.00 WT rate on Butyl. The request is erroneous in that the shipment began on February 6, 1980, and the corrected tariff provides that after February 1, 1980, the rate should be $77.00 WT. Consequently, the refund cannot exceed the difference between what was paid and the $77.00 WT rate. The application does not properly "break-down" the various charges even using the $70.00 WT rate so that it is difficult to interpolate. However, based on the documents submitted with the application, the refund should not exceed $3,230.18 (the amount paid of $8,545.80, less $5,315.62, the amount due at the $77.00 WT rate).

Finally, with respect to the corrected tariff filed on February 21, 1980, it is important to consider its effect in light of the holding in *Munoz y Cabrero v. Sea-Land Service, Inc.,* 20 F.M.C. 152 (1977). That case stands for the proposition that under section 18(b)(3) an application for refund or waiver cannot be granted unless a new, corrected tariff rate is filed prior to the time the application is filed, which rate must conform to the earlier rate which had been unintentionally deleted or had not been filed through inadvertence. Here, by clearly setting forth the $70.00 WT rate through January 31, 1980, and setting forth the general rate increase from February 1, 1980, the applicant not only has correctly filed a new tariff obviating the holding in *Munoz, supra,* but has given proper notice to all shippers so as to avoid discrimination amongst shippers.

Wherefore, based on the above facts and discussion, I find that:

1. There was an error which resulted in the inadvertent failure to file a new tariff reflecting a $77.00 WT rate for Butyl, which rate would have been in effect had the error not been made.

2. The refund sought will not result in discrimination amongst shippers.

3. Prior to applying for a refund, PWC filed a new, corrected tariff which sets forth the rate on which the refund should be based.

4. The application was filed within 180 days from the date of shipment; and therefore, it is

ORDERED, That permission is granted to Japan Line and PWC to refund a portion of the freight charges to Nomura in the amount of $3,230.18; and it is

FURTHER ORDERED, That PWC promptly publish in its appropriate tariff the following notice in lieu of the note contained therein:

Notice is given as required by the decision of the Federal Maritime Commission in Special Docket No. 710, that effective January 1, 1980, the rate on Butyl Motor Tube Scrap is $70.00 WT through January 31, 1980, and $77.00 WT from February 1, 1980, through February 20, 1980, for purposes of refund or waiver of freight charges, subject to all other applicable rules, regulations, terms and conditions of said rate and this tariff.

WASHINGTON, D.C.
April 9, 1980

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

SUBCHAPTER A—GENERAL PROVISIONS

[GENERAL ORDER NO. 16, AMENDMENT 35, DOCKET NO. 80-15]

PART 502—RULES OF PRACTICE AND PROCEDURE

June 23, 1980

ACTION: Final Rules

SUMMARY: The Federal Maritime Commission has revised Rule 67 of the Commission's Rules of Practice and Procedure (46 C.F.R. §502.67). The originally proposed revision limited the application of certain provisions of the rule to vessel operating common carriers, and required carriers to file testimony, workpapers and exhibits with the relevant State Attorney Generals on the same day that they are filed with the Commission. After reviewing comments submitted by Sea-Land Service, Inc. the Commission made, in addition, the following changes: Rule 67(d)(2) is revised to require the parties to serve on each other only a prehearing statement instead of testimony, exhibits and workpapers. "Administrative Law Judge" is changed to "presiding officer." The presiding officer in Rule 67(d)(2) cases is required to hold a prehearing conference. Rule 67(a)(3) is amended to require all persons wishing to inspect workpapers underlying financial and operating data filed in connection with a proposed rate change to submit a certification. Finally, Rule 67 is amended to require a protestant to file his protest with the tariff publishing officer of the carrier.

EFFECTIVE DATE: June 30, 1980

SUPPLEMENTAL INFORMATION:

This proceeding was initiated by a Notice of Proposed Rulemaking published in the Federal Register on March 24, 1980; 45 Fed. Reg. 18991. The

purpose of the proceeding was to amend Rule 67 (46 C.F.R. § 502.67) to limit its applicability to vessel operating carriers and to clarify certain other aspects of the rule. Only one party, Sea-Land Service, Inc., submitted comments. It directed its comments toward that part of the proposed rule that deals with less than general rate increases and the increases of NVO's. Sea-Land's comments on the proposed rule were carefully considered by the Commission and adopted in part.

1. *Section 502.67(d)(2).* Sea-Land proposed that the following procedures be followed for non-general rate increases or decreases and non-vessel operating common carrier rate changes: The carrier should submit his direct testimony, exhibits and workpapers within 20 days of the Order of Investigation; Hearing Counsel and all protestants should simultaneously serve their direct testimony, exhibits and workpapers within 30 days of the Order. A prehearing conference should be convened to help simplify and identify the issues and otherwise prepare for resolution of the case or holding of a hearing. Sea-Land pointed out that an administrative law judge need not preside over the case and suggested that either an individual commissioner, an administrative law judge, or a designated employee of the Commission preside. Within 35 days of the Order, the conference chairman should issue an order and, if necessary, set a date for a hearing before an administrative law judge, to commence no later than 50 days after the Order of Investigation. Sea-Land also pointed out that in cases where the carrier only filed the financial data required by G.O. 11, the Commission might not want to bind Hearing Counsel, and all protestants to simultaneous filing of direct cases with the carrier, so it would be best to have the conference soon after the Order. Sea-Land expressed concern that requirements established by general rules might work unfairness in particular cases.

The Commission agrees with Sea-Land that a prehearing conference can be very useful and that such a conference need not be presided over by an administrative law judge. It also agrees with Sea-Land on the danger of applying inflexible general rules to particular cases. In fact, the Commission feels that both the proposed rule and Sea-Land's proposal as to exchange of direct testimony, exhibits and workpapers are too inflexible and might work unfairness in particular cases. Therefore, the Commission has revised Rule 67(d)(2) to require the carrier, Hearing Counsel, and all protestants to simultaneously serve on each other only a prehearing statement instead of direct testimony, exhibits and workpapers. After the service of these statements the presiding officer shall, at his discretion, hold a prehearing conference to consider, among other things, ordering the exchange of written testimony and exhibits. The term "Administrative Law Judge" is changed to "presiding officer" wherever it appears. Rule 25 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.25) defines "presiding officer" to include:

> (a) any one or more of the members of the Commission (not including the Commission when sitting as such), (b) one or more Administrative Law Judges or (c) one or more officers authorized by the Commission to conduct nonadjudicatory proceedings when duly designated to preside at such proceedings.

The fifty (50) day limitation on the commencement of hearings suggested by Sea-Land is rejected. Section 3(b) of the Intercoastal Shipping Act, 1933

already requires that hearings be completed within sixty (60) days. There appears to be no reason to impose an additional requirement in the Commission's Rules of Practice and Procedure.

2. *Section 502.67(a)(3).* Sea-Land proposed that whenever a carrier is required to provide financial data to any interested person in connection with a proposed rate change, that person should be required to submit a certification that he will use the material only for evaluating the rate change and identifying all those to whom the data will be made available. Sea-Land was concerned with the inconsistency between G.O. 11 and Rule 67 in cases where G.O. 11 requires carriers to make financial data available to interested persons and Rule 67 does not require submission of a certification.

The Commission agrees that there is an inconsistency in the rules and has amended 502.67(a)(3) to require all persons wishing to inspect workpapers underlying financial and operating data filed in connection with a proposed rate change to submit a certification.

3. *Definition of the term "file".* Sea-Land claims that "file" is a term of art defined in 46 C.F.R. § 531.2(i) and that amendments should be made to the rules to reflect the current, accurate meaning of the word. The Commission does not agree that any such amendment is necessary. First, the definition of a term in one order does not govern that term's meaning in other orders or rules. Second, the term "file" as used in both 46 C.F.R. § 531.2(i) and Rule 67 implies receipt.

4. *Filing protest on the carrier.* Sea-Land pointed out that present rules only require a protestant to file his protest with a carrier. The rule would allow the protestant to leave the protest at an office which was not aware of the Commission's requirements. Instead, Sea-Land proposes, the protestant should be required to file his protest with the tariff publishing officer of the carrier. The Commission agrees with this proposal and has amended the rule accordingly.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. § 553), sections 2 and 3 of the Intercoastal Shipping Act, 1933 (46 U.S.C. §§ 844, 845) and sections 21, 27, and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 820, 826, 841(a)), Part 502 of Title 46, Code of Federal Regulations, is amended as set forth hereinafter.

Section 502.67 is revised as follows:

Sec. 502.67—*Proceedings under section 3(a) of the Intercoastal Shipping Act, 1933*

(a)(1)(i) The term "general rate increase" means any change in rates, fares, or charges which will (A) result in an increase in not less than 50 per centum of the total rate, fare, or charge items in the tariffs per trade of any common carrier by water in intercoastal commerce; and (B) directly result in an increase in gross revenues of such carrier for the particular trade of not less than 3 per centum.

(ii) The term "general rate decrease" means any change in rates, fares, or charges which will (A) result in a decrease in not less than 50 per centum of the total rate, fare, or charge items in the tariffs per trade of any common

carrier by water in the intercoastal commerce; and (B) directly result in a decrease in gross revenue of such carrier for the particular trade of not less than 3 per centum.

(2) No general rate increase or decrease shall take effect before the close of the sixtieth day after the day it is posted and filed with the Commission. A vessel operating common carrier (VOCC) shall file, under oath, concurrently with any general rate increase or decrease testimony and exhibits of such composition, scope and format that they will serve as the VOCC's entire direct case in the event the matter is set for formal investigation, together with all underlying workpapers used in the preparation of the testimony and exhibits. The VOCC shall also certify that copies of testimony, exhibits and underlying workpapers have been filed simultaneously with the Attorney General of every non-contiguous State, Commonwealth, possession or Territory having ports in the relevant trade that are served by the VOCC. The contents of underlying workpapers served on attorneys general pursuant to this paragraph are to be considered confidential and are not to be disclosed to members of the public except to the extent specifically authorized by an order of the Commission or a presiding officer. A copy of the testimony and exhibits shall be made available at every port in the trade at the offices of the VOCC or its agent during usual business hours for inspection and copying by any person.

(3) Workpapers underlying financial and operating data filed in connection with proposed rate changes shall be made available promptly by the carrier to all persons requesting them for inspection and copying upon the submission of the following certification, under oath, to the carrier:

CERTIFICATION

I, _____ (Name and Title if Applicable), of _____ (Full name of Company or Entity), having been duly sworn, certify that the underlying workpapers requested from _____ (Name of Carrier), will be used solely in connection with protests related to and proceedings resulting from _____ (Name of Carrier)'s rate (increase) (decrease) scheduled to become effective _____ (Date) and that their contents will not be disclosed to any person who has not signed, under oath, a certification in the form prescribed, which has been filed with the Carrier, unless public disclosure is specifically authorized by an order of the Commission or the presiding officer.

_____
(Signature)

_____
(Date)

Signed and Sworn before me this ____ Day of _____.

_____
(Notary Public)

My Commission expires _____.

(4) Failure by the VOCC to meet the service and filing requirements of paragraph (a)(2) may result in rejection of the tariff matter. Such rejection will take place within three work days after the defect is discovered.

(b)(1) Protests against a proposed general rate increase or decrease made pursuant to section 3 of the Intercoastal Shipping Act, 1933, may be made by letter and shall be filed with the Director, Bureau of Ocean Commerce Regulation and the tariff publishing officer of the carrier no later than thirty (30) days prior to the proposed effective date of the proposed changes. In the event the due date for protests falls on a Saturday, Sunday or national legal holiday, protests must be filed with the Director, Bureau of Ocean Commerce Regulation and the carrier no later than the last business day preceding the weekend or holiday. Persons filing protests pursuant to this section shall be made parties to any docketed proceeding involving the matter protested, provided that the issues raised in the protest are pertinent to the issues set forth in the order of investigation. Protests shall include:

(i) Identification of the tariff in question;

(ii) Grounds for opposition to the change;

(iii) Identification of any specific areas of the VOCC's testimony, exhibits, or underlying data that are in dispute and a statement of position on each area in dispute (VOCC general rate increases or decreases only);

(iv) Specific reasons why a hearing is necessary to resolve the issues in dispute;

(v) Any requests for additional carrier data;

(vi) Identification of any witnesses that protestant would produce at a hearing, a summary of their testimony and identification of documents that protestant would offer in evidence; and

(vii) A subscription and verification.

(2) Protests against other proposed changes in tariffs made pursuant to section 3 of the Intercoastal Shipping Act, 1933, shall be filed no later than twenty (20) days prior to the proposed effective date of the change. The provisions of paragraph (b)(1) relating to the form, place and manner of filing protests against a proposed general rate increase or decrease shall be applicable to protests against other proposed tariff changes.

(c) Replies to protests shall conform to the requirements of § 502.74 (Rule 74).

(d)(1) In the event the general rate increase or decrease of a VOCC is made subject to a docketed proceeding, Hearing Counsel, the VOCC and all protestants shall serve, under oath, testimony and exhibits constituting their direct case, together with underlying workpapers on all parties and lodge copies of testimony and exhibits with the presiding officer no later than seven (7) days after the tarrif matter takes effect or, in the case of suspended matter, seven (7) days after the matter would have otherwise gone into effect.

(2) If other proposed tariff changes made pursuant to section 3 of the Intercoastal Shipping Act, 1933 are made subject to a docketed proceeding, the carrier, Hearing Counsel and all protestants will simultaneously serve on all parties and lodge with the presiding officer prehearing statements as specified in paragraph (f)(1) of this section no later than seven (7) days after the tariff

matter takes effect, or in the case of suspended matter, seven (7) days after the matter would have otherwise gone into effect.

(e)(1) Subsequent to the exchange of prehearing statements by all parties, the presiding officer shall, at his discretion, direct all parties to attend a prehearing conference to consider:

(i) Simplification of issues;

(ii) Identification of issues which can be resolved readily on the basis of documents, admissions of fact, or stipulations;

(iii) Identification of any issues which require evidentiary hearing;

(iv) Limitation of witnesses and areas of cross-examination should an evidentiary hearing be necessary;

(v) Requests for subpoenas; and

(vi) Other matters which may aid in the disposition of the hearing including but not limited to the exchange of written testimony and exhibits.

(2) After considering the procedural recommendations of the parties, the presiding officer shall limit the issues to the extent possible and establish a procedure for their resolution.

(3) The presiding officer shall, whenever feasible, rule orally upon the record on matters presented before him.

(f)(1) It shall be the duty of every party to file a prehearing statement on a date specified by the presiding officer, but in any event no later than the date of the prehearing conference.

(2) A prehearing statement shall state the name of the party or parties on whose behalf it is presented and briefly set forth:

(i) Identification of issues which can be resolved readily on the basis of documents, admissions of fact, or stipulations;

(ii) Identification of any issues which require evidentiary hearing, together with the reasons why these issues cannot be resolved readily on the basis of documents, admissions of fact, stipulations or an alternative procedure;

(iii) Requests for cross-examination of the direct written testimony of specified witnesses, the subjects of such cross-examination and the reasons why alternatives to cross-examination are not feasible;

(iv) Requests for addition, specified witnesses and documents, together with the reasons why the record would be deficient in the absence of this evidence; and

(v) Procedural suggestions that would aid in the timely disposition of the proceeding.

(g) The provisions of this section are designed to enable the presiding officer to complete a hearing within sixty (60) days after the proposed effective date of the tariff changes and submit an initial decision to the Commission within one hundred twenty (120) days pursuant to section 3(b) of the Intercoastal Shipping Act, 1933. The presiding officer may employ any other provision of the Commission's Rules of Practice and Procedure, not inconsistent with this section, in order to meet this objective. Exceptions to the decision of the presiding officer, filed pursuant to section 502.227 (Rule 227) shall be served no later than fifteen (15) days after date of service of the initial decision. Replies thereto shall be served no later than ten (10) days after date of service

of exceptions. In the absence of exceptions, the decision of the presiding officer shall be final within 30 days from the date of service unless within that period a determination to review is made in accordance with the procedures outlined in § 502.227 of this part.

(h) Intervention by persons other than protestants ordinarily shall not be granted. In the event intervention of such persons is granted, the presiding officer or the Commission may attach such conditions or limitations as are deemed necessary to effectuate the purpose of this section. [Rule 67].

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 440(I)

ALLIED STORES INTERNATIONAL, INC.
SUBSIDIARY OF ALLIED STORES CORPORATION

v.

UNITED STATES LINES, INC.

ORDER OF RECONSIDERATION

June 30, 1980

The Commission has before it a letter from United States Lines, Inc. (USL) protesting the Commission's May 1, 1980 award of 12 percent interest on a Settlement Officer's grant of reparation to Allied Stores International, Inc.[1] The interest is to accrue from date of payment of freight charges. USL argues that: (1) it was not responsible for the long delay in the resolution of this proceeding; (2) that in 1976, when the freight payment was made, short term interest rates were considerably lower than 12 percent; and (3) there is "no indication as to what the cut off date of the application of the 12% is." USL agrees to pay the $147.46 in reparation, "but will not pay the 12% interest pending further consideration of this highly controversial issue."

USL's petition will be denied. Although the length of time it took to reach a decision in this proceeding may have been out of the carrier's control, it was the carrier's violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817) which prompted the proceeding. The award of interest is intended to make whole the complaining party.[2] For whatever reason, USL has held and had use of the excess charges paid by Complainant. Finally, the Commission considers it obvious that the interest will continue to accrue from the date of payment of freight charges until the date of payment of the interest.

[1] Although not captioned as such, the letter will be treated by the Commission as a Petition for Reconsideration. Although the letter refers to Informal Docket No. 441(I), it is apparent that this reference is an error and that Informal Docket No. 440(I) is the subject of the letter.

[2] While the Commission's policy of assessing interest awards at 12 percent may reflect somewhat higher interest rates than those in effect in 1976, the award of 12 percent interest on a reparation of $147.46 will cause neither a hardship to the carrier nor an unjust enrichment to the complainant.

THEREFORE, IT IS ORDERED, That the petition of United States Lines, Inc. is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 667(I)

FMC CORPORATION

v.

SEA-LAND SERVICE, INC.

ORDER ON RECONSIDERATION

June 30, 1980

This proceeding is before the Commission upon Sea-Land Service, Inc.'s Petition for Reconsideration of the Commission's April 8, 1980 Order awarding 12 percent interest on the Settlement Officer's award of reparation to FMC Corporation. The interest accrued from the date of payment of freight charges. Sea-Land contends that the delay between the time the freight charges were paid and the decision of the Commission was not caused by Sea-Land, and that the award of interest under these circumstances is punitive.

The Commission is unpersuaded by Sea-Land's argument. Imposition of award of interest is not punitive, but rather compensatory. It is intended to make whole the complaining party. For whatever reason, Sea-Land has held and had use of the excess charges paid by Complainant.

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration of Sea-Land Service, Inc. is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 684(I)

JAMES BETESH IMPORT COMPANY

v.

SEATRAIN PACIFIC SERVICES, S.A.

REPORT AND ORDER

June 30, 1980

BY THE COMMISSION:* (Thomas F. Moakley, *Vice Chairman;* James V. Day, Leslie Kanuk and Peter N. Teige, *Commissioners*)

This proceeding is before the Commission upon its determination to review the decision of Settlement Officer William Weiswasser, served April 9, 1980, awarding reparation. The Settlement Officer found that Seatrain Pacific Services, S.A. violated section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817) by overcharging James Betesh Import Company on two shipments of snorkel jackets which were incorrectly measured.

Complainant alleges that upon receipt of the shipment, it discovered that the cartons were overmeasured and that it "overpaid around $500.00." Complainant's proof of the allegedly correct cargo measurements consists of two unverified warehouse receipts. Complainant wrote four letters to various Seatrain offices, demanding a refund; two of the letters invited Seatrain to measure the goods in issue at Complainant's warehouse.

Seatrain did not respond to Complainant's correspondence. Seatrain filed a Motion to Dismiss the complaint, arguing that Complainant produced insufficient evidence to prove incorrect measurement, and that its claim was properly denied by Seatrain because the cargo had left Seatrain's possession and certified remeasurement was impossible.[1]

*Chairman Richard J. Daschbach did not participate.

[1] Seatrain also submitted a letter to the Presiding Officer, after the issuance of his decision, protesting alleged procedural irregularities and the award of reparation. Because of the Commission's disposition of this proceeding, it is unnecessary to address the Motion to Dismiss or the correspondence.

The Settlement Officer disagreed, concluding that Complainant did meet its burden of proof. The Settlement Officer noted that Seatrain's failure to avail itself of the opportunity to remeasure the cargo at Complainant's warehouse prevents it from arguing that it was disadvantaged by its no longer having custody of the cargo.

DISCUSSION AND CONCLUSION

The Commission concludes that Complainant has not met its burden of proof, and that reparation must be denied. The unsigned warehouse receiving slips do not establish with any reasonable certainty the correct measurements of the cargo as opposed to the measurements provided by the shipper on the bill of lading. Nor did Complainant offer affidavits of witnesses establishing the exact measurements of the cartons, evidence of use of standard size cartons in similar shipments, or any other corroboration of its claim.

It is Complainant's burden to prove that the cargo was mismeasured, and not the carrier's to prove that it was not. Complainant offered no evidence that the shipments stored in its warehouse remained complete and unadjusted. Therefore, Complainant's invitations to measure the cargo did not constitute an opportunity for Seatrain to verify with assurance the correct measurements. Seatrain's failure to accept Complainant's invitation does not mitigate Complainant's insufficiency of evidence.

THEREFORE, IT IS ORDERED, That the decision of the Settlement Officer is reversed; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary