DECISIONS OF THE

FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMMISSION

Washington, D.C.
June 30, 1980

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FEDERAL MARITIME COMMISSION

DOCKET NO. 79-56

MCGIFFIN & COMPANY, INC. v. ELLER & COMPANY, INC.
PETITION FOR A DECLARATORY ORDER

NOTICE OF WITHDRAWAL OF PETITION

July 5, 1979

Notice is given that the petition for declaratory order initiating this proceeding has been withdrawn and accordingly the proceeding is hereby discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

SUBCHAPTER A—GENERAL PROVISIONS

[DOCKET NO. 79-13; GENERAL ORDER 16, AMDT. 30
AND GENERAL ORDER 22, AMDT. 9]

PART 502—RULES OF PRACTICE AND PROCEDURE

PART 503—PUBLIC INFORMATION

FEES FOR SERVICES

July 5, 1979

ACTION: Final Rules

SUMMARY: Parts 502 and 503 have been revised to reflect the updating of existing fees and charges and the establishment of new fees for certain services provided by the Federal Maritime Commission. The purpose of the revision is to assure the recovery of costs to the extent possible for services rendered to identifiable individuals that are not offered to the public as a whole. Periodic reassessment of fees and charges is required under guidelines established by the Office of Management and Budget.

EFFECTIVE DATE: August 15, 1979

SUPPLEMENTAL INFORMATION:

This proceeding was instituted by a Notice of Proposed Rulemaking published in the *Federal Register* on March 14, 1979 (44 Fed. Reg. 15517-19). The Federal Maritime Commission proposed to revise its schedule of fees and charges for certain services by updating existing fees and charges and establishing new fees.

In the provisions of Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. §483(a)), hereinafter referred to as "Title V," Congress has stated that "any work, services, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency . . . to or for any person . . . shall be self-sustaining to the full extent possible." In order to bring about the accomplishment of this objective, Title V authorizes the head of each agency to prescribe by regulation such fees and charges as he shall determine " . . . to be fair and equitable taking into consideration direct and indirect cost to the government, value to the recipient, public policy or interest served and other pertinent facts."

This enabling legislation also provides that the fees and charges shall be as uniform as practicable and subject to such policies as the President may prescribe. On September 23, 1959, the Bureau of the Budget, now the Office of Management and Budget, issued Circular No. A-25, which sets forth general policies for developing a fair, equitable, and uniform system of charges for certain government services and property so as to implement the applicable provisions of Title V. Essentially, Circular No. A-25 requires that a reasonable charge be made to each recipient for a measurable unit or amount of Federal Government service from which he derives a benefit in order that the Government recover the full cost of rendering that service. The Circular further calls for a periodical reassessment of costs, with related adjustment of fees, if necessary, and the establishment of new fees where none exists.

Two comments were received in response to the Notice of Proposed Rulemaking. The National Capital Area Paralegal Association objects to the establishment of a fee for processing applications of non-attorneys to practice before the Commission (proposed 503.43(h)). Mr. Wade S. Hooker, an attorney who practices before the Commission, has commented on the rise in the charge for subscription to Commission issuances in formal proceedings (proposed section 503.43(d)(1)).

The Commission proposed to establish a fee of $10 for processing applications of nonattorneys for admission to practice. The Association argues that such a fee discriminates against nonattorneys in favor of attorneys who need only certify that they are a member in good standing of a state or Federal bar. The Association further questions whether nonattorneys should be required to apply for admission at all. We disagree with the position expressed by the Association. An attorney in good standing has already been examined as to professional ability and personal qualifications. On the other hand, a nonattorney applicant may be totally unknown to the Commission. The Commission has a duty to assure that persons appearing before it are qualified to represent others. Under the circumstances, the requirement for application for admittance is appropriate and the assessment of a modest fee for processing the application is proper under Title V.

Mr. Hooker expresses "surprise" that the charge for the subscription list should rise from $30 to $175 annually since the existing price was "established on February 25, 1975." In point of fact, the $30 fee was established in 1965 and costs associated with providing the service have escalated considerably since then. The most recent survey by the Commission shows the cost of service to be slightly in excess of $200. We have set the revised fee at $175 in acknowledgement of the public interest standard of Title V.

In light of the foregoing, we have determined to publish the final rules as they were proposed.*

Therefore, pursuant to the provisions of section 4 of the Administrative Procedure Act (5 U.S.C. § 553) and Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. § 483(a)), as implemented by Budget Circular No. A-25, dated September 23, 1959, and Rule 52 of the Commission's Rules of Practice and Procedure, 46 C.F.R § 502.52, Parts 502 and 503 of Title 46, Code of Federal Regulations are amended as set forth hereinafter.

I. Subpart E of Part 503, Title 46 of the Code of Federal Regulations is revised to read as follows:

SUBPART E—FEES

§ 503.41 Policy and Services Available

Pursuant to policies established by the Congress, the Government's costs for special services furnished to individuals or firms who request such service are to be recovered by the payment of fees (Act of August 31, 1951—5 U.S.C. § 140).

(a) Upon request the following services are available upon the payment of the fees hereinafter prescribed:
  (1) Copying records/documents
  (2) Certification of copies of documents
  (3) Records search

(b) Fees shall also be assessed for the following services provided by the Commission:
  (1) Subscriptions to Commission publications
  (2) Placing one's name, as an interested party, on the mailing list of a docketed proceeding
  (3) Processing nonattorney applications to practice before the Commission

§ 503.42 Payment of fees and charges

The fees charged for special services may be paid through the mail by check, draft, or postal money order, payable to the Federal Maritime Commission, except for charges for transcripts of hearings. Transcripts of hearings, testimony, and oral argument are furnished by a nongovernmental contractor, and may be purchased directly from the reporting firm.

§ 503.43 Fees for services

The basic fees set forth below provide for documents to be mailed with postage prepaid. If copy is to be transmitted by registered, certified, air, or special delivery mail, postage therefor will be added to this basic fee. Also, if special handling or packaging is required, costs thereof will be added to the basic fee.

* A sentence has been added to § 503.43(c) to clarify the intent of the proposed rule to charge five cents per page plus cost of services when copying is performed by Commission personnel.

(a) Photo-copying of records and documents performed by requesting party will be available at the rate of five cents per page (one side), limited to size 8 1/4″ × 14″ or smaller.

(b) The certification and validation (with Federal Maritime Commission seal) of documents filed with or issued by the Commission will be available at $3 for each such certification.

(c) To the extent that time can be made available, records and information search and/or copying will be performed by Commission personnel for reimbursement at the following rates. Any such charges are in addition to a five cent per page charge for copies provided.

(1) By clerical personnel at a rate of $5 per person per hour.

(2) By professional personnel at an actual hourly cost basis to be established prior to search.

(3) Minimum charge for record and information search $5.

(4) Minimum charge for copying services performed by Commission personnel, $1.

(5) *Exceptions.* No charge for copying or searching will be made for providing a single copy of a tariff page on file with the Commission.

(d) Annual subscriptions to Commission publications for which there are regular mailing lists are available at the charges indicated below for calendar year terms. Subscriptions for periods of less than a full calendar year will be prorated on a quarterly basis. No provision is made for refund upon cancellation of subscription by a purchaser.

(1) Orders, notices, rulings, and decisions (initial and final) issued by Administrative Law Judges and by the Commission in all formal docketed proceedings before the Federal Maritime Commission are available at an annual subscription rate of $175.

(2) Final decisions (only) issued by the Commission in all formal docketed proceedings before the Commission are available at an annual subscription rate of $50.

(3) General Orders of the Commission are available at the following rates: 1) initial set including all current General Orders for a fee of $12.50, and 2) an annual subscription rate of $2 for all amendments to existing General Orders and any new General Orders issued.

(4) *Exceptions.* No charge will be made by the Commission for notices, decisions, orders, etc., required by law to be served on a party to any proceeding or matter before the Commission. No charge will be made for single copies of the above Commission publications individually requested in person or by mail. In addition, a subscription to Commission mailing lists will be entered without charge when one of the following conditions is present:

(i) The furnishing of the service without charge is an appropriate courtesy to a foreign country or international organization.

(ii) The recipient is another governmental agency, Federal State, or local, concerned with the domestic or foreign commerce by water of the United States or, having a legitimate interest in the proceedings and activities of the Commission.

(iii) The recipient is a college or university.

(iv) The recipient does not fall into paragraphs (d)(4)(i), (ii), or (iii) of this section but is determined by the Commission to be appropriate in the interest of its program.

(e) To have one's name and address placed on the mailing list of a specific docket as an interested party to receive all issuances pertaining to that docket, cost $3 per proceeding.

(f) The Commission publication entitled "Automobile Manufacturers' Measurements" is available on a fiscal year subscription basis, including any supplements issued during the fiscal year in which purchased, for a fee of $5.

(g) Loose-leaf reprint of the Commission's complete, current Rules of Practice and Procedure for an initial fee of $2.50. Future amendments to the reprint are available at an annual subscription rate of $1.50.

(h) Applications for admission to practice before the Commission for persons not attorneys at law must be accompanied by a fee of $10 pursuant to § 502.27 of this Chapter.

(i) Upon a determination by the Commission that waiver or reduction of the fees prescribed in this section is in the public interest because the information furnished has been determined to be of primary benefit to the general public, such information shall be furnished without charge or at a reduced charge at the discretion of the Commission.

(j) Additional issuances, publications and services of the Commission may be made available for fees to be determined by the Managing Director, which fees shall not exceed the cost to the Commission for providing them.

II. The second sentence of 46 C.F.R. § 502.27 is amended to read as follows:

Applications by persons not attorneys at law for admission to practice before the Commission shall be made on the forms prescribed therefor, which may be obtained from the Secretary of the Commission, shall be addressed to the Federal Maritime Commission, Washington, D.C. 20573, and shall be accompanied by a fee as required by § 503.43 (h) of this Chapter.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-5

LEONARD T. BUTLER D/B/A MANUFACTURERS FORWARDING—
INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND
INTERMODAL SALES, INC—
POSSIBLE VIOLATIONS OF SECTIONS 15 AND 18(b)(3)

NOTICE

July 11, 1979

Notice is given that no exceptions have been filed to the June 5, 1979 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-5

LEONARD T. BUTLER D/B/A MANUFACTURERS FORWARDING—INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND INTERMODAL SALES, INC. POSSIBLE VIOLATIONS OF SECTIONS 15 AND 18(b)(3)

Finalized July 11, 1979

Violations of sections 15 and 18(b)(3) of Shipping Act, 1916, found.

Because of violations and lack of showing of mitigation to warrant granting of license as independent ocean freight forwarder upon this record, the application is denied.

Thomas E. Durkin, Jr., for respondent-applicant.

Joseph Slunt, Deana E. Rose and *J. Robert Ewers*, Director of Commission's Bureau of Hearing Counsel, for Hearing Counsel.

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

This is a proceeding in which an independent ocean freight forwarder license is sought by Leonard T. Butler d/b/a International Sales, Inc. Investigation of the application raised possible violations of sections 15 and 18(b)(3) of the Shipping Act, 1916.

The Presiding Administrative Law Judge takes official notice that the original application, dated November 22, 1977, sought a license for Leonard T. Butler d/b/a Transmodal Forwarding Company. The Commission began its investigation.

After *mesne process*, an amended application, dated May 15, 1978, was filed and license was sought for Leonard T. Butler d/b/a Manufacturers Forwarding (to be established).

Pursuant to section 510.8 of the Commission's General Order 4 (46 C.F.R. § 510.8), the Commission, on October 30, 1978, advised Leonard T. Butler d/b/a Manufacturers Forwarding of its intent to deny the application for the

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

reasons set out hereinafter. In accordance with General Order 4 an applicant may, within 20 days of receipt of such advice, request a hearing on the application.

By letter dated November 6, 1978, Leonard T. Butler d/b/a Manufacturers Forwarding requested the opportunity to show at a hearing that the denial of the application is unwarranted.

On January 24, 1979, the Commission served the instant Order of Investigation and Hearing (published in the *Federal Register* January 29, 1979, Vol. 44, No. 20, pages 5713–5714). It indicates that during the course of the Commission's investigation of Leonard T. Butler d/b/a Manufacturers Forwarding, information was received possibly indicating that:

1. Intermodal Sales, Inc. of which Mr. Butler is President and majority stockholder under the trade name Intermodal Services, Inc., maintains with the Commission an NVOCC tariff as required by section 18, Shipping Act, 1916. Evidence deduced in the course of the investigation appeared to demonstrate that Intermodal Services, Inc. violated section 18(b)(3), Shipping Act, 1916, (46 U.S.C. §817) on at least eleven of the nineteen shipments it handled during the period January 15, 1978 through May 12, 1978 in charging, demanding or collecting a greater, lesser or different compensation for the transportation of property than the rates and charges specified in its tariff on file with the Commission.
2. Intermodal Sales Inc. d/b/a Intermodal Services, Inc. appeared to violate section 15, Shipping Act, 1916, (46 U.S.C. §814) in that it and Seaway Express Lines, a vessel operating common carrier by water, entered into an exclusive, non-competitive cooperative working agreement subject to the filing and approval requirements of the aforementioned section 15, implementing that agreement in carrying out its terms without the pre-requisite Commission sanction.

In view of the above, Leonard T. Butler, 52% owner and President of Intermodal Sales, Inc. would appear to lack the fitness to properly carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, and the requirements, rules and regulations of the Commission issued thereunder as required by section 44 and the Commission's Rules and Regulations issued pursuant to section 44 of the Shipping Act, 1916.

The Commission ordered that pursuant to sections 15, 18(b), 22 and 44 (46 U.S.C. §§814, 817, 821 and 841(b)) of the Shipping Act, 1916, and section 510.8 of the Commission's General Order 4 (46 C.F.R. §510.8), it be determined:

1. Whether Intermodal Sales Inc. d/b/a Intermodal Services, Inc. has violated section 15 Shipping Act, 1916, by entering into an exclusive non-competitive cooperative working agreement with Seaway Express Lines without the pre-requisite Commission approval;
2. Whether Intermodal Sales, Inc. d/b/a Intermodal Services, Inc. has violated section 18(b)(3), Shipping Act, 1916, by transporting property at rates and charges other than those specified in its tariff on file with the Comission, and

3. Whether, in light of the evidence, adduced pursuant to the foregoing issues, together with any other evidence adduced, Leonard T. Butler d/b/a Manufacturers Forwarding possesses the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, to properly carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, and the requirements, rules and regulations of the Commission issued thereunder.

The named respondents herein are (1) Leonard T. Butler d/b/a Manufacturers Forwarding and (2) Intermodal Sales, Inc.

By notice served January 30, 1979, a prehearing conference was scheduled for Thursday, February 22, 1979. Counsel for respondent telephoned the Presiding Administrative Law Judge on February 16, 1979, pleading he was on call for cases in his own jurisdiction and requested a postponement. By notice served the former date, which was preceded by telephone notice to all parties on February 16, 1979, of the change, the prehearing conference was rescheduled and held on Monday, February 26, 1979. The official stenographic transcript thereof consists of 12 pages. Hearings began and concluded on Monday, March 12, 1979. The transcript of the hearing consists of 50 pages. The total pages of transcipt are 62. Two (2) exhibits were introduced and received into evidence. The briefing schedule developed was: (1) opening brief of respondent-applicant to be filed on April 9, 1979 (Tr. of Hearing, at 48, line 25, change 1978 to 1979); (2) Hearing Counsel's reply brief to be filed on April 23, 1979; and (3) the closing brief of respondent-applicant to be filed on May 7, 1979 (Tr. 49).

The opening brief of respondent-applicant was received in the Commission on April 11, 1979; it had been mailed by Registered Mail No. 854603 from Newark, New Jersey, on April 6, 1979. Hearing Counsel's Reply Brief was received in the Commission on April 23, 1979. On May 10, 1979, the Presiding Administrative Law Judge received from counsel for the respondent-applicant a letter dated May 8, 1979, stating, *inter alia*, "I acknowledge receipt of the Brief of Hearing Counsel, and I would respectfully advise that I do not see the need for any further submissions."

Hearing Counsel in its brief proposed 18 findings of fact (Brief, at 3 to 5). The respondent-applicant's brief proposed no findings of fact. Hearing Counsel's requests upon consideration are granted in substance or denied as shown in the following section entitled "Facts."

The transcript of testimony and exhibits, together with all papers and requests filed in this proceeding, constitutes the exclusive record for the finding of facts and for decision (Rule 169, 46 C.F.R. §502.169).

FACTS

1. Intermodal Sales, Inc., a sales agency and marketing arm for various carriers (Tr. 36) does business as Intermodal Services, Inc. It was founded in 1971-72 by Leonard T. Butler. Intermodal Services, Inc., has on file with this Commission NVOCC Freight Tariff No. 1 (the original effective date of the tariff was October 2, 1976) between United States Atlantic, Gulf and Pacific

Coasts, Puerto Rico, Hawaiian and Alaskan Ports. The tariff is worldwide. The Issuing Officer of the tariff of Intermodal Sales, Inc. is Leonard T. Butler (1st Revised Title Page, effective November 21, 1978).

2. Intermodal Sales, Inc., a corporation of the State of New Jersey (Exh. 1, Attachment A, page 1) admitted (it is stipulated all demands for admission of Exh. 1 are acknowledged in the affirmative (Tr. 4)) its officers are:

Leonard T. Butler	President and 52% shareholder of the company.
Reuben Klein	Executive Vice President and 48% shareholder of the company.
Marilyn T. Butler	Secretary and holder of no stock interest therein.

3. Intermodal Services, Inc., issued the following bills of lading under which shipments were carried at rates other than those in its NVOCC tariff:

B/L No.	*Dated*	*Commodity*
10	1-15-78	Construction Material
11	1-15-78	Copper Wire
18	2-26 78	Rigid Steel Galvanized
19	2-28 78	Stranded Cable Alpha
20	2-28-78	KV Single Phase Shielded Cable
21	3-08-78	Kitchen, Laundry & Other Equipment for Units of Ministry of Health
22	2-28-78	Kitchen, Laundry & Other Equipment for Units of Ministry of Health
24	3-24-78	Cabinet Sections
26	4-23-78	Conduit Pipes
27	5-12-78	Operation Rods for Disconnect Switches
28	5-12-78	Cast Iron Pipe Accessories of Piping Fittings

The filing of the tariffs and tariff changes pertaining to the rates assessed the above shipments was delegated to a company in that business (Tr. 13) and to Reuben Klein (Tr. 37).

4. Under date of September 24, 1976, Intermodal Sales, Inc., entered into a Sales Agency Agreement with Klevan Associates Incorporated, a corporation of the State of Pennsylvania. Klevan is the owner and operator of a certain container service more commonly known and referred to as Seaway Express Lines, a Panamanian Corporation. Under the terms of the said agreement, Intermodal Sales, Inc., is to act as Seaway's exclusive sales and marketing agent in the United States for those services rendered by Seaway in its container services between the United States, Taiwan and Korea; a noncompetitive clause in the agreement provides that during the term thereof, Intermodal will not represent any carrier or carriers who offer similar container services between the United States and Taiwan and Korea. Exh. 1 At 1, and Attachment A; Tr. 36. The term of the agreement was for a two-year period and was to renew itself for a period of two years. The agreement was signed for Intermodal Sales, Inc., by Leonard T. Butler, President. Mr. Butler testified the relationship with Seaway was terminated in September of 1978 (Tr. 40).

5. Intermodal Sales, Inc., operated under the terms and tenure of the said Sales Agency Agreement with Klevan. However, Intermodal Sales, Inc., did

not file that agreement with this Commission (Tr. 36) for approval pursuant to section 15, Shipping Act, 1916.

6. Applicant Leonard T. Butler, asked to outline his activities over the last ten or fifteen years, particularly within the ambit of the shipping industry (Tr. 35), testified he held marketing and agent positions as follows:

1964 to 1968 with Sea-Land (Tr. 35)
1968 to 1972 with Seatrain
1972 started his own business—Intermodal Sales

After founding of his own business, the agreements or associations are between his company, Intermodal Sales, and others (Tr. 43):

1973 to 1975—agent for Zim Container Services (Tr. 44)
1974 to 1975—agent for Medspan Shipping
1976 to 1977—agent for Mercantile Marine, a vessel operating carrier (Tr. 44)
1976 to 1977—agent for Iran Overland (Tr. 44)
1976 to 1978—Sales Agency Agreement with Kleven Associates
1978—Sales Agency Agreement with Oceans International, agent for Lignes Centre Africaine

DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

Leonard T. Butler testified that he did not file the September 24, 1976, Seaway and Intermodal agreement with the Commission (Tr. 36). Asked, "Is there a reason why you didn't so file, if in fact you were required to file?" he answered:

> I had a previous contract, the contract that is mentioned here is subsequent to a previous contract with Seaway as sales agent. Because in the services I performed for Seaway, sales, I did not know that there was anything else required. At the time I entered into that contract I did not even have a tariff as an NVO.

The applicant in his brief at page 3 argues that:

> Acknowledging fully that the responsibility to so file may not be necessarily excused by any such claim, the "seriousness' of such failure may be, however, ameliorated if such an explanation is believed.

Hearing Counsel in its Reply Brief at 2 states:

> By stipulation, respondents affirmatively admitted all facts contained in Hearing Counsel's "Request for Admissions" (Exhibit 1), thereby admitting the facts pertinent to the sections 18(b)(3) and 15 issues.

The circumstances of this case demand that the Presiding Administrative Law Judge agree with Hearing Counsel that the respondent has admitted the facts pertinent to the sections 18(b)(3) and 15 issues. Therefore he *finds* and *concludes* that Intermodal Sales, Inc. d/b/a Intermodal Services, Inc., has violated section 15, Shipping Act, 1916, by entering into an exclusive non-competitive cooperative working agreement with Seaway Express Lines without the prerequisite Commission approval and has violated section 18(b)(3), Shipping Act, 1916, by transporting property at rates and charges other than those specified in its tariff on file with the Commission.

It is to amelioration, if any, as to the violations of sections 15 and 18(b)(3) of the Shipping Act, 1916, that attention is directed. The applicant, as indicated above, testified he was unaware of the filing requirements under section 15 to which Hearing Counsel counters (Brief for Hearing Counsel at 7) ignorance of the law is no excuse; nor is inadvertence, citing *Investigation of Rates in the Hong Kong—United States Atlantic and Gulf Trade*, Docket No. 1083, 11 F.M.C. 168, 178 (1967). The latter citation points to section 18(b)(3) violations. The Commission wrote:

> We have no authority under section 18(b)(3) to dismiss a charge simply because it may have been an isolated violation or an honest mistake though we may couple our finding of violation with such other factual determinations as may tend to mitigate the seriousness of the offense.

Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade, 11 F.M.C. at 178.

The parties do not dispute the facts as to allegations of violations of section 15 and section 18(b)(3) as is evidenced by Exhibits 1 and 2.

The only lawful rate which a carrier may charge is that rate appearing in the carrier's filed tariff. This rate must be charged and paid regardless of seemingly innocent justification for departure such as mistake, inadvertence, or contrary intention of the parties. *United States v. Pan American Mail Lines, Inc.*, 359 F. Supp. 728, 733 (S.D.N.Y. 1972).

The applicant argues in his brief at page 5 that the involved tariff was filed so as to become effective October 2, 1976. He says (Brief for Applicant at 6) that the tariff, when effective, concerning rates or charges, contained only a single factor cargo N.O.S. (not otherwise specified), WM $295; that this rate "of course, and as is usual, was never intended to be utilized commercially, but was, in fact, established so as to be in compliance with the requirements of a tariff filing." However, it is argued by the applicant (Brief for Applicant at 7) (speaking of the 11 Bills of Lading in Exhibit 1, Attachment B), that no potential shippers received any advantage nor were they disadvantaged by any rate quoted to any of the involved shippers in the instances here illustrated. Then the applicant poses the question:

> Isn't this aspect of the Commission's case at very best extremely technical and ministerial and is it not clearly distinguishable from the usual and ordinary tariff violation?

Brief for Applicant at p. 8.

Hearing Counsel assert, at page ten of his brief, that the applicant argues without record support that no shipper was advantaged or disadvantaged by the admitted improper tariff assessments.

The Presiding Administrative Law Judge is not persuaded by the questions asked by the repondent-applicant that mitigation is found in them, because the arguments and the law presented by Hearing Counsel is more persuasive that the situation is proved by a preponderance of the evidence that the Presiding Administrative Law Judge must and does *find* and *conclude* that violations of sections 15 and 18(b)(3) have been committed by the respondent and that no mitigating circumstances have been shown in these areas.

Now as to whether Leonard T. Butler d/b/a Manufacturers Forwarding possesses the requisite fitness, within the meaning of section 44(b), Shipping

Act, 1916, to properly carry on the business of forwarding and to conform to those provisions of the Shipping Act, 1916, and the requirements, rules and regulations of the Commission issued thereunder. The applicant argues (Brief for Applicant at 2) that he, individually, must be deemed to be fit, willing and able to properly carry out the business and functions of a forwarder; that it must be accepted as irrefutable fact that there is no issue nor is there controversy as to the moral characteristics or reputation of the applicant (*Id.*). He concludes (*Id.* at 10) the applicant possesses all of these moral traits and characteristics required and desired of an applicant.

Hearing Counsel contends that Leonard T. Butler d/b/a Manufacturers Forwarding does not possess the requisite fitness to be licensed as an independent ocean freight forwarder (Brief for Hearing Counsel at 11). Counsel cites *Harry Kaufman, Independent Ocean Freight Forwarder*, Docket No. 71-47, 16 F.M.C. 256, 271 (1973) for the Commission enunciated standard of conduct required of an applicant seeking a license:

> It is crucial to his "fitness" that it appear that the applicant intends to and will in good faith adhere to such "high standard" of conduct and that he intends to and will obey the Commission's rules and policies for the conduct of licensed freight forwarders.

The Hearing Counsel argues that the existence of past Shipping Act violations by an applicant for a freight forwarder's license is highly pertinent to the issue of whether the applicant "intends to or will obey" the U.S. shipping laws (Brief for Hearing Counsel at 11). Hearing Counsel points out that the Commission recently denied a freight forwarder application in *Concordia International Forwarding Corporation—Independent Ocean Freight Forwarder Application and Possible Violation of Section 44, Shipping Act, 1916*, Docket No. 78-34, 18 SRR 1364, 1371 (FMC 1978), exhorting that disregard of the shipping statutes would not be tolerated. The Commission said: "In determining whether an applicant possesses the requisitness fitness, a past violation of the Shipping Act militates against the issuance of a license." Brief for Hearing Counsel at 12. Hearing Counsel contends that the activities of Leonard T. Butler, President of Intermodal Sales, Inc. d/b/a Intermodal Services, do not constitute the standard of conduct the law imposes upon those seeking to be licensed as an ocean freight forwarder (*Id.*, at 15); that the applicant has failed to meet his burden of demonstrating his character qualifications and fitness to operate as a freight forwarder and to conform to the provisions of the Shipping Act and that the Commission should deny his application.

As has been indicated above, the applicant made no reply to Hearing Counsel's Reply Brief other than to submit a letter, repeated now: "I acknowledge receipt of the Brief of Hearing Counsel and I would respectfully advise that I do not see the need for any further submissions."

The parties do not dispute certain facts in this case. The undisputed facts are deemed by the Presiding Administrative Law Judge to support the position of Hearing Counsel against the applicant. The applicant's attempt to show mitigation of circumstances so as to warrant granting of the license as an independent ocean freight forwarder is unpersuasive and falls short of showing such mitigation.

The Supreme Court has held that the only lawful rate which a carrier may charge is that rate appearing in the carrier's filed tariff. This rate must be charged and paid regardless of seemingly innocent justification for departure such as mistake, inadvertence or contrary intention of the parties, *Louisville & Nashville Ry. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915).

FINDINGS AND CONCLUSIONS

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

1. Applicant Leonard T. Butler's Intermodal Services, Inc., violated section 18(b)(3), Shipping Act, 1916, on at least eleven of the nineteen shipments it handled during the period January 15, 1978, through May 12, 1978, in charging, demanding, or collecting a greater, lesser or different compensation for the transportation of property than the rates and charges specified in its tariff on file with the Commission.

2. Intermodal Sales, Inc. d/b/a Intermodal Services, Inc., violated section 15, Shipping Act, 1916, in that it and Seaway Express Lines, a vessel operating common carrier by water, entered into an exclusive, noncompetitive cooperative working agreement subject to the filing and approval requirements of the aforementioned section 15, implementing that agreement in carrying out its terms without the prerequisite Commission sanction.

3. In view of the above, Leonard T. Butler, 52% owner and President of Intermodal Sales, Inc., is found to lack the fitness to properly carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, and the requirements, rules and regulations of the Commission issued thereunder as required by section 44 and the Commission's Rules and Regulations issued pursuant to section 44 of the Shipping Act, 1916.

WHEREFORE, IT IS ORDERED subject to review by the Commission, as provided in the Commission's Rules of Practice and Procedure, that

(A) Leonard T. Butler d/b/a Intermodal Sales, Inc., is found to have violated sections 15 and 18(b)(3) of the Shipping Act, 1916, as indicated herein.

(B) The application of Leonard T. Butler d/b/a Manufacturers Forwarding for an independent ocean freight forwarder license be and hereby is denied.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON, D.C.
June 5, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-30

PUERTO RICO MARITIME SHIPPING AUTHORITY—
GENERAL INCREASE IN RATES

NOTICE

July 11, 1979

Notice is given that no appeal has been filed to the June 1, 1979 order of discontinuance in this proceeding and the time within which the Commission could determine to review that order has expired. No such determination has been made and, accordingly, that order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 77-30

PUERTO RICO MARITIME SHIPPING AUTHORITY—
GENERAL INCREASE IN RATES

DISCONTINUANCE OF PROCEEDING

Finalized July 11, 1979

The Commission instituted this proceeding in an Order of Investigation served on July 7, 1977, in order to investigate the reasonableness of a 10.4% general rate increase by the Puerto Rico Maritime Shipping Authority (PRMSA) effective June 19, 1977. The Commission specifically directed that a hearing not be held until a Commission decision had been issued in a related on-going proceeding (Docket No. 75-38).

On August 16, 1978, Administrative Law Judge William Beasley Harris issued his decision upon remand in Docket No. 75-38, finding the increase therein under investigation to be just and reasonable. No exceptions were filed and on September 21, 1978 the Commission determined not to review that decision. The period for requesting appellate review of the decision expired in November, 1978 with no review petitions having been filed.

Subsequent to the above events concerning #75-38, a tentatively scheduled prehearing conference for the instant proceeding was postponed at the request of Hearing Counsel to allow for informal review of PRMSA's audited financial reports by staff experts working with Hearing Counsel. That review has been completed and Hearing Counsel now has no challenge to PRMSA's data or conclusions relating to revenues, rate of return on rate base or the need for the subject general rate increase. See also summarized data set forth in PRMSA's April 27, 1979 Motion To Discontinue Proceeding, at 3-4.

PRMSA filed a Motion To Discontinue Proceeding on April 27, 1979, to which Hearing Counsel filed a reply on May 11, 1979. Hearing Counsel's Reply makes the point that merely because "a given rate increase has been in effect for an extended period of time and has been 'superseded' by yet another increase in rates does not, in and of itself, mandate a discontinuance of the proceeding," citing the Commission's decision in the *Matson* proceeding (F.M.C. Docket 76-43, Dec. 12, 1978, 18 SRR 1351, 1352). However, Hearing Counsel joins in the Motion For Discontinuance herein on the basis that the financial data clearly show that PRMSA's 10.4% general rate increase is just and reasonable; indeed, the Commission's Office of Economic Analysis has expressed concern regarding the relatively low level of profitability of PRMSA's operation. Hearing Counsel agrees that no useful purpose would be served by continuing this investigation. I find that the financial summary set forth by PRMSA (in its Motion) for Fiscal Year 1978 support those conclusions.

Accordingly, the motion is granted and the proceeding is ordered to be discontinued.

(S) THOMAS W. REILLY
Administrative Law Judge

June 1, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-22

I. CHARLES LUCIDI, D/B/A
LUCIDI PACKING COMPANY

v.

THE STOCKTON PORT DISTRICT

NOTICE

July 17, 1979

Notice is given that no exceptions have been filed to the June 8, 1979 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78-22

I. CHARLES LUCIDI, D/B/A LUCIDI PACKING COMPANY

v.

THE STOCKTON PORT DISTRICT, KILL-PEST, INC., DELK TERMINEX PEST CONTROL, TERMINEX INTERNATIONAL, INC., COOK INDUSTRIES, INC.

Finalized July 17, 1979

Respondent, Port of Stockton, is not in violation of section 16, First, in that it does not give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic.

Respondent, Port of Stockton, is not in violation of section 16, First, in that it does not subject complainant to any undue or unreasonable prejudice or disadvantage.

Respondent, Port of Stockton, is in violation of section 17 in that Item 85 of its Terminal Tariff No. 4 constitutes an unjust or unreasonable regulation and practice related to or connected with receiving, handling, storing or delivering property.

C. Richard Walters for complainant, I. Charles Lucidi d/b/a Lucidi Packing Company.
Edwin Mayall for respondent, Stockton Port District.
Frank Wagner for intervenor, Port of Los Angeles, California.
John Robert Ewers, Aaron W. Reese and *Bruce Love*, Hearing Counsel.

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

Charles Lucidi, d/b/a Lucidi Packing Company (Lucidi), complainant herein, filed a civil action in the Supreme Court of California against the Stockton Port District (Stockton or Port), respondent herein, seeking recovery for alleged damage to property of Lucidi while on the terminal facilities of Stockton. It was alleged that 25,710 bags of sesame seeds became infested with rodent and bird droppings while being stored on Stockton's terminal facilities.

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

Stockton pleaded as an affirmative defense the provisions of item 85 of its Terminal Tariff No. 4. Item 85 provides:

> The Port of Stockton shall not be responsible for any injury to freight on or in its facilities, by fire, leakage, evaporation, natural shrinkage, wastage, decay, animals, rats, mice, other rodents, moths, weevils, other insects, weather conditions, sweat moisture, the elements or discharge of water from breakdown of plant, machinery, other equipment, collapse of building or structure, insurrection, war, or shortage of labor; for delay, loss or damage arising from riots, strikes, labor or other disturbances of any persons or of any character beyond the control of the Port of Stockton.

The California Court, recognizing the Commission's primary jurisdiction, granted the port's motion to stay the trial of the civil action pending a determination by the Commission as to the validity of Item 85.

Thereupon, in compliance with the order of the California Court, this complaint was filed naming the Stockton Port District, Kill-Pest, Inc., Delk Terminex Pest Control, Terminex International, Inc., and Cook Industries, Inc., respondents. The complaint does not identify any of the named respondents other than Stockton, nor does it make any allegations concerning them. The record contains nothing to show that the named respondents, other than the Stockton Port District, are other persons subject to the Shipping Act and, therefore, they are dismissed as parties in this proceeding.

Complainant contends that Item 85 is unjust, unreasonable and void on its face as against public policy as it purports to exculpate the Port from the consequences of its own fault or negligence. Complainant further contends that the tariff item is unlawfully discriminatory against complainant.

The Port of Los Angeles, California (Los Angeles), having shown an interest in this proceeding, was permitted to intervene.

Discovery having been completed, all counsel agreed that the documents developed during discovery provide an adequate record for disposition of this proceeding and that there remain no genuine issues of material fact which require oral testimony and cross-examination. Accordingly, seven documents were admitted as exhibits in evidence and, with the brief filed herein, constitute the complete record in this proceeding as follows:

- Ex. 1 Respondent's first set of answers to Hearing Counsels Interrogatories;
- Ex. 2 Respondent's second set of answers to Hearing Counsel's Interrogatories;
- Ex. 3 Respondent's answers to Complainant's Interrogatories;
- Ex. 4 Deposition of Walter H. Meryman;
- Ex. 5 Deposition of Owen E. Block;
- Ex. 6 Further Responses of Walter Meryman to Interrogatories and Deposition Questions; and
- Ex. 7 Central National Insurance Company policy insuring the Port of Stockton for the period December 9, 1975 to December 9, 1978.

An opening brief was filed by Hearing Counsel, and Lucidi adopted as its own opening brief the opening brief of Hearing Counsel.

Reply briefs were filed by Stockton and by Los Angeles.

ISSUES

The issues to be resolved in this proceeding are whether the tariff provision of the Port of Stockton which has been challenged by complainant (1) results in undue or unreasonable preference or advantage or in any undue or unreasonable prejudice or disadvantage in any respect whatsoever within the meaning of section 16, First,[2] or (2) constitutes an unjust or unreasonable regulation and practice related to or connected with receiving, handling, storing, or delivering property within the meaning of section 17, Second Paragraph.[3]

FINDINGS OF FACT

1. Respondent, the Stockton Port District, was created pursuant to the provisions of the Harbors and Navigation Code of the State of California.

2. The Port is an operating port as distinguished from a non-operating or landlord port.

3. The Port operates marine terminal facilities, providing various terminal services with its own employees. The Port provides terminal services and facilities to break-bulk vessels, bulk carriers and a combination of break/bulk and container vessels. The terminal services furnished by the Port include dockage, wharfage, free time, wharf demurrage, terminal storage and cargo handling.[4] As such, the Port is a person subject to the Shipping Act, 1916, as defined in section 1 thereof.

4. The Port has published and filed with the Commission a tariff, effective November 1, 1977, relating to its terminal services which is designated Terminal Tariff No. 4. The Port also publishes a tariff designated General Tariff No. 1.

5. When outbound cargo arrives at Port facilities, the Port issues a dock receipt. When inbound cargo is delivered to a place of rest on its facilities by independent stevedoring companies, the Port takes custody of the cargo until it is delivered to trucks or rails cars.

6. The Port participates in the activities of the California Association of Port Authorities (CAPA). The Committee on Tariffs and Practices of CAPA meets from time to time to discuss and agree upon rates and charges for wharfage, dockage and related port services. The Committee and the full Association

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[2] Section 16, First, of the Shipping Act, 1916 (46 U.S.C. §815) declares it unlawful for any common carrier by water or other person subject to the Act:

> To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . .

[3] Section 17, Second Paragraph, of the Shipping Act, 1916 (46 U.S.C. §816) provides:

> Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

The Commission, in order to discharge its responsibilities under section 17 of the Shipping Act, adopted General Order 15, 46 C.F.R. §533, which requires every terminal operator to file with the Commission a tariff showing all its rates, charges, rules and regulations relating to or connected with the receiving, handling, storing and/or delivering of property at its terminal facilities.

[4] See 46 C.F.R. §533.6 (d).

discussed and agreed to wharfage increases which were adopted and placed into effect by the Port in 1974, 1975, 1976, 1977 and 1978.

7. There has been no consideration of the provisions of Item 85 of Stockton's tariff or of similar provisions in the tariffs of any other ports (Ex. 4).

8. The Port does not solicit bids for its liability insurance nor are specifications written for the procurement of insurance. Liability insurance is obtained through independent brokers who are given a copy of existing policies and instructed to obtain the same coverage as provided by the policies which are expiring (Ex. 5).

9. At the time of the alleged damage to complainant's property which was the basis of the civil action filed in the Superior Court of California, May 14, 1974, the Port has property damage insurance with total liability limits of $16,000,000, with a $1,000 deductible clause.

10. The Port's liability insurance is issued by the Central National Insurance Company of Omaha, Nebraska, for a three-year term commencing December 9, 1975. That policy covers the liability of the Port for physical loss or damage to property of customers of the Port. The policy does not, *inter alia*, cover liability of the assured Port:

(a) For property held as "storage in transit" under the terms of an applicable bill of lading issued by the assured;
(b) For loss or damage caused by or arising out of ordinary wear and tear, gradual deterioration, dampness or atmosphere, extremes of temperature, inherent vice or latent defect;
(c) For damage sustained due to and resulting from any repairing, restoration or retouching process, unless caused by fire;
(d) For loss due to delay, loss of use or loss of market;

11. Lucidi's cargo of sesame seeds of some 25,710 bags was received at the Port's Dock 9; unloading commenced on February 2, 1974, and was concluded by February 4, 1974.

12. Employees of the Federal Department of Agriculture inspected the seed in transit shed 9 where it had been deposited, on or about May 2, 3, 4 and 6, 1974, and Lucidi received notice of the contamination found by them on May 14, 1974.

13. The sesame seed was being held on the dock for instructions from Lucidi because complainant did not have the facilities available at its Fresno plant to process the seed at that time.

14. There are thirteen wharves at the Port, and only seven of them have transit sheds on them. The Port also has long-term storage facilities. When the free time expires for ingoing cargo, the shipper has his choice of whether it will be placed on wharf demurrage or wharf storage. It may be transferred from the transit shed into the warehouses where it comes under the regulations of General Tariff No. 1.

DISCUSSION

Complainant alleges that Item 85 of Stockton's Terminal Tariff No. 4 is unlawfully discriminatory against complainant "as applied under the circumstances." Complainant has not specifically alleged a violation of section 16, First, but the complaint in a "shotgun" allegation embraces several sections of the Act by contending:

> Is unlawful and invalid as violative of the Shipping Act of 1916, Title 46 U.S.C. §§814–817;

The record contains nothing to indicate that respondent makes or gives any undue or unreasonable preference or advantage to any particular person, locality, or description or traffic. The record is also lacking any evidence to support a finding that Item 85 of the Port's tariff subjects complainant to any undue or unreasonable prejudice or disadvantage. To the contrary, the record establishes that the Port invokes the exculpatory provision of Item 85 as to all users of its facilities who suffer damage or loss from any of the causes set forth therein.

The record is clearly without any evidence to support a finding of a violation of section 16, First.

Accordingly, we now consider whether the regulation or practice established by Item 85 is unjust and unreasonable within the meaning of section 17, Second Paragraph.

The Commission in *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 547 (1966), stated that:

> As used in section 17 and as applied to terminal practices, we think that "just and reasonable practice" most appropriately means a practice, otherwise lawful but not excessive and which is fit and appropriate to the end in view.
>
> The justness or reasonableness of a practice is not necessarily dependent upon the existence of actual preference, prejudice or discrimination. It may cause none of these but still be unreasonable.

Item 85 of Stockton's tariff proclaims that the Port will not be responsible for any injury to freight in or on its facilities resulting from various specified causes.[5]

In addition to its Terminal Tariff No. 4, Stockton also publishes a tariff entitled General Tariff No. 1, a copy of which is on file with the Commission. Section 2 of that tariff establishes warehouse rules and regulations. Item 114(c) of its General Tariff No. 1 contains an exculpatory clause similar to Item 85 of Terminal Tariff No. 4 except for the following language:

> unless such loss or damage be caused by failure of the warehousemen to exercise the ordinary care and diligence required of them by law.

Exculpatory clauses in the water transportation industry appears to have been first considered by the U.S. Supreme Court in *The Steamer Syracuse*, 12 Wall. 167 (1870), where it was held that, notwithstanding a contractual agreement that "the canal boat was being towed at her own risk," the towing boat "must be visited with the consequences" of its negligence. 12 Wall. at 171.

The Supreme Court, in *United States v. Atlantic Mutual Insurance Co., et al.*, 343 U.S. 236 (1952), stated that there is a controlling rule of law that, without Congressional authority, common carriers cannot stipulate against their own negligence or that of their agents or servants.

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[5] The Port pleaded this provision as an affirmative defense in a civil action for damages brought by complainant, which action was based upon the alleged negligence of the Port

In *Bisso v. Inland Waterways Corporation,* 349 U.S. 85 (1955), the Court said:

For many years *The Syracuse* seems to have been generally accepted as either (1) construing a contract to "tow at own risk" as not including an exemption from negligence, or (2) holding invalid as against public policy a contract which exempts a tower from his negligence.

349 U.S. at 86 and at pages 90–91:

This rule is merely a particular application to the towage business of a general rule long used by courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships such as bailors and bailees, employers and employees, public service companies and their customers. [Footnote omitted.]

In 1959, the Supreme Court modified the long-established general rule that exculpatory clauses were invalid as a matter of law in a case where such a clause was contained in a tariff which had been filed with the Interstate Commerce Commission. The question before the Court in *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.,* 360 U.S. 411 (1959), was:

[W]hether consideration of public policy which may be called upon by courts to strike down private contractual arrangements between tug and tow are necessarily applicable to provisions of a tariff filed with, and subject to the pervasive regulatory authority of an expert administrative body.

360 U.S. at 417

The Court distinguished *Bisso* by noting that the exculpatory clause there was part of a contract over which the ICC had no control. The Court said:

In these circumstances we would be moving too fast were we automatically to extend the rule of *Bisso* to govern the present case. For all we know, it may be that the rate specified in the relevant tariff is computed on the understanding that the exculpatory clause shall apply to relieve the towboat owner of the expense of insuring itself against liability for damage caused tows by the negligence of its servants, and is a reasonable rate so computed. If that were so, it might be hard to say that public policy demands that the tow should at once have the benefit of a rate so computed and be able to repudiate the correlative obligation of procuring its own insurance with knowledge that the towboat may be required to respond in damages for any injury caused by its negligence despite agreement to the contrary. For so long as the towboat's rates are at all times subject to regulatory control, prospectively and by way of reparation, the possibility of an overreaching whereby the towboat is at once able to exact high rates and deny the liabilities which transportation at such rates might be found fairly to impose upon it can be aborted by the action of the I.C.C. The rule of *Bisso,* however applicable where the towboat owner has "the power to drive hard bargains," may well call for modification when that power is effectively controlled by a pervasive regulatory scheme. [Footnote omitted.]

360 U.S. at 417, 418.

The Court concluded:

We hold that the Court of Appeals correctly ruled that the exculpatory clause here at issue should not be struck down as a matter of law, and that the parties should be afforded a reasonable opportunity to obtain from the I.C.C., in an appropriate form of proceeding, a determination as to the particular circumstances of the tugboat industry which lend justification to this form of clause, if any there be, or which militate toward a rule wholly invalidating such provisions regardless of the fact that the carrier which seeks to invoke them is subject to prospective and retrospective rate regulations. "Cases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation." *Federal Maritime Board v. Isbrandsten Co.,* 356 U.S. 481, 498.

360 U.S. at 421

In 1966, the Commission addressed the issue of an exculpatory clause in the tariff of the New York Terminals Conference, in *Truck and Lighter Loading and Unloading Practices at New York Harbor*, 9 F.M.C. 505. The clause in that tariff provided:

The Terminal Operator assumes no responsibility for delay to motor vehicles and no claims for such delay will be honored.

The Commission found at page 515:

It is neither just nor reasonable for respondent to disclaim liability for all delays and their attempt to do so was invalid under section 17.

The Commission did recognize that the terminal operators should be allowed to disclaim liability for causes of delay beyond their control. The Commission determined that failure of the terminals to establish a rule to compensate truckers for unusual delay caused by or under control of the terminals constitutes an unjust and unreasonable practice under section 17 of the Shipping Act. This order of the Commission was upheld by the Court of Appeals in *American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission*, 389 F.2d 962 (D.C. Cir. 1968).

The Port in its brief points out that edible goods such as sesame seed if left on the dock or put in a transit shed are very difficult to protect from rodents and pigeons. These transit sheds are just what the name implies—goods are coming from the ships and into the sheds and going out and goods are also coming into the sheds for a short time before a ship docks to go out on. This means a cargo is being moved in and out by forklifts and trucks through the sheds during anytime that ships are docking for loading or unloading and this keeps the facility so open that pigeons can fly in. This is not true of the permanent warehouse facilities where the storage of goods is not on such a temporary basis and can be controlled as to type of goods in this location and as to need for undisturbed area.[6]

To the extent that the nature of the cargo and the operation of the Port's transit sheds is relevant to this proceeding, it cannot be stated too strongly that this initial decision does not presume to pass on the question of whether or not the Port was negligent with respect to the Lucidi cargo. The issue of negligence is to be resolved in the suit in the California court. The issues to which the initial decision relates are whether the Port may, by tariff, excuse itself from liability even if negligent.

It is noteworthy that the warehouse aspect of the Port's question is regulated by a California statute which does not permit exculpatory agreements and requires a warehouseman to comply with the standard of care set forth in the California Commercial Code § 7204 (1) reading as follows:

§7204. DUTY OF CARE; CONTRACTUAL LIMITATION OF WAREHOUSEMAN'S LIABILITY. (1) A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise

[6] Reply Brief of the Stockton Port District, pp. 4-5.

under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care.
(Stats. 1963, c.819, §7204.)

The Port admits that under existing California Law, Item 85 would not be valid if the storage of the sesame seed had been removed to a warehouse rather than remaining in the transit shed on the wharf.[7]

The Port argues that there is a significant difference between the exposure to the Port for damage to cargo while on the wharf or in the transit sheds as opposed to cargo placed in protected warehouses. Therefore, it contends that the duty of providing insurance for such cargo should be placed on the shipper, who has control of its location if he does not choose to or cannot at the time of unloading immediately move his cargo away from the Port area. It is the Port's contention that if the shipper wants complete protection for the cargo, he can take advantage of California law holding warehousemen to the standard of care indicated by §7204 of the California Commercial Code.

The arguments of the Port beg the question whether a tariff provision exculpating the Port in the transit shed area from the standard of care similar to that imposed in the warehouse area is a just and reasonable tariff provision. Absent such a tariff provision and assuming §7204 is not applicable to the transit sheds, then whether the Port should be liable for damage to the cargo under the factual circumstances as they exist at the Port is for the California court to determine.

In support of the Port, Los Angeles argues that absent Item 85, which contemplates that each party bringing a particular cargo into the Port shall bear the responsibility for protecting that particular cargo against loss, the Port must recover costs of potential liability from the users of the Port either through increased tariffs or other methods of raising revenue. Increase in rates means an increase in the cost of goods moving through Stockton. Los Angeles contends this means that the general public will be paying for these costs rather than the shipper and his customers.

Los Angeles asserts that it is reasonable that the method utilized by the Port of Stockton (and also by the Port of Los Angeles) which provides that the Port will not be responsible for the loss of the cargo informs the shippers that if there is going to be a loss, even though that loss may be caused by the sole negligence of the Port, in order to protect themselves they should acquire their own insurance. This prevents the Port from having to spread the risks of the particular cargo among, if not all the users of the Port, certainly all the users of the Port that bring in that particular type of cargo. Los Angeles also says that requiring each shipper to be responsible for its own cargo has the added benefit of having the customer who uses that cargo in its ultimate form pay the actual charges for that cargo rather than having those charges paid for by other general users of the Port.

It is difficult to understand how the general public rather than the shipper and his customers would be paying the costs of increased tariffs at the Port. In any event, the cost of protecting cargo against loss, whether borne by the Port

[7] Reply Brief of the Stockton Port District, p. 4.

and passed on as a cost of Port operation in the same manner or other costs of Port operation are passed on, or whether borne by the shipper, the cost of cargo protection ultimately is paid by the consumer.

In order to determine the legality of Item 85 of Stockton's tariff, it is necessary to ascertain whether the limitation or restriction of liability provisions of a terminal tariff are rules or regulations relating to or connected with the receiving, handling, storing, and/or delivering of property within the meaning of section 17 of the Shipping Act and the Commission's General Order 15.

The purpose of General Order 15 is to enable the Commission to discharge its responsibilities under section 17 by keeping informed of practices and rates of terminal operators, and by keeping the public informed. 46 C.F.R. § 533.1. Terminal operators clearly must include in tariffs all rates, charges, rules and regulations in connection with and/or related to the receiving, handling, storing, or delivering of property. However, whether a rate, charge, rule or regulation, it must be just and reasonable.

There is no evidence that the rates and charges contained in its tariff were established on the understanding that they were related in any respect to the exculpatory provision of Item 85. The record here is to the contrary. Walter Meryman, the Port's Director of Marketing and Traffic, testified as to the ratemaking procedures of the Port.[8] The Port is a member of the California Association of Port Authorities (CAPA). CAPA's Committee on Tariffs and Practices meets usually every two months to discuss wharfage, dockage and related port services. The Port's NOS wharfage rate was increased each year from 1974 to and including 1978. Mr. Meryman, the Port's representative on CAPA's Committee on Tariffs and Practices, testified that these increases were discussed by and agreed to by the Committee.

Following its usual procedure, the Port adopted the rates as agreed to by the Committee. Further, Mr. Meryman testified that during the years he participated in CAPA rate discussions, there was never a discussion of Stockton's Tariff Item 85 or similar clauses in other port tariffs. Accordingly, the record contains nothing to support a finding that Tariff Item 85 could be justified under the theory suggested by the Supreme Court in the *Southwestern Sugar & Molasses Co. supra.*

CONCLUSIONS

Respondent Port of Stockton, a person subject to regulation by the Shipping Act, 1916, among other things provides terminal services including terminal storage and cargo handling.

In the operation of its terminal, the Port has published and filed a tariff relating to its terminal services which is designated Terminal Tariff No. 4. Included in Terminal Tariff No. 4 is Item No. 85, which provides, in essence, that the Port shall not be responsible for injury to freight on or in its facilities resulting from a variety of causes, including injury caused by animals, rats, mice, other rodents, moths, weevils or other insects.

[8] Deposition of Walter H. Meryman, Ex. 4.

To the extent that the provisions of Item 85 would relieve the Port from damage for liability to property caused in whole or in part by fault of the Port, and without a *quid pro quo* of any kind, such provisions are unjust and unreasonable, in violation of section 17 of the Act.

There is no evidence, and the Port does not contend that Item 85 was promulgated in consideration of any benefits otherwise conferred on users of the Port.

The provisions of Item 85 are against public policy insofar as such policy requires businesses affected with a public interest be precluded from taking unfair advantage of those who by necessity must use the facilities of such businesses. To permit the Port to isolate itself from liability, if such liability accrued by reason of the Port's negligence by the mere publication of an exculpatory tariff provision, is unjust and unreasonable, in violation of section 17 of the Act.

Item 85 of Terminal Tariff No. 4 is an unjust and unreasonable regulation and practice relating to or connected with the receiving, handling, storing or delivering of property in violation of section 17, Second Paragraph, Shipping Act, 1916.

Therefore, respondent shall cease and desist from the aforementioned unjust and unreasonable tariff provision by deleting Item 85 from Terminal Tariff No. 4 or, in the alternative, amend Item 85 as to clearly set forth that non-liability does not apply in the event that injury results from negligence by the Port.

(S) STANLEY M. LEVY
Administrative Law Judge

WASHINGTON D.C.
June 4, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-51

PERRY'S CRANE SERVICE

v.

PORT OF HOUSTON AUTHORITY
OF THE PORT OF HOUSTON, TEXAS

NOTICE

July 27, 1979

Notice is given that the time within which the Commission could determine to review the June 21, 1979 order of discontinuance of the Administrative Law Judge in this proceeding has expired. No such determination has been made and, accordingly, that order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78-22

I. CHARLES LUCIDI, D/B/A LUCIDI PACKING COMPANY

v.

THE STOCKTON PORT DISTRICT, KILL-PEST, INC., DELK TERMINEX PEST CONTROL, TERMINEX INTERNATIONAL, INC., COOK INDUSTRIES, INC.

Finalized July 17, 1979

Respondent, Port of Stockton, is not in violation of section 16, First, in that it does not give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic.

Respondent, Port of Stockton, is not in violation of section 16, First, in that it does not subject complainant to any undue or unreasonable prejudice or disadvantage.

Respondent, Port of Stockton, is in violation of section 17 in that Item 85 of its Terminal Tariff No. 4 constitutes an unjust or unreasonable regulation and practice related to or connected with receiving, handling, storing or delivering property.

C. Richard Walters for complainant, I. Charles Lucidi d/b/a Lucidi Packing Company.
Edwin Mayall for respondent, Stockton Port District.
Frank Wagner for intervenor, Port of Los Angeles, California.
John Robert Ewers, Aaron W. Reese and *Bruce Love*, Hearing Counsel.

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

Charles Lucidi, d/b/a Lucidi Packing Company (Lucidi), complainant herein, filed a civil action in the Supreme Court of California against the Stockton Port District (Stockton or Port), respondent herein, seeking recovery for alleged damage to property of Lucidi while on the terminal facilities of Stockton. It was alleged that 25,710 bags of sesame seeds became infested with rodent and bird droppings while being stored on Stockton's terminal facilities.

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

remanded the proceeding to the presiding officer to determine the amount of reparation for monetary damages suffered by complainant. In taking this latter action, the Commission recognized that complainant was "entitled to some degree of monetary restitution for losses occasioned by the unlawful practices" but that the extent of reparation could not be determined on the record which had been developed. F.M.C. Decision, p. 5.[1] The Commission instructed the parties to utilize the procedures set forth in Commission Rule 252 (formerly Rule 15(b)) which required complainant to prepare a statement itemizing damages which could form the basis for an award of reparation or for further hearing.

Following the Commission's decision, a number of events occurred which impeded progress toward conclusion of this proceeding and resulted in considerable delay which was not the fault of either complainant and respondent. In brief, although respondent cooperated in an effort to bring the question of reparation to a prompt conclusion, complainant's first counsel was unable to conduct the necessary investigation of facts in a timely fashion and, as I mentioned above, even disappeared for a time. Furthermore, three other similar complaints were filed.[2] Finally, after it appeared that complainant's first counsel was not able to develop the necessary information upon which settlement discussions could be based, despite numerous conferences, rulings, meetings, and the like, complainants in all four cases retained new counsel. This was done sometime in April or May of 1978. Thereafter, with new counsel, steps were taken to enable the parties to develop relevant evidence and to commence negotiations leading toward settlement. See Report of Special Conference and Rulings Made Therein, May 30, 1978. The process of developing this evidence was time-consuming and involved, among other things, checking of Port records and other records to determine "bumping" instances over a period of time extending from November 17, 1973, to March 23, 1977. Counsel's work was made more difficult because of the uncertain measure of damages in cases of this type and the extreme difficulty in determining instances when complainant had not obtained jobs because of the Port's first-call preferential practice. Nevertheless, after records had been checked, negotiations seeking settlement resumed, finally reaching a successful conclusion which has culminated in the filing of the subject motion.

THE SETTLEMENT AND REASONS SUPPORTING ITS APPROVAL

As the motion states, after all of the effort described above in which the parties checked and cross-checked records seeking to determine instances of

[1] Both the Commission and I wished to pursue the question of reparation although complainant had failed to furnish reliable and probative evidence at the hearing on this question despite having had several opportunities at the hearing to do so. However, furnishing proof of actual compensable damages is not easy in this type of case, and as became apparent late, part of the problem which complainant faced stemmed from the activities of his first counsel who actually seems to have disappeared for a period of time during the remanded phase of the proceeding. For a description of the problems in proving financial injury which complainant experienced at the hearing, see my Initial Decision, cited above, 16 SRR at 1487–1490.

[2] These were: Docket No. 76-57, *H & H Cranes, Inc. v. Port of Houston Authority*, 19 SRR 547 (1979), Docket No. 77-41, *Houston Gulf Crane, Inc. et al. v. Port of Houston Authority;* and Docket No. 77-42, *P & M Crane Service, Inc. v. Port of Houston Authority*, 19 SRR 997 (1979). Docket No. 77-41 has been terminated by the withdrawal of the complaint. Docket No. 76-57 is also nearing submission of a settlement. Docket No. 77-42 has not been settled and is proceeding toward hearing.

"bumping," the parties exchanged proposals for settlement. As noted, it was recognized that even if specific instances of "bumping" could be verified to the satisfaction of both parties, an enormously difficult problem remained if the parties were to determine those instances in which complainant never obtained jobs because a particular Port crane had secured the job through the Port's former preferential first-call practices. Under the Commission's decision, complainant was entitled to monetary restitution for injury caused by "bumping" from jobs actually commenced but also from jobs never obtained because the Port had required a stevedore to utilize a Port crane not equally suitable to one of complainant's. Even if all of these facts could be determined easily and a causal relationship established between the Port's practices and idleness of complainant's cranes, the question of items of damages to be considered compensable under section 22 of the Act remained to be argued.

In view of all of these difficulties of proof and expenses of continued litigation, the parties determined that further costs of litigation would outweigh any benefits that either party could derive from efforts to identify and prove monetary damages more precisely. Accordingly, both parties desire to compromise and settle complainant's claim by agreeing upon the amount of $9,727.41, to be paid by respondent, together with costs of the proceedings, if any, as have been assessed. By this means, the parties seek to bring this lengthy and exasperating litigation to an amicable close. To that I say amen! It only remains for me to determine under applicable principles of law whether there is any reason why this compromise and settlement should not be approved and why this old case should not be laid to rest. I find no such reasons as I now explain.

Governing Principles of Law

It has long been recognized by the Commission that the law strongly favors settlements and that settlements will be treated with indulgence and with presumptions that they are correct and fair. *Organic Chemicals v. Atlanttrafik Express Service,* 18 SRR 1536a, 1539 (1979), and cases cited therein. There are a few caveats which must be considered, however. As the Commission has stated, notwithstanding the strong policy favoring settlements, a presiding judge should not act as a rubber stamp and should be especially careful to ensure that the settlement does no violence to any statutory scheme. In a recent order in Docket No. 78-44, *Pierpoint Management Company and Retla Steamship Company v. Holt Hauling and Warehousing Systems, Inc.,* 19 SRR 435 June 13, 1979, the Commission stated as follows:

> The Commission is aware of and fully supports the policy which favors the settlement of disputes, but it is incumbent upon the decision maker to assure that the settlement proposed by litigants does not violate the law. As was stated in *Inter Equip, Inc. v. Hugo Zanelli & Co.,* 17 SRR 1232, at 1234 (1977):
>
>> The fact that parties seek approval of their settlement does not . . . mean that the presiding officer or the Commission must blindly approve and has no useful function to perform. Care must be taken to insure that no violence is done to any statutory schemes involved especially if there is a question concerning the applicability of Section 15 of the Act. . . .

The statutory scheme to which the Commission had reference in *Pierpoint* involved a possible agreement that required filing and formal approval under section 15 of the Act, i.e., a certain type of anticompetitive agreement among carriers or other persons subject to the Act. In such cases, settlements may be approved but they are subject to formal Commission processing under section 15. See *Pierpoint, supra; Massachusetts Port Authority v. Container Marine Lines,* 11 SRR 37, 40 (1969); *American Export Isbrandtsen Lines, Inc.,* 14 F.M.C. 82, 89 (1970). Another statutory scheme which requires special attention when settlements are submitted involves section 18(b)(3) of the Act. While permitting compromise and settlement in complaint cases alleging that carriers have overcharged in violation of that law, where the facts are not readily ascertainable, the Commission has been careful to ensure that the settlement is a bona fide effort to terminate a controversy and not a device to circumvent the strict requirements of tariff law. See *Organic Checmicals v. Atlanttrafik Express Service, supra,* 18 SRR at 1539–40.

The present case does not involve the complications which occurred in connection with the section 15 and section 18(b)(3) cases described. This case involves simply a compromise and settlement in which the problem presented was to fashion a reasonable measure of monetary damages arising out of discontinued practices which had been found to be unduly prejudicial and unreasonable within the meaning of sections 16 First and 17 of the Act. There is no concern that the settlement itself, which is not between two carriers or other persons subject to the Act and which does not establish ongoing anticompetitive conditions, need undergo section 15 processing. Moreover, there is no tariff policy which comes into play under section 18(b)(3). The case may therefore be evaluated under general principles favoring compromise and settlement in which a major consideration is the fact that the parties, after lengthy negotiations, have determined that whatever they could have achieved to vindicate their respective positions by means of continued litigation would be outweighed by the costs of such litigation and that the amount of settlement to which both have agreed represents a satisfactory compromise and succeeds in terminating a seemingly interminable proceeding.[3] Considering furthermore the extreme difficulty of identifying every "bumping" instance and every lost job attributable to the Port over a period of more than three years, as well as establishing a formula by which each compensable item of damages could be identified, the merits of entering into a compromise and settlement become more obvious. This case, therefore, falls into the customary pattern of the typical settlement which the law encourages in order to terminate complicated controversies and avoid wasteful litigation. See, e.g., *Old Ben Coal Company v. Sea-Land Service, Inc.,* 18 SRR 1085, 1091–1099 (I.D. 1978, F.M.C. adoption, December 29, 1978) for a full discussion of these principles and relevant case citations.

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[3] In respect to the particular amount of damages upon which the parties have agreed, the Commission has recognized that this is a matter for the parties to determine. In *Inter Equip, Inc. v. Hugo Zanelli & Co., supra,* 17 SRR 1232 at 1234 (1977), it was stated:

The amount of the settlement . . . is a matter for the parties to determine and the Commission has in the past recognized the tradition. See *Lavatino & Sons, Inc. v. Prudential-Grace Lines, Inc.,* 12 SRR 1079, 1100–1102 (I.D.), affirmed in pertinent portion by the Commission, 14 SRR 1301 (1974).

CONCLUSION

On the basis of relevant principles of law governing compromises and settlements and considering the nature of the settlement entered into by the parties to this proceeding, I find, as in *Old Ben, supra,* that the settlement agreement which the parties have submitted for approval as a means to terminate this case is reasonable, violates no law or policy, and fully comports with the Commission's policy which strongly encourages settlements. Therefore, subject to Rule 227(c), as amended,[4] the settlement is approved and this complaint case is discontinued.

(S) NORMAN D. KLINE
Administrative Law Judge

June 21, 1979

[4] Rule 227(c), as amended, states as follows:

Whenever an administrative law judge orders dismissal of a proceeding in whole or in part, such order, in the absence of appeal, shall become the order of the Commission 30 days after date of service of such order (and the Secretary shall so notify the parties), unless within such 30-day period the Commission decides to review such order on its own motion, in which case notice of such intention shall be served upon the parties. 46 C.F.R. § 502.227(c); General Order 16, Amdt. 26, served October 25, 1978.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-7

PUERTO RICO MARITIME SHIPPING AUTHORITY

v.

SEATRAIN GITMO, INC. AND
TRAILER MARINE TRANSPORT CORPORATION

NOTICE

July 27, 1979

Notice is given that the time within which the Commission could determine to review the June 22, 1979 order of discontinuance of the Administrative Law Judge in this proceeding has expired. No such determination has been made and, accordingly, that order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-7

PUERTO RICO MARITIME SHIPPING AUTHORITY

v.

SEATRAIN GITMO, INC. AND
TRAILER MARINE TRANSPORT CORPORATION

NOTICE OF WITHDRAWAL OF COMPLAINT AND DISCONTINUANCE OF PROCEEDING

Finalized July 27, 1979

By complaint served February 5, 1979, the Puerto Rico Maritime Shipping Authority (PRMSA) alleged that respondents Seatrain Gitmo, Inc. and Trailer Marine Transport Company (TMT) had violated section 15 of the Shipping Act, 1916, by entering into and carrying out an anticompetitive agreement as a result of a charter of a barge from a company known as Crowley Towing & Transportation Company to Seatrain Gitmo. PRMSA sought a cease and desist order and reparation. Respondents generally denied the allegations and asserted that the charter arrangement did not constitute a section 15 agreement.

By letter dated April 23, 1979, counsel for respondent TMT advised that settlement discussions had commenced. I instructed complainant to advise me of the status of these discussions. See Order to Furnish Status Report Regarding Possible Settlement, May 1, 1979. On May 30, 1979, counsel for PRMSA advised me by letter that PRMSA had decided to withdraw its complaint on the basis of representations of counsel for TMT that the charter in question would expire on or about May 20, 1979, and that there was no expectation that it would be renewed. PRMSA asserts, however, that all parties should understand that its withdrawal is without prejudice to the filing of a new complaint if respondents or related companies enter into similar charter arrangements in the future. No other party has replied to the letter announcing withdrawal.

A complainant has a right to file a complaint and generally to withdraw it if it sees no point in prosecuting it. I know of no doctrine of law that would authorize me to compel PRMSA to continue litigation concerning the status of an apparently expired charter agreement nor any principle of law that would prevent PRMSA from filing a new complaint should a similar charter be executed in the future.

Accordingly, in view of complainant's decision to withdraw its complaint, this proceeding is discontinued.

(S) NORMAN D. KLINE
Administrative Law Judge

June 22, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-27

TRAILER MARINE TRANSPORT CORPORATION—
GENERAL INCREASE IN RATES

DOCKET NO. 77-28

GULF CARIBBEAN MARINE LINES, INC.—
GENERAL INCREASE IN RATES

ORDER ADOPTING INITIAL DECISION ON REMAND

July 31, 1979

On December 19, 1978, the Commission remanded this proceeding to the Office of Administrative Law Judges for further hearings after determining that TMT's rate increases in Docket No. 77-27 could not be found to be reasonable without some inquiry into TMT's debt/equity structure and the effect of its through movement rates on its port-to-port rates. This proceeding is now before the Commission upon its determination to review the Initial Decision on Remand issued in this proceeding on April 18, 1979 by Administrative Law Judge Thomas W. Reilly.

On remand, the Presiding Officer found that the record was sufficient to allow a final determination as to the reasonableness of the subject rate increases, in conformity with directives of the Commission. Although he found the rates to be reasonable, sufficient evidence of such reasonableness was put into the record only as a result of the salutary efforts of the Commission's Bureau of Hearing Counsel. In contrast the Presiding Officer specifically noted that TMT had flatly refused to provide the information required by the Commission as part of a "deliberate calculated strategy".

Although the United States Court of Appeals for the District of Columbia has found that the Commission does not have jurisdiction over joint through rail-water rates to and from Puerto Rico, the right of the Commission to obtain any and all information concerning the operations of regulated carriers reasonably necessary to carry out its regulatory functions was upheld. *Trailer Marine Transportation Corporation v. Federal Maritime Commission,* 602 F.2d 379

(D.C. Cir. 1979). In light of this decision, the Presiding Officer's warning that "it is a perilous course for a regulated carrier to refuse to divulge the requested information" is completely supported by the Commission. Had an adequate record for determination of the reasonableness of these rate increases not been developed through the efforts of Hearing Counsel, they could well have been held to be unlawful due to the failure of TMT to sustain its burden of proof in this regard. See, *Commonwealth of Puerto Rico v. Federal Maritime Commission,* 468 F.2d 872 (D.C. Cir. 1972).

Because sufficient evidence supporting the ultimate disposition of this case as recommended by the Presiding Officer is contained in the record, his decision will not be disturbed. In the future, any carrier's refusal to comply with Commission orders may cause adverse inferences to be drawn or result in the imposition of appropriate legal sanctions.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding is adopted; and

IT IS FURTHER ORDERED, That this proceeding be discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 77-27

TRAILER MARINE TRANSPORT CORPORATION—
GENERAL INCREASE IN RATES

No. 77-28

GULF CARIBBEAN MARINE LINES, INC.—
GENERAL INCREASE IN RATES

Adopted July 31, 1979

The respondents in this remanded consolidated proceeding were found to have produced sufficient additional evidence to meet their burden of proving that the new rates that went into effect on August 29, 1977 are just and reasonable within the meaning of § 18(a) of the Shipping Act, 1916.

SUPPLEMENTAL INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

INTRODUCTION

Pursuant to the Commission's December 19, 1978 Order of Further Investigation (OFI), this is the Initial Decision On Remand which the Commission directed be served after additional proceedings conducted under an accelerated schedule.

This consolidated proceeding was originally instituted on June 30, 1977 to determine whether identical (10.4%) rate increases filed by both Respondents are just and reasonable under § 18(a) of the Shipping Act, 1916 (46 U.S.C. § 817(a)). The increases, initially suspended by the Commission, eventually became effective on August 29, 1977. The Initial Decision found, in essense, that the Respondents had sustained their burden of proving that their rate increases were just and reasonable, as being based on a legitimate need for additional revenue. Although no party filed exceptions to that Initial Decision

[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).

(served June 27, 1978), the Commission reviewed *sua sponte* and concluded that a finding of reasonableness could not be made on the then-existing record. Because Trailer Marine Transport Corporation, Inc. (TMT) began offering through-movement service during the test period involved in the original proceeding (as evidenced by tariffs on file with the I.C.C. of which the Commission took official notice) but failed to mention this in its direct case, the Commission remanded for consideration of the relationship between TMT's through movements and its port-to-port service.

The second area remanded for further investigation was the methodology used to determine the reasonableness of TMT's and GCML's (Gulf Caribbean Marine Lines, Inc.) new rates. The Commission stated in its OFI that: "The method used to determine whether the proposed rates of both TMT and GCML are reasonable also appears to be incomplete. No rate of return was computed on the equity portion of the rate base of either carrier. Only the rates of return on total capital were used in arriving at the conclusion that the returns were not unreasonable in comparison with other U.S. businesses. . . ."

After the issuance of the Commission's OFI, the remanded proceedings formally commenced with a Prehearing Conference in Washington, D.C. on January 9, 1979, at which a schedule was worked out (later slightly revised). The parties ultimately agreed that no oral hearing would be necessary (consistent with the Commission's directions in this regard). The official record for decision in this remanded proceeding consists of the following:[2]

(1) Respondent's Direct Case, filed January 30, 1979;
(2) Hearing Counsel's Interrogatories to Respondents, January 12, 1979;
(3) Respondent's Replies to Hearing Counsel's Interrogatories, January 30, 1979;
(4) Depositions of William F. Roush, Craig A. Wallace & Donald C. O'Malley, February 1, 1979;
(5) Testimony of Robert A. Ellsworth, February 16, 1979;
(6) Affidavit of Robert A. Ellsworth, March 14, 1979.

The first five of the foregoing documents were submitted by Hearing Counsel on March 2, 1979 in connection with a Motion To Admit Evidence, which motion is hereby granted. (There was no opposition or reply to the motion by any other party.) The sixth was separately submitted on March 14, 1979, also with no opposition, and likewise it is admitted in evidence. In addition to the evidence, the parties filed the following briefs:

(a) Respondent's Opening Brief, March 2, 1979;
(b) Hearing Counsel's Opening Brief, March 9, 1979;
(c) Respondents' Reply Brief, March 16, 1979;
(d) Hearing Counsel's letter of March 19, 1979, disclaiming need for reply.

[2] Proposed testimony of Thomas L. Farmer, dated Feb. 16, 1979, was initially submitted by Hearing Counsel and later withdrawn by explanatory letter of March 9, 1979 (together with an affidavit from Mr. Farmer outlining the circumstances of the withdrawal of his testimony). It should be noted that Mr. Farmer also submitted earlier testimony in the first phase of this proceeding (January 1978), but I do not deem the subsequent events to have impaired in any way the validity of his earlier testimony.

Discussion

I. The Effect Of TMT's Through-Movement Rates On Its Port-to-Port Rates

The Commission in its OFI questioned TMT's allocation of 100% of its rate base and expenses to port-to-port cargo in its G.O. #11 submissions which comprised TMT's direct case in the original proceeding. TMT began offering through-movement service during the test period but did not mention this fact in its direct case,[3] making no mention of any other cargo being carried on its vessels nor offering any explanation why portions of its rate base and expenses should not be allocated to the through-movement cargo. Thus, the Commission concluded that: "A finding that the all-water rates are reasonable cannot be made without reliable information as to the effect of TMT's through movement rates on its port-to-port rates" (OFI, 2–3). GCML does not participate in any through-movement rates, thus only TMT is concerned with this portion of the Commission's OFI.[4]

Hearing Counsel's proposed witness Thomas L. Farmer made an on-site review of the Respondents' work papers at the corporate offices of the parent corporation, Crowley Maritime Corporation (Crowley), in San Francisco; however, Mr. Farmer's testimony has been withdrawn (*supra,* fn.2) so that his testimony cannot and will not be relied upon or used in any way in this decision.

In addressing this first issue, the Respondents refused to supply any specific commodity data or through rate division data (ocean portion, etc.) either on their own as part of their direct case or support therefor, or in response to Hearing Counsel's Interrogatories. This was a part of the Respondents' deliberate calculated strategy first explicitly announced at the January 9, 1979 Prehearing Conference,[5] despite their acknowledgement that they had the burden of proof in this proceeding. The Commission expressly stated on pages 2 and 3 of the OFI that: "The 'rate divisions' of the through rate received by the ocean carrier are relevant to a determination as to the reasonableness of TMT's all-water rates . . . ." (and) "Initially, there must be an examination of the comparative levels of the water division of the through rate of the port-to-port rate." In view of those statements, it is a perilous course for a regulated carrier

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[3] Responding to the Commission's OFI criticism for ignoring TMT's through-movement cargo in its original direct case, Respondents now assert that it did not segregate revenues in the test year because at that time TMT did not know when, or even if, it would get a joint rail-water tariff adopted for filing at FMC or ICC, and even if it did, Respondents believed that the initial benefits of the tariff would be minimal for at least a year until it gained general acceptance and use. Resp.Dir.Case, at 3. TMT further asserts that historical facts now prove that the "omission was meaningless" because the amount of revenue derived from through-movement cargo "does not meet the criteria of Part 512.6(c)."

[4] Both in response to an Interrogatory of Hearing Counsel and in their Direct Case, Respondents state that GCML does *not* offer through service.

[5] See page 3, fn.2 of Hearing Counsel's Opening Brief; also statements of Mr. Roush at Prehearing Conference, tr.4 and 6:

> [i]t is our position . . . that we will show that the through rated traffic represents a very small portion of the traffic in total . . . which represents so small a portion that the regulations do not provide that we have to segregate that portion of traffic. (tr.4.)

> [w]e will not reveal any data that would give the Commission any insight as to what the ocean divisions are on the through rates. (tr.6.)

See also TMT's argument on pages 2–4 of Respondents' Direct Case as to why the Commission does not need, nor its Regulations require, the production of such further data. Also see Respondents' refusal to answer Hearing Counsel's Interrogatory #6, using assertion: "This information is not necessary to prove reasonableness of respondents' rates." Cf., OFI, at page 3 (last full sentence) and fn.3.

to refuse to divulge the requested information. As pointed out in my January 22, 1979 Ruling On Motion For Clarification, the fact that data requested by a regulatory agency deals with partly regulated and partly unregulated activity is no valid objection to that agency's request for such data.[6] Respondent's reliance on what the Commission ordinarily requires in carrier's regular reports under Part 512 of the Commission's Regulations (46 C.F.R. § 512) is equally inappropriate, having no relevance to what the Commission may require in a general rate increase proceeding.[7]

Nevertheless, Hearing Counsel did not pursue the issue of adamant refusal to turn over data in the form requested by Hearing Counsel[8] and suggested by the Commission in its OFI. Hearing Counsel now joins with Respondents in asserting that the material supplied should be sufficient for the Commission to reach a decision in this limited remand proceeding. Respondents point out in their Direct Case that while Part 512 is not directly applicable here, it does constitute an indication that revenues from other sources which comprise less than 5% of the revenues from the service over which the Commission has jurisdiction are not considered significant by the Commission with respect to requiring regular financial reports for such service (Resp.Dir.Case, at 2-3). Specifically, Respondents point to 46 C.F.R. § 512.6(c) as clearly dealing with only "gross revenue" when referring to revenue from "other cargo," and make the argument that the most that is required by Part 512 is to segregate "revenue and expenses" within the "Service" *only if* the gross revenue of "other cargo" exceeds 5% of the gross revenue from the "Service." TMT in the test year had port-to-port revenues of $53,332,000 compared to through-movement revenue of $1,647,000. Thus, TMT's "other cargo" produced only 3.0% of the gross revenue of the service and therefore, Respondents argue, there is no substantial reason to require a segregation of revenue and expenses for such a relatively insignificant amount of "other cargo." Respondents further showed, using August 1978 as an example, that through-movement cargo produced more revenue than expenses and thus could not be a burden on port-to-port traffic.[9]

Hearing Counsel tested Respondent's conclusions through Interrogatories, requests for production of documents and oral depositions of three company officials. Based on this investigation, Hearing Counsel concluded that they have no basis to argue that TMT's through movement service places any financial burden on its all-water service. The answers of Respondents' officials to deposition questions on transcript pages 29-38[10] add specific details of the nature of the through-movements, how billings are recorded and determined, and

[6] See *ICC v. Goodrich Transit Co.*, 224 U.S. 194, 211, 215-16 (1912), cited and excerpted at page 3 of the above January 22 Ruling; see also discussion on pages 2-6 of same Ruling.

[7] See also Hearing Counsel's remarks on G.O. #11 applicability and adamance of Respondents in refusing to produce data specified by the Commission, Prehearing Conference transcript, 6-7.

[8] See fn.2, at 3 of Hearing Counsel's Opening Brief.

[9] Respondents' Direct Case, at 4-5.

[10] All 3 depositions are bound together under cover titled "Deposition of William F. Roush."

where the figures that Respondents used in their Direct Case originated.[11] On pages 8–9, Mr. Roush explained the source for and calculations made in determining the revenue produced for the through-movement.

II. The Method Used To Determine Reasonableness Of Rates

In the Commission's OFI, the Commission found that the parties' use of rate of return on total capital to determine reasonableness of rates was "incomplete." As stated by the Commission:

> No rate of return was computed on the equity portion of the rate base of either carrier. Only the rates of return on total capital were used in arriving at the conclusion that the returns were not unreasonable in comparison with other U.S. businesses. The rate of return on equity was not determined because "the respondents' complex corporate structure made this impossible". . . .
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> [I]f such a critical analysis can be avoided by carriers which happen to have a "complex corporate structure" there exists the possibility that important aspects of their financial structure regarding the effect of debt management on profitability may go unexamined. When the financing structure of a subsidiary is unusually complex, an acceptable alternative may be the use of the debt-equity ratio and imbedded debt rate of the parent corporation in calculating the respective rates of return.

OFI at 4–5.

Once again, as in responding to the first remanded issue, the Respondents declined to present the Commission with the analysis it requested, arguing instead that they should not be required to make such analysis. This argument is repeated in Respondents' Direct Case (at 5–8). Respondents argue that only the G.O. #11 accounting methodology should be employed in determining the rate of return *unless* "the application of such rules and regulations create *unreasonable results*" (citing 46 C.F.R. § 512.3(g)).[12] Respondents cite the decision in *Sea-Land Service, Inc.—Gen. Increase in Rates, etc.,* Docket #71-53, 13 SRR 907, 921 (1973), as supporting their position.[13] However, I find nothing in that decision that in any way constricts or limits the Commission in its discretion to choose the most appropriate accounting methodology for use in a particular rate proceeding.

Even though the Respondents did not present debt and equity data in their Direct Case, Hearing Counsel points out that they did provide sufficient information to the staff expert witness, Dr. Robert Ellsworth of the FMC Bureau of Industry Economics, so that he could make the analysis required by the

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[11] In its Direct Case, Respondents testify that through-movement cargo cannot burden its all-water cargo because the revenue produced from the through-rate division exceeds the related fully-distributed expenses. For the most current 12-month period available to TMT (through Nov. 30, 1978), total expenses were $39,814,099. During this same period, TMT handled 37,500 forty-foot trailers. That resulted in average expense per trailer of $1,061.71. Using the August 1978 example (the month chosen by Hearing Counsel in its Request for Documents), the revenue from the 347 through-movement trailers was $405,615—an average revenue of $1,168.91 per trailer. Thus, the through-movement cargo produced a margin over expenses of $107.20 per forty-foot trailer, ergo, no expense burden on the port-to-port traffic. Resp.Dir.Case, at 4–5.

[12] Respondents further contend that no unreasonable results occur by using G.O. #11 accounting methodology. "Respondents should not be subject to the uncertainty of submitting a financial report based on GO 11 requirements and having it judged by another accounting methodology. The mathematical exercises sought to be engaged in by the Commission serve little practical purpose as GO 11 makes provision for the inclusion in the rate base of the cost, less depreciation, of the assets used in the trade." (Res.Dir.Case, at 6.)

[13] That decision, though cited as a statement of the Commission in Respondent's Direct Case, was actually a decision of Administrative Law Judge Herbert K. Greer in a proceeding that was ultimately discontinued by the Commission on March 18, 1975 because two other proceedings were expected to deal with key issues from the Docket #71-53 proceeding. See 14 SRR 1569 (1975).

Commission. His analysis is set forth in his testimony[14] and is directed to the following areas: (a) rates of return on equity, (b) fair (maximum) rates of return on equity, (c) debt and equity ratios, and (d) tax savings arising from interest payments as a deductible expense. Again, as in the original proceeding, the ultimate conclusion as to reasonableness of the new rates is based upon a comparison with average rates of return for U.S. corporations, including a comparison with transportation industries as well as in "all industries," and also includes consideration of risk factors for TMT and GCML.

Dr. Ellsworth disagrees with the Respondent's argument that the Commission should utilize the same hypothetical debt and equity ratio concept that the CAB uses, but beyond that his analysis leads him to conclude that the general rate increases of TMT and GCML are reasonable when viewed in the light of the carriers' rates of return.

Dr. Ellsworth's analysis established embedded debt costs (8.32%: TMT, 8.57%: GCML) and then following the Commission's suggestion, used the debt and equity structure of the parent corporation (Crowley Maritime Corporation or CMC) as an indicator of the debt and equity structures for TMT and GCML. From this, the analysis proceeds to calculate rates of return on equity. After including the post-tax effect of the revenue TMT earned from its joint rail/water service, TMT yields a rate of return on equity of 12.34% and a 10.04% return on rate base. Dr. Ellsworth calculates that GCML should have realized a negative return on equity of −2.61% and a positive 3.75% return on rate base. (The negative return on equity results from the cost of meeting the imbedded debt being greater than the net income before interest.)

Dr. Ellsworth then determined what the maximum fair rate of return would be for the Respondents. Before arriving at that conclusion, he first details several factors he considered (Ellsworth, 8–16). Dr. Ellsworth calculates that TMT and GCML would be entitled to a maximum fair rate of return of 15%. Therefore, based on the documentation submitted and his analysis thereof, he concludes that the Respondents' new rates reflecting the new general rate increases are just and reasonable.

CONCLUSION

I find that based upon the additional evidence submitted in this remanded proceeding (including staff analysis thereof) the Respondents' new rates incorporating their new general rate increases are just and reasonable within the meaning of § 18(a) of the Shipping Act 1916 (46 U.S.C. § 817(a)).

(S) THOMAS W. REILLY
Administrative Law Judge

WASHINGTON, D.C.
April 17, 1979

[14] See also explanatory affidavit of Dr. Ellsworth dated March 14, 1979.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 606

APPLICATION OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF NEPERA CHEMICAL, INC.

REPORT AND ORDER ADOPTING INITIAL DECISION

August 8, 1979

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

Sea-Land Service, Inc. filed an application pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817), requesting permission to waive $42,569.90 and refund $280.00 in freight charges to Nepera Chemical, Inc., in order to give effect to a rate negotiated between the parties but not filed in the appropriate tariff prior to shipment.

Administrative Law Judge Norman D. Kline rendered an Initial Decision denying the application on the ground that Sea-Land had failed to file a corrected tariff rate which conformed to the negotiated rate. Judge Kline based his decision upon the Commission's holding in *Munoz v Cabrero v. Sea-Land Service, Inc.,* 17 S.R.R. 1191 (1977), that secton 18(b)(3) absolutely requires the carrier, prior to applying for refund or waiver authority, to file a new tariff reflecting the intended tariff upon which a refund or waiver is to be based. Here he found that the new tariff filed by Sea-Land will result in a charge to Nepera of $18.25 per container more than the negotiated rate.

Sea-Land filed Exceptions to the Initial Decision arguing that the difference between the negotiated rate and the rate filed must be regarded as *de minimis* and, therefore, not a jurisdictional defect. Sea-Land's Exceptions admit that there is a variance between the negotiated rate and the rate filed, but argue that it results merely from the conversion from the rate negotiated in pounds to the rate filed in tons and the load factor of the particular commodity.

DISCUSSION AND CONCLUSION

The rate negotiated between Sea-Land and Nepera and the rate filed by Sea-Land pursuant to its application are clearly at variance. The rate filed would result in a charge to Nepera greater than the rate negotiated.

The Commission held in *Munoz, supra,* at 1193, that:

> Section 18(b)(3) requires that prior to applying for a refund or a waiver the carrier file a new tariff upon which "such refund or waiver will be based." When read in conjunction with the statements in the House and Senate reports, it is clear that "the new tariff" is expected to reflect a prior intended rate, not a rate agreed upon after the shipment.
>
> [T]he authority granted by P.L. 90-298 to depart from the rigid requirements of Section 18(b)(3) of the Act and to make a rate applicable retroactively is strictly limited and in our opinion would not extend to approve a rate which was never agreed upon or intended to be filed.

No argument has been advanced that would justify a modification of that holding. *Munoz* reflects Congress' intention that the requirements of section 18(b)(3) special docket applications be strictly applied. A strict application does not allow even for a *de minimis* exception.

THEREFORE, IT IS ORDERED, That the Exceptions to the Initial Decision of Sea-Land Service, Inc. are denied; and

IT IS FURTHER ORDERED, That the Initial Decision served April 23, 1979 is adopted and made a part hereof; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 606

APPLICATION OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF NEPERA CHEMICAL, INC.

Adopted August 8, 1979

Application for permission to waive and refund portions of freight charges denied.

Carrier applicant failed to publish specific commodity rate on a particular commodity after cancelling and republishing its tariff although its solicitor had indicated to the shipper that the specific rate would be carried over into the new tariff. This situation may have resulted in a tariff error of a clerical or administrative nature or constitute an inadvertence in failing to file a new tariff. However, the application is fatally defective because the carrier, in filing the new conforming tariff prior to filing the application, as required by law, filed a rate different from that quoted to the shipper and from the rate which had been published in the previous tariff.

Since the application was filed on the very last day permitted by law, it was too late to reject the application so that carrier could file a corrected, conforming tariff and new application.

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

This is a special-docket application filed by Sea-Land Service, Inc. (Sea-Land), seeking permission to waive a total of $42,569.90 and refund $280.00 in freight charges for the benefit of the shipper, a company known as Nepera Chemical, Inc., located in Harriman, New York. Sea-Land seeks this permission in connection with two shipments of a liquid chemical known as "beta picoline"[2] carried in tank containers on the *SEA-LAND GALLOWAY,* which sailed out of Port Elizabeth, New Jersey on June 10, 1978, bound for the port of Barcelona, Spain. The first shipment consisted of two containers in which an aggregate of 73,680 lbs. of "beta picoline" were carried. The second shipment consisted of three containers in which an aggregate of 108,820 lbs. of this commodity were carried.

[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 commodity is referred to as "picaline" in Sea-Land's tariffs but as "picoline" in Sea-Land's shipping documents, letters, and application. According to Webster's Third New International Dictionary at 1711, the correct spelling is "picoline" and "beta picoline" is a liquid used in making nicotinic acid. Sea-Land ought to correct the spelling in its tariff.

The application was mailed from Sea-Land's headquarters in New Jersey on December 7, 1978, exactly 180 days after the date of sailing, and is under consideration in accordance with the special-docket provisions of section 18(b)(3) of the Shipping Act, 1916 (the Act), and the procedures established under Commission rule 92(a), as amended. The sworn application is well documented with affidavits, inter-office memoranda, letters, bills of lading, freight bills, pertinent tariff pages, and a calculation of freight charges as billed and collected from the shipper on each of the shipments. All of this evidence appears to make out a case for the relief requested on the basis of tariff error of a clerical or administrative nature as well as inadvertence on the part of the carrier to file an intended rate prior to the time of the shipments in question as described in greater detail below. However, because the new tariff which Sea-Land filed to correct its error does not conform to the prior intended rate and because the application was filed on the very last day permitted under the applicable law and regulations so that a new filing is impossible, the application must regrettably be denied.

FACTUAL BACKGROUND

This case involves the failure of Sea-Land, when canceling a previous tariff and republishing a new tariff, to continue to publish in the latter tariff a specific commodity rate on "beta picoline" although Sea-Land's sales representative had indicated to the shipper that such rate would be continued in the later tariff.

The well-documented materials which Sea-Land has appended to its application tell the following story. Prior to December 31, 1977, Sea-Land had published commodity rates from U.S. North Atlantic ports to ports in Spain in its Freight Tariff No. 166 (FMC–43). That tariff had contained a rate on "Picalines, refined, mixed" of $6.85 per hundredweight, minimum 40,000 lbs. per container. Tariff No. 166, Item 9140. On December 31, 1977, Sea-Land cancelled this tariff and published a new tariff for tank trailers, namely Tariff No. 232 (FMC No. 104). This new tariff failed to publish a specific commodity rate for "picalines." Before the new tariff had been published, however, a Sea-Land sales representative, Mr. Karl Douglass, had requested Sea-Land's Pricing Department to continue the old rate of $6.85 per hundredweight, minimum 40,000 lbs. in the new tariff and, furthermore, Mr. Douglass had notified the shipper, Nepera Chemical Corp., that this old rate would be continued in the new tariff, by letter dated December 6, 1977. Somehow, however, the Pricing Department, which apparently did not know of these representations made to the shipper, did not cause a transfer of the old rate to the new tariff. The result was that when the shipments of "Beta Picoline" were carried on June 10, 1978, there was no specific rate for that commodity and the cargo, N.O.S. rate for liquid (non-hazardous), a higher rate of $631.25 per ton of 2240 lbs., minimum 40,000 lbs. per tank, was considered by Sea-Land to be applicable. Tariff No. 232, Item 10, 12th Rev. page 5.

Upon learning that the shipments were rated on the basis of the Cargo N.O.S. rate, Sea-Land's Pricing Department requested the Tariff Publications

Department to publish a specific commodity rate for this item. This was done. Effective June 21, 1978, only 10 days after the sailing, Sea-Land by telex filing, publsihed a rate on "Beta Picaline, in tanks" of $162.25, minimum 17 WT per tank container. Tariff No. 232, 6th Rev. page 5-A. Although the shipments were rated on the higher Cargo N.O.S. rate basis, the shipper did not actually pay the amount so rated. On the first shipment of two containers, the shipper paid $280.50 more than the freight charge which would be payable under the new rate of $162.25 per WT, minimum 17 WT. On the second shipment of three containers, the shipper actually paid $.25 less than the freight which would be payable under the new rate. Sea-Land wishes to retain only the total amount of freight calculated on the basis of the new $162.25 rate and if the application is granted, would in fact be refunding $280.25 to the shipper and would be waiving any amount of freight over a total of $13,791.25, which are the total freight charges calculated on the basis of the new $162.25 per ton rate which Sea-Land wishes to apply retroactively to the shipments. See "Calculation of Freight Charges on Shipments of Picolines from Elizabeth, N.J.," Ex. 7. The amount of the waiver would be over $42,000.

Discussion and Conclusions

As mentioned, this is a special-docket application filed under the provisions of section 18(b)(3) of the Act, as amended by P.L. 90-298. It has been recognized in numerous special-docket decisions of the Commission that this law is remedial and equitable in nature and is designed to relieve shippers of financial harm which would fall on them because of carrier error in tariff publishing and filing. See, e.g., *D. F. Young, Inc. v. Cie. Nationale Algerienne de Navigation,* 18 SRR 1645 (1979); *Ghiselli Bros. v. Micronesia Interocean Lines, Inc.,* 13 F.M.C. 179, 182 (1970); *Hermann Ludwig, Inc. v. Waterman Steamship Corporation,* 18 SRR 383, 385 (1978); *Westinghouse Trading Co. Division of Westinghouse Electric Corp. v. American Export Lines, Inc.,* 18 SRR 570, 572-574 (1978). Nevertheless, it is also well established that although the law is based on equitable principles, applications for relief must show that a bona fide error of the type contemplated by the law occurred and that certain other conditions have been met. For example, applications do not qualify for relief even under this remedial statute if a zealous solicitor makes unauthorized representations to a shipper which the carrier never intended him to make or if a rating clerk misreads a tariff or misquotes a rate in a tariff and the carrier never intended its tariff to conform to the unauthorized or mistaken quotation. See *Farr Co. v. Seatrain Lines,* 17 SRR 1463, 1467-1469 (I.D. 1977); 18 SRR 369 (F.M.C. 1978) and the legislative history to P.L. 90-298 cited in 17 SRR at 1467 n. 6. Equitable though this law may be, the advocates of the law made clear to Congress that if the Commission obtained the authority to grant special-docket applications it would act carefully to guard against rebating and would not treat these applications as matters to be rubber stamped. See remarks of Mr. John Mahoney and Chairman Harllee to the House Subcommittee on Merchant Marine and Fisheries cited in 17 SRR at 1467 n. 6. These remarks in the legislative history furthermore demonstrate the important fact that carrier intent to file a conforming tariff prior to shipment was considered necessary. Mr. Mahoney, a spokesman for the bill, even stated that "[i]f the Commission gets this power, it must be made clear that carriers and shippers alike will have a very heavy burden to show good cause for relief under these conditions." Hearings, at 103, cited in 17 SRR at 1467 n. 6. Chairman Harllee concurred with Mr. Mahoney's sentiments. Furthermore, the Chairman assured the Subcommittee that the proceeding would be carefully examined by an Administrative Law Judge (then called hearing examiner) to ensure that the applicant had established the fact that there has been a bona fide mistake. See colloquy between Chairman Harllee and Congressman Edwards. Hearings on H.R. 9473 before the Subcommittee on Merchant Marine & Fisheries, 90th Cong., 1st Sess., Sen. No. 90–11 (1967), at 88.

In addition to the above, it is clear that there are certain jurisdictional prerequisites which cannot be waived and which every applicant must meet before the Commission can grant the relief requested. Among them are the requirement that the application be filed no later than 180 days after date of shipment and that the new tariff showing the rate on which relief is based be filed before the application is filed.[3]

In this case, although not entirely free of doubt, it appears that there was an error in Sea-Land's new tariff published after December 31, 1977, because Sea-Land forgot to continue publishing the commodity rate on "picalines" which had appeared in its previous tariff. It also appears that Sea-Land may have inadvertently failed to publish this commodity rate in its later tariff because of a failure of communication between the solicitor who represented to the shipper that the old rate of $6.85 per hundredweight would be continued in the new tariff and Sea-Land personnel authorized to make good on his quotation. I qualify these findings because of the fact that it is not clear that Sea-Land conceived the intent to continue the old rate in the new tariff prior to the time of the shipment since the official, Mr. Kenneth D. Nenart, who apparently had authority to back up the sales representative and cause the old rate to be published in the new 1978 tariff was unaware of the quotation made to the shipper when publishing the new tariff and states that "had he known of the quotation made by K. Douglass to Nepera Chemical, [he] would have published same in the applicable tariff to protect booking made." Affidavit of Kenneth D. Nenart, Assistant Pricing and Conference Manager-Mediterranean Service of Sea-Land Service, Inc.

Although prior conceived intent by a carrier has been found to be a required element before the Commission could conclude that there was an inadvertent failure to file a tariff,[4] had there been no jurisdictional defect otherwise in the application, this application could have been granted perhaps by finding that the later ratification by Mr. Nenart of the original quotation demonstrated a

[3] Section 18(b)(3) of the Act authorizes the Commission to grant special-docket applications but, among other things, provides that "the common carrier by water in foreign commerce . . . 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" and provided that "application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment."

[4] See *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 SRR 1191 (1977), and the legislative history discussed in *Farr Co. v. Seatrain Lines, supra*, 17 SRR at 1467 n. 6.

policy of Sea-Land of backing up its sales solicitors, thereby establishing intent to publish the quotation in its later tariff. Cf. *D. F. Young, Inc. v. Compagnie Nationale Algerienne de Navigation,* 18 SRR 1645 (1979).[5]

However, it is not necessary to decide whether such a ratification by Mr. Nenart establishes either error in republishing Sea-Land's later tariff because of administrative or clerical error or inadvertent failure to file the quoted commodity rate in the later tariff. The reason for this statement is that the application shows that Sea-Land has failed to meet a requirement imposed by law, which requirement cannot be waived, and furthermore, that this fatal defect in its application cannot be cured because the application was not filed until the very last day permitted under the law.

The fatal defect relates to the second condition imposed by the applicable law. Thus, in pertinent part, section 18(b)(3) permits the Commission to grant applications *"Provided, further,* That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based. . . ." 46 U.S.C. §817(b)(3). In this case, the application was filed, as I found above, on December 7, 1978, exactly 180 days after date of sailing. Prior to the filing, on June 21, 1978, only 11 days after sailing, Sea-Land filed its new tariff. The new tariff did indeed publish a specific commodity rate on "Beta Picaline, in tanks." However, consider the new rate that was published. This rate was not the previous rate which Sea-Land's sales representative had quoted to the shipper in his letter dated December 6, 1977. Nor was it the rate to which any of Sea-Land's officials referred in the several internal memoranda attached to the application. See Memo from Douglass to Nenart, November 30, 1977; Memo from Cash to Nenart, same date; letter from Douglass to Ms. Edith Soderberg, c/o Nepera Chem., December 6, 1978. The rate to which all of these gentlemen referred was $6.85 cwt min. 40,000 lbs." This was the exact rate previously published in the earlier tariff which Sea-Land had canceled. Tariff No. 166, Item 9140. This was also the quotation which Mr. Douglass made to the shipper, which quotation, as noted, Mr. Nenart states that he "would have published same in the applicable tariff to protect booking made." Affidavit of Kenneth D. Nenart; letter of Mr. Douglass to shipper, dated December 6, 1977.

But what was the actual rate which Sea-Land published in its new tariff for "Beta Picaline, in tanks?" This new rate, as noted, was $162.25 per weight ton of 2240 lbs., minimum 17 WT (weight tons). Tariff No. 232, Item 78, Ex. 6. Is this latter rate the same as the earlier rate which had been quoted to the shipper and which Mr. Nenart would have carried over into the later tariff? In its application Sea-Land explains this obvious change in numbers by stating

[5] In *D. F. Young,* the Commission granted a special-docket application when it was shown that a carrier member of a conference conference had agreed upon a rate with a shipper but had neglected to bring the matter to the conference's attention prior to shipment so that the conference could publish the agreed rate in the applicable tariff. Although the conference did not know of the carrier's negotiations prior to shipment, when it learned of the negotiations, it voted to file the corrective tariff after the shipment had taken place, in effect ratifying the rate agreement of its member carrier. The Commission found that there was an error in the conference's tariff of a clerical or administrative nature at the time of shipment although the conference never knew of its member's agreement with the shipper at that time.

that "[i]n publishing the new item, the previous rate of $6.85 per cwt. as shown in Sea-Land Tariff No. 166 was converted to the per ton basis and the minimum of 17 weight tons reflected the load factor of this commodity. This conversion represents a difference of $18.25 per tank." Application, third page, paragraph D. Had the new rate merely been an arithmetic conversion from hundredweight to tons with no change in minimum weight requirement, in substance it would have conformed to the earlier tariff rate and to the quotation made to the shipper by Mr. Douglass. But, as even Sea-Land notes, the new rate makes a substantive change, in effect amounting to an increase in freight charges of $18.25 per container.

Arithmetically, a rate of $6.85 per hundredweight simply does not convert to $162.25 per ton of 2240 lbs. Rather it converts to $153.44.[6] Furthermore, when the complete rate is considered by taking into account the 40,000 lbs. minimum for the earlier rate and the 17 weight ton minimum for the later rate, the discrepancy is further compounded. 40,000 lbs. converts to 17.86 long tons, not 17 tons. Thus, the total freight charge per container for the earlier rate amounts to $2,740 whereas the charge as per the latter rate amounts to $2,758.25.[7] The difference, as Sea-Land itself noted, is $18.25 per container. Thus, if the shipper was quoted and expected to be charged only $2,740 per container on the basis of the earlier rate, under the new tariff which Sea-Land later filed and on which it bases this application, the shipper will be charged $2,758.25 per container. Perhaps in numbers the difference is not significant. However, under governing law, the difference is greatly significant. The problem is that a carrier cannot quote one rate to a shipper and then file another rate which does not conform to the quoted rate nor to the understanding between shipper and carrier and seek to apply this later nonconforming rate retroactively to the shipment in a special-docket application. Such a change in the later tariff filed prior to the application is fatal to the application. Such is the current law. In *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 SRR 1191 (1977) the application was denied on precisely those grounds. In that case, Sea-Land had agreed to carry a shipment at a rate of $44 W/M instead of the higher rate provided in its tariff but failed to file the agreed rate prior to the shipment. Later, Sea-Land filed the corrective tariff prior to its special-docket application. However, the corrective tariff published a rate of $40 W/M, not the agreed rate of $44 W/M. The application was therefore denied. The Commission explained why it was forced to deny as follows:

> Section 18(b)(3) requires that prior to applying for a refund or a waiver the carrier file a new tariff upon which "such refund or waiver will be based." When read in conjunction with the statements in the House and Senate reports, it is clear that "the new tariff" is expected to reflect a prior intended rate, not a rate agreed upon after the shipment.
>
> While we recognize that should the application be denied the consequences of the carrier's consecutive errors would fall upon the shipper, nevertheless the authority granted by P.L. 90–298 to depart from the rigid requirements of Section 18(b)(3) of the Act and to make a rate applicable retro-

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[6] $\frac{2240}{100} \times \$6.85$ equals $153.44.

[7] $6.85 × 400 equals $2,740.
$162.25 × 17 equals $2,758.25.

actively is strictly limited and in our opinion would not extend to approve a rate which was never agreed upon or intended to be filed.

17 SRR at 1193.

The same type of situation has occurred recently in another special-docket proceeding. Special Docket No. 583, *Owens Illinois Company v. Trans Freight Lines, Inc.* (Initial Decision, served April 2, 1979), 19 SRR 170. In that case the carrier and shipper had agreed upon a rate of $1,800 per container, which was not timely filed. Prior to filing its special-docket application the carrier filed a new tariff but the rate filed in that tariff was $36 WM, minimum 2200 ft. per container, not $1,800 as earlier agreed. The application had to be denied. Judge Glanzer noted that the second proviso of section 18(b)(3) regarding the filing of a new tariff prior to filing the application is jurisdictional and cannot be waived, citing *Louis Furth, Inc. v Sea-Land Service, Inc.*, 17 SRR 1171, 1172 (1977), and *Henry I. Daty, Inc. v. Pacific Westbound Conference*, 17 SRR 1439, 1442 (1978). Initial Decision, case cited, at 4, 5.

For the above reasons, the application must be denied.[8] Since, as Sea-Land's documents show (Ex. 7), Sea-Land has not recovered the full amount of freight charges due under the tariff applicable at time of shipment, Sea-Land must take steps to recover that amount regardless of equities. See *Louisville & Nashville Ry. v. Maxwell*, 237 U.S. 94, 97 (1915); *Southern Pacific Co. v. Miller Abattoir Company*, 454 F.2d 357, 359–360 (3d Cir. 1972); *Chicago B. & Q. R. Co. v. Ready Mix Concrete Co.*, 487 F.2d 1263, 1267 (8th Cir. 1973); *United States v. Associated Air Transport, Inc.*, 275 F.2d 827, 832–834 (5th Cir. 1960); *Farr Co. v. Seatrain Lines, supra*, 17 SRR at 1468, 1469; *United Nations et al. v. Hellenic Lines Ltd. et al.*, 3 F.M.B. 781, 786 (1952); discussion in 88 A.L.R. 2d 1375 (1963) and 83 A.L.R. 245 (1933).

Accordingly, within 30 days after this decision is adopted by the Commission or otherwise becomes administratively final, Sea-Land shall take steps to recover the full amount of freight and notify the Commission of the action which it has taken.

(S) NORMAN D. KLINE
Administrative Law Judge

WASHINGTON, D.C.
April 20, 1979

[8] It is regrettable that the application must be denied. However, it should be noted that had Sea-Land not waited until the very last day on which it was permitted by law to file (mail) the application, it might have been possible to call Sea-Land's attention to the fatal jurisdictional defect so that Sea-Land could file a corrected conforming tariff and a new application before the statutory 180-day time period expired. However, by the time the application was actually received by the Commission (on December 8, 1978), it was already too late to cure the defect, the 180-day period having expired after December 7.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-14

CARGO SYSTEMS INTERNATIONAL (CSI)—INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND POSSIBLE VIOLATION OF SECTION 44, SHIPPING ACT, 1916

NOTICE

August 10, 1979

Notice is given that no exceptions have been filed to the July 2, 1979, initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-14

CARGO SYSTEMS INTERNATIONAL (CSI)—INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND POSSIBLE VIOLATIONS OF SECTION 44, SHIPPING ACT, 1916

Finalized August 10, 1979

John J. Montefusco for respondent Cargo Systems International (CSI).
Joseph B. Slunt, Charles L. Hunter, and *John Robert Ewers,* Director, Bureau Bureau of Hearing Counsel, Federal Maritime Commission.

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

This proceeding was instituted by a Commission Order of Investigation and Hearing served March 9, 1979, wherein the Commission specified that the issues to be resolved are:

1. Whether Cargo Systems International has violated section 44(a), Shipping Act, 1916, by engaging in unlicensed forwarding activities; and
2. Whether in light of the evidence adduced pursuant to the foregoing issue, together with any other evidence adduced, Cargo Systems International 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.

At the request of Cargo Systems International (CSI), the Commission, in an effort to expedite matters, has limited the proceeding initially to the submission of Memoranda of Law and Affidavits of Fact. Opening Memorandum of Law and Affidavits of Fact were submitted by Respondent on March 14, 1979. Hearing Counsel filed Memorandum of Law and Affidavits of Fact in reply on May 7, 1979.

Neither Hearing Counsel nor Respondent have requested oral testimony and cross-examination. Accordingly, the Memoranda of Law and Affidavits of Fact

[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).

filed by Hearing Counsel and Respondent constitute the record in this proceeding and it is concluded that said record is adequate and appropriate for disposition and determination of this case.

FINDINGS OF FACT

1. Cargo Systems International (CSI) was incorporated under the laws of the State of New Jersey in April 1977. Created as a spin-off of Cargo Export Corporation (CEC), CSI was designed to act as a project forwarding concern. CEC placed two of its employees, Armand Ventura and Stephen Larzelere, at CSI to aid in marketing and operational functions. Richard Kesselman is the current president and sole stockholder of CSI. Kesselman Affidavit § 1; Decibus Affidavit § 8; Decibus Exhibit C.

2. During the early months of 1978, CSI and CEC entered into an arrangement whereby CSI would be able to forward ocean freight shipments under CEC's independent ocean freight forwarder license. Sada Affidavit II § 6; May Affidavit §§ 16–18. In accordance with this arrangement, CEC placed one of its employees, Rochelle Karmel, in CSI's office at 40 Rector Street, New York, New York. While performing ocean freight forwarding services at 40 Rector Street, Ms. Karmel remained on CEC's payroll. During this period, CSI's ocean freight shipments were forwarded under CEC's independent ocean freight forwarder license, FMC License Number 1498. Sada Affidavit II § 6.

3. In January 1978, Armand Ventura was employed by CSI on a limited basis as a commission salesman. During the preceding five years, Mr. Ventura had been employed by CEC as a vice president and director of marketing. Ventura Affidavit § 2–3.

4. During the early months of 1978, Edward A. Sada, Sr., the president and sole stockholder of Sada Trading Company, Inc. (STC), performed some limited ocean freight forwarding services for CEC. May Affidavit § 4, 8; Sada Affidavit II § 2. Prior to June 8, 1978, STC was the holder of FMC License No. 210. Due to financial difficulties, the volume of business conducted by STC had decreased substantially in late 1977. Mr. Sada was therefore compelled to accept outside employment with CEC. Sada Affidavit II § 4; May Affidavit §§ 17–18.

5. On May 1, 1978, Mr. Sada was hired by CSI to perform ocean freight forwarding services. Sada Affidavit II § 4; May Affidavit §§ 7, 8.

6. As an employee of CSI, Mr. Sada received a set weekly salary and conducted business at CSI's office at 40 Rector Street, Sada Affidavit II § 4; May Affidavit §§ 7, 8, 14.

7. While employed by CSE, Mr. Sada's duties included the preparation of ocean freight documents, including bills of lading, dock receipts, consular documents, export declaration, etc. Mr. Sada was authorized by CSI to sign such documents on its behalf. Sada Affidavit II § 5; May Affidavit § 8.

8. Although Mr. Sada, on behalf of CSL, regularly prepared invoices assessing brokerage on ocean freight shipments, he did not personally collect or

receive brokerage on any of these shipments. Sada Affidavit II §7; May Affidavit §10.

9. CSI solicited the shipments for which Mr. Sada prepared ocean freight documents. CSI also booked cargo space for all shipments except those bound for the Caribbean. Mr. Sada booked cargo space for Caribbean shipments Sada Affidavit II §8; May Affidavit §14.

10. During the months May through November 1978, Mr. Sada, as an employee of CSI, handled approximately twenty of thirty ocean freight shipments per month. Sada Affidavit II §7; May Affidavit §9. In his limited dealings with shippers and carriers, Mr. Sada represented himself as an employee of CSI. Payments for ocean freight forwarding services were made directly to CSI. Sada Affidavit II §8, 9.

11. By letter dated May 10, 1978, Mr. Sada was notified by the Commission's Office of Freight Forwarders that STC's surety bond had been cancelled. He was further informed that unless a valid surety bond was filed with the Commission prior to June 8, 1978, STC's independent ocean freight forwarder license would be revoked. The cancellation of STC's surety bond was occasioned by the placement of a lien against the bond by Royal Netherlands Steamship Company. Sada Affidavit II §10, May Affidavit §4.

12. By Order of Revocation served June 20, 1978, the Commission revoked, effective June 8, 1978, FMC License Number 210. Sada Affidavit II §11, May Affidavit §4. Notice of the revocation appeared in the *Federal Register* on June June 26, 1978. Although CSI had advanced Mr. Sada sufficient funds to satisfy the lien placed against STC's surety bond, Mr. Sada was unable to secure a new surety bond by June 8, 1978. May Affidavit §14; Sada Affidavit I §3.

13. On July 5, 1978, CSI submitted an application for a license to operate as an independent ocean freight forwarder. That application listed Richard Kesselman as President/Treasurer and sole stockholder and Edward Sada, Sr., as Secretary. Mr. Sada was described as the present holder of "valid Ocean Freight Forwarder License #210." Also identified in the application, as employees, were Rochelle Karmel and Steven Larzelere. May Affidavit §2; Kesselman Affidavit §3.

14. Accompanying CSI's application were five letters of reference. Two of these letters appeared to suggest that CSI had been engaged in unlicensed ocean freight forwarding. May Affidavit §3; May Exhibit 1.

15. By letter dated July 13, 1978, the Commission's Office of Freight Forwarders acknowledged receipt of CSI's application. CSI's attention was directed in that letter to the section 44 prohibition of unlicensed ocean freight forwarding. Letter of July 13, 1978, Charles L. Clow to Richard Kesselman, Attachment A.

16. The Commission's Office of Freight Forwarders, by letter dated July 26, 1978, requested that CSI explain the suggestions contained in the letters of reference, referred to above, that CSI had been engaged in unlicensed ocean freight forwarding. Letter of July 26, 1978, Charles L. Clow to Richard Kesselman, Attachment B.

17. In mid July 1978, Mr. Sada informed CSI that STC's independent ocean freight forwarder license had been revoked. He further advised CSI of

his belief that, upon the filing of a new surety bond, STC's license would be reissued retroactive to June 8, 1978. Sada Affidavit II §13.

18. On August 14, 1978, the Commission's Bureau of Enforcement instituted a field investigation in order to resolve questions raised by the letters of reference submitted by CSI and the appearance of Edward A. Sada, Sr.'s name on CSI's application. May Affidavit §4.

19. By letter dated August 29, 1978, Richard Kesselman informed the Commission's Office of Freight Forwarders that CSI had "not in any way been acting as a freight forwarder." Accompanying Mr. Kesselman's letter were two other letters signed by the individuals who had submitted the letters of reference referred to in Proposed Finding of Fact §14. These letters were intended to dispel the impression created by the letters of reference that CSI had been engaged in unlicensed ocean freight forwarding. May Affidavit §5; May Exhibit 2.

20. Joseph A. May, an investigator in the Commission's Atlantic District Office, interviewed Edward A. Sada, Sr., at CSI's office at 40 Rector Street on September 11, 1978. At the conclusion of the interview, Mr. Sada was requested to produce documents prepared for a sampling of ocean freight shipments he had handled for CSI. Mr. Sada supplied Mr. May with copies of six bills of lading and the accompanying invoices, dated June 30, 1978 through September 6, 1979. May Affidavit §11.

21. Each of the bills of lading designated CSI as the forwarding agent and FMC License No. 210 as the governing license number. A CSI export reference number also appeared on the documents. The accompanying invoices carried a CSI letterhead and were signed by Edward Sada. All questions as to the charges assessed by the invoices were directed to "Freight Forwarder: Cargo Systems." These documents also listed a CSI export reference number. May Affidavit §§12-13; May Exhibit 3.

22. On September 22, 1978, Mr. Kesselman contacted the Atlantic District Office to inquire as to the status of CSI's application. During the course of the conversation, Mr. Kesselman reiterated his position that CSI was merely soliciting ocean freight business for STC. Further, Mr. Kesselman noted that Mr. Sada was paid a weekly salary by CSI to perform ocean freight forwarding services. May Affidavit §14.

23. In late September 1978, the Commission's Atlantic District Office received information which indicated that CSI was a subsidiary of Cargo Export Corporation (CEC). May Affidavit §15. In subsequent interviews, Mr. Kesselman and Gene Pagano, President of CEC, denied that any corporate relationship existed between the two companies. May Affidavit §§16, 8.

24. On October 18, 1978, Keith Crosson, Traffic Department, F.W. Hartman & Co., Inc., Agents for Hansa Lines, notified the Commission's Atlantic District Office that CSI had submitted a number of brokerage invoices to F. W. Hartman & Co., Inc., in conjunction with bills of lading which listed FMC License Number 210. The bills of lading identified CSI export reference number. The accompanying invoices carried a CSI letterhead and a CSI export reference number. May Affidavit §20.

25. The following day, Mr. Crosson produced six bills of lading, dated September 13, 1978, through September 21, 1978, and five brokerage invoices, dated September 29, 1978, through October 9, 1978. Mr. Crosson stated that none of the $2,101.60 in brokerage assessed by CSI had been paid. May Affidavit § 21, May Exhibit 4.

26. Sophie Synicer, Traffic Department, Kerr Steamship Co., Inc. (Kerr) notified the Commission's Atlantic District Office on October 19, 1978, that Kerr had paid brokerage to CSI on four ocean freight shipments. Brokerage payments in the amount of $697.00 had been made by checks payable to CSI. Within a week thereafter, Ms. Synicer notified the Commission's Atlantic District that Kerr had secured the return of the brokerage checks paid to CSI. May Affidavit § § 22–23.

27. On October 23, 1978, the Commission's Office of Freight Forwarders received a letter from Larry Phillips, Transportation Revenue Accounting, Sea-Land Services, Inc., which indicated that CSI was making use of FMC License Numbers 210 and 1498. Included with Mr. Phillip's letter were three bills of lading on which CSI was identified as the forwarder. One document, dated April 15, 1978, carried FMC License Number 1498, while the other two, dated July 1, 1978, and October 14, 1978, listed FMC License Number 210.

28. In late November 1978, Carey Brady of the Commission's Office of Freight Forwarders notified Mr. Sada that the Commission had not received a new surety bond for STC. Mr. Sada had, following the cancellation of STC's bond, undertaken to secure a new bond and had been notified by the Commission's Office of Freight Forwarders, by letter dated August 21, 1978, that a bonding company had issued and was submitting a surety bond for STC. Having learned that STC was not bonded, Mr. Sata notified CSI that he would no longer be able to perform ocean freight forwarding services. Sada Affidavit I § 9, Sada Affidavit II § § 12, 15.

29. In the November 13, 1979 editions of *Shipping Digest* and *Shipper & Forwarder,* CSI placed advertisements in which it characterized itself as an international freight forwarder and export specialist. One of these advertisements listed the following services: "ocean consolidation, international freight forwarding, warehousing, thru door to door delivery (and) specialists in project type cargo."

30. In early December 1978, Armand Ventura discussed with Tonny Mosholt, Vice President of Freight Base, Inc. (Freight) and branch manager of Freight's New York Office (FBNY), an arrangement whereby FBNY would prepare ocean freight documents based on information supplied by CSI and bill CSI for all services performed (Mosholt Affidavit, May Affidavit § 34).

31. On or about December 15, 1978, Mr. Sada's employment at CSI was terminated. In late December 1978 and early January 1979, Mr. Sada completed the documentation on a number of ocean freight shipments that he had begun while employed by CSI. In accordance with CSI's instructions, he listed FMC License Number 1963 on these documents. Sada Affidavit II § 18; May Affidavit § 33.

32. By letter dated December 19, 1978, the Commission notified CSI of its intent to deny CSI's application for an independent ocean freight forwarder

license. Letter of December 19, 1978, Arthur Pankopf to Richard Kesselman.

33. By letter dated January 2, 1979, John J. Montefusco, Counsel for CSI, requested that CSI be granted a hearing to contest the intended denial of CSI's application. It was stated in that letter that Armand Ventura would be submitted by CSI as its new qualifying officer. Mr. Ventura had been made an officer and enlisted as the qualifying officer of CSI in December 1978. Ventura Affidavit § 2; Kesselman Affidavit § 6; May Affidavit § 33.

34. On January 15, 1978, the Commission's Office of Freight Forwarders received a second letter, dated January 10, 1979, from Larry Phillips, Transportation Revenue Accounting, Sea-Land Service, Inc., disclosing that CSI had attempted to collect brokerage from Sea-Land Services, Inc., utilizing FMC License Number 210. Mr. Phillips attached a brokerage invoice, dated November 13, 1978, which carried a CSI letterhead and export reference number.

35. In the course of a separate inquiry, the Commission's Atlantic District Office obtained two ocean freight documents which identified CSI as the forwarding agent and listed FMC License Number 1963 as the governing license number. Both documents, a bill of lading dated November 28, 1978, and a dock receipt dated January 5, 1979, also bore a CSI export reference number. The dock receipt was signed by Edward A. Sada, Sr., and carried the notation, "If need contact 'Eddie' at 21/227-7500." The phone number listed is that of CSI's office at 40 Rector Street. May Affidavit §§ 24-25; May Exhibit 6.

36. In early January, Mr. Mosholt was notified by Peter Allen of Freight's Chicago Office that a steamship company had inquired of Freight's Houston Office regarding a bill of lading on which CSI was identified as the freight forwarder and FMC License Number 1963 appeared as the governing license number. Mr. Mosholt received several other calls from Mr. Allen and from Seatrain Lines regarding CSI's use of FMC License Number 1963. Mosholt Affidavit.

37. Since Mr. Mosholt's meeting with Mr. Ventura, FBNY had received no information from CSI and had, therefore, prepared no ocean freight documents. Mr. Mosholt contacted Mr. Ventura and threatened to terminate the previously discussed arrangement. Mr. Ventura promised to rectify the situation. Mosholt Affidavit.

38. In order to facilitate the arrangement, Mr. Mosholt suggested to Mr. Ventura that Todd Randell, a CSI employee, be placed on FBNY's payroll. May Affidavit §§ 28, 36; Mosholt Affidavit.

39. Todd Randell had been employed by CSI since September 15, 1978. He was placed on FBNY's payroll sometime in January 1979. The first check issued to Mr. Randell by FBNY was dated February 1, 1979. May Affidavit §§ 28, 36, 39; Mosholt Affidavit.

40. Though employed by FBNY, Mr. Randell continued to work at CSI's office at 40 Rector Street. Mr. Randell's desk was in a room occupied by several other CSI employees. He received telephone calls via a central office telephone system. May Affidavit §§ 28, 35, 36, 42.

41. Mr. Randell's duties included the preparation of ocean freight documents and the booking of cargo space. Mr. Randell stated that he handled ten to fifteen ocean freight shipments per month as an employee of FBNY. Mr. Mosholt stated earlier that through early March FBNY had handled only five such shipments for CSI. May Affidavit §§28, 36.

42. Joseph A. May interviewed Mr. Mosholt at FBNY's office at 26 Broadway on March 5, 1979. At the conclusion of that interview, Mr. Mosholt produced FBNY's files on four of the ocean freight shipments FBNY had allegedly handled for CSI. Each folder contained only a copy of the ocean bill of lading and FBNY's brokerage invoice to the steamship company. Mr. Mosholt stated that all other documents pertaining to the shipments were maintained by Todd Randell at 40 Rector Street. May Affidavit §§27, 29.

43. The bills of lading produced by Mr. Mosholt identified Freight as the forwarding agent and listed FMC License Number 1963 as the governing license number. Both CSI's and Freight's export reference numbers appeared on these documents. Two of the brokerage invoices also appeared to list a CSI export reference number. The bills of lading were dated December 12, 1978 through January 27, 1979. May Affidavit §§29–30; May Exhibit 7.

44. On March 6, 1979, Mr. May interviewed Armand Ventura and Todd Randell at CSI's Office at 40 Rector Street. At the conclusion of the interview, Mr. Randell produced his files on the four shipments for which Mr. Mosholt had supplied documents. Among the documents produced by Mr. Randell were bills of lading, export declarations, dock receipts, consular documents and worksheets. One of the bills of lading, dated December 22, 1978, listed CSI as the forwarding agent and FMC License No. 1963 as the governing license number. A recut version of the same bill of lading supplied earlier by Tonny Mosholt listed Freight as the forwarding agent (May Exhibit 8).

45. On March 9, 1979, Todd Randell produced copies of CSI's invoices to shippers for those shipments previously documented by CSI and FBNY. CSI's letterhead and export reference numbers appeared on these documents (May Affidavit §43, May Exhibit 9).

46. In accordance with instructions from Freight's main office, FBNY fired Todd Randell on or about March 21, 1979. Mr. Randell's employment at CSI was also terminated at this time. May Affidavit §44; Mosholt Affidavit.

47. General Electric Supply Company, a Division of General Electric Company (GESCO), had dealt with CSI on over 250 ocean freight shipments since January 1978. On these shipments GESCO considered CSI to be the company providing ocean freight forwarding services. Davis Affidavit §§1, 2, 3, 5.

48. CSI received shipping instructions from GESCO; arranged for the transportation of GESCO cargo to the pier; booked cargo space for GESCO cargo; prepared all ocean freight documentation; and received payment of ocean freight charges from GESCO. GESCO dealt with the following individuals at CSI: Armand Ventura, Steve Larzelere, Edward Sada and Todd Randell. Davis Affidavit §§3, 4.

49. GESCO paid CSI directly for ocean freight forwarding services performed by CSI on GESCO shipments. Davis Affidavit §6.

50. GESCO ceased dealing with CSI in February 1979 because of confusion as to CSI's status as a licensed freight forwarder.

51. Foster Wheeler Energy Corporation (FWEC) entered into an agreement with CSI on January 23, 1979, whereby CSI agreed to perform ocean freight forwarding services on FWEC project shipments bound for Venezuela. CSI handled three ocean freight shipments for FWEC under this agreement. Decibus Affidavit §§3–5.

52. Regarding the above shipment, FWEC considered CSI to be the party responsible for performing ocean freight forwarding services. CSI prepared all necessary ocean freight documentation and booked cargo space for FWEC's shipments. All payments for ocean freight forwarding services performed on these shipments were made directly by FWEC to CSI. Decibus Affidavit §§4–6.

53. FWEC terminated its agreement with CSI on April 3, 1979. The agreement was cancelled when FWEC became aware that CSI was not a licensed independent ocean freight forwarder. Decibus Affidavit §7.

54. Under the terms of the contract, FWEC held CSI "referred to as Forwarder, wholly responsible for coordination and prompt forwarding of all Project Equipment/material when ready and released." The bills of lading, dated February 24, 1979 through March 11, 1979, representing the three FWEC ocean freight shipments to Venezuela handled by CSI carried FMC License Number 1963 and CSI export reference numbers. One of the bills of lading bore the following notation, signed by Stephen Larzelere:

Cargo Systems International
As Forwarding Agents For Foster
Wheeler Energy Corporation.

The invoices accompanying these bills of lading, dated March 7, 1979 through March 16, 1979, carried a CSI letterhead and export reference number Decibus Exhibits A & B.

55. By letter dated March 30, 1979, Gene Pagano, President of Cargo Export Corporation (CEC), assumed "all liabilities and responsibility of Cargo Systems International and commitments made by Cargo System International" related to the purchase order referred to above. The letter further indicated that Armand Ventura, Stephen Larzelere and Gene Pagano would be responsible for handling FWEC's shipments. All correspondence regarding these shipments was directed to Mr. Ventura or Mr. Larzelere at CEC, "40 Rector Street, Suite 1829, New York, New York 10006, telephone # (212) 227-7500)." Decibus Exhibit C.

DISCUSSION

As ordered by the Commission, the first issue to be determined is:

whether Cargo Systems International has violated section 44(a), Shipping Act, 1916, by engaging in unlicensed forwarding activities.

Section 44(a) of the Shipping Act, 1916 (46 U.S.C. §841b), states, in pertinent part, that:

No person shall engage in carrying on the business of forwarding as defined in this Act unless such person holds a license issued by the Federal Maritime Commission to engage in such business . . .

Section 1 of the Shipping Act, 1916 (46 U.S.C. § 801), defines "carrying on the business of forwarding," as " . . . the dispatching of shipments by any person on behalf of others, by oceangoing common carriers . . . and handling the formalities incident to such shipments."

Respondent does not dispute the allegation that Edward A. Sada, Sr., performed ocean freight forwarding services during the period in question. Nor, for that matter, does Respondent deny that it was, at least, indirectly involved in supplying these services. Respondent does argue, however, that its involvement was limited to the solicitation of cargo and clients for Sada Trading Company Inc. (STC), and its president and sole stockholder, Edward A. Sada, Sr. Arguing for the existence of an agency relationship, Respondent asserts that it acted solely as a commission salesman. Respondent concludes, therefore, that it did not operate as an independent ocean freight forwarder.

It is necessary, therefore, to determine what was the relationship that actually existed.

The record reveals that Respondent's actual role in the relationship was not limited to the solicitation of cargo and clients for STC. Respondent was clearly Mr. Sada's employer. The relationship which existed between Respondent and Mr. Sada was that of Master and Servant.

In determining the relationship, factors to be considered are:

1. the extent of the master's authority to direct and control the nature of the servant's work and the manner in which that work is performed;
2. the authority of the master to engage and discharge the servant;
3. the provision by the master of the instrumentalities with which the work is performed and the place in which the work is performed;
4. the duration and time of the relationship entered into by the master and servant;
5. the connection between the work performed by the servant and the business normally engaged in by the master; and
6. the fact, manner and basis of payment made by the master to the servant.

See *Eagle Star Insurance Company, Ltd. v. Deal,* 474 F. 2d 1216, 1220 (8th Cir. 1973); *Tarboro v. Reading Company,* 396 F. 2d 941, 943 (3d Cir. 1968), *cert. denied,* 393 U.S. 1027 (1969), *Dovell v. Arundel Supply Corp.,* 361 F.2d 543, 544 (D.C. Cir.). *cert. denied,* 385 U.S. 841 (1966).

Applying the criteria outlined above to the relationship which existed between Respondent and Edward A. Sada, Sr., the record supports the conclusion that their relationship was one of Master and Servant or Employer and Employee. On May 1, 1978, Respondent engaged Mr. Sada to perform ocean freight forwarding services for it and demonstrated its authority to discharge Mr. Sada on or about December 15, 1978. As an employee of Respondent, Mr. Sada received a weekly salary. The salary received by Mr. Sada was of a predetermined amount and, therefore, did not vary according to the quantity of work performed. Further, Mr. Sada did not receive payments from shippers for forwarding ocean freight shipments nor did he collect brokerage on such shipments from carriers. An independent ocean freight forwarder would normally have received monies from both shippers and carriers.

Mr. Sada was employed by Respondent, not only to perform ocean freight forwarding services, but to serve as Respondent's qualifying officer. As Respondent's qualifying officer, Mr. Sada was considered by Respondent as an integral part of its future operations. Respondent anticipated that its association with Mr. Sada would be an extended one. Mr. Sada's duties were intimately related to Respondent's regular business, the providing of international freight forwarding services.

During the course of his employment, Mr. Sada worked at Respondent's office at 40 Rector Street, New York, New York, and utilized the facilities located therein. While working at 40 Rector Street, Mr. Sada's duties were determined by Respondent. Mr. Sada was directed to prepare all necessary documentation on ocean freight shipments handled by Respondent. Although the booking of cargo space is an accepted responsibility of ocean freight forwarders, Respondent directed Mr. Sada to perform this function only on infrequent shipments bound for the Caribbean.

Far from being the principal for whom Respondent argues that it served as soliciting agent, Edward A. Sada, Sr., was but an employee of Respondent. In his limited dealing with shippers and carriers, Mr. Sada always represented himself as such. Further, Respondent apparently held itself out as the party responsible for providing the ocean freight forwarding services performed by Mr. Sada.

As evidenced by the affidavit of Winston E. Davis, Respondent was considered by the shippers whose ocean freight shipments it handled as the ocean freight forwarder. General Electric Supply Company (GESCO) dealt with Respondent on a regular basis throughout the period in question. In the course of these dealings, GESCO relied on Respondent to perform all ocean freight forwarding services. GESCO looked to Respondent, not STC, for the receiving of shipping instructions, arranging for the transportation of cargo to the pier, for booking of cargo space, for preparing ocean freight documentation, and for collecting ocean freight charges.

Two of the letters of reference submitted by Respondent in conjunction with its application also suggest that Respondent was holding itself out and was considered by shippers and carriers to be an active participant in the ocean freight forwarding industry. The letters, from Seatrain Lines and Mercantile and Marine, Inc., referred to Respondent as a "valued customer." Seatrain further noted that it was "pleased to have freight forwarders in our industry of this caliber," while Mercantile and Marine added that it was delighted to have Respondent "contribute professionalism of this caliber to the industry." While letters of explanation denying any intent to imply that Respondent was engaging in unlicensed ocean freight forwarding followed they are inconsistent with the substance of the original letters.

That it was Respondent's intention that shippers and carriers should consider it to be the party responsible for performing ocean freight forwarding services is apparent from the contents of ocean freight documents prepared on Respondent's behalf. Bills of lading representing ocean freight shipments which

Respondent handled designate Respondent as the forwarding agent and often as the shipper/exporter as well. FMC License Number 210 is invariably listed as the governing license number on these documents.

Invoices assessing ocean freight forwarding charges to shippers and brokerage to carriers evidence a like intent to portray Respondent as the actual ocean freight forwarder. These invoices carry the heading:

CARGO SYSTEMS INTERNATIONAL
INTERNATIONAL FREIGHT FORWARDERS

under which Respondent's address and telephone number appear. All questions regarding collection are referred to "Freight Forwarder: Cargo Systems Intl." More importantly, both shippers and carriers who were invoiced by Respondent made their payments directly to Respondent.

Respondent characterized itself as an "international freight forwarder" and "export specialist" in advertisements taken out in trade journals. Clearly, such advertisements were designed to promote Respondent's name as a freight forwarder among shippers and carriers alike and are consistent with the conclusion that Respondent was holding itself out as carrying on the business of forwarding as defined by section 1 of the Act.

Respondent makes the argument that neither carriers nor shippers considered it to be an ocean freight forwarder. The evidence is to the contrary. GESCO, a substantial shipper client, considered Respondent to be the party responsible for forwarding its ocean freight shipments. Two letters of reference submitted by Respondent, itself, indicate that carriers perceived Respondent to be active in the ocean freight forwarding industry.

Respondent contends that it never held itself out as an independent ocean freight forwarder. Documents prepared on Respondent's behalf argue to the contrary. On ocean bills of lading and invoices to shippers and carriers alike, Respondent is characterized as the ocean freight forwarder.

Respondent asserts that it acted solely as a soliciting agent for STC and, therefore, did not function as an ocean freight forwarder. The record supports a contrary conclusion. The relationship entered into by Respondent and Edward A. Sada, Sr., was that of employer and employee. In light of the employment relationship in which Respondent and Mr. Sada engaged, Respondent was carrying on the business of an ocean freight forwarder. The activities engaged in by Mr. Sada and the other employees of Respondent during the course of their employment are those of Respondent.

FMC License Number 210 was held by STC and its president and sole stockholder, Edward A. Sada, Sr. Respondent hired Mr. Sada to prepare ocean freight documents and immediately thereafter began forwarding ocean freight shipments utilizing FMC License Number 210. Respondent thereafter held itself out as an ocean freight forwarder.

It was the intent of Congress that the Federal Maritime Commission should issue independent ocean freight forwarder licenses to applicants it found to be fit, willing and able to carry on the business of forwarding. 46 U.S.C. § 841b. Pursuant to that authority, the Commission established a licensing procedure whereby applicants would be screened by the Commission. 46 C.F.R. § 510. Respondent circumvented this process by hiring a licensee and utilizing his license number to engage in ocean freight forwarding.

Respondent cannot shift responsibility for its action onto the shoulders of Edward A. Sada, Sr. Claiming, in effect, that it was duped by Mr. Sada, Respondent argues that STC was performing the ocean freight forwarding services and Respondent is being penalized solely on the basis of its association with STC. In fact, Respondent's entire position is founded on the assumption that the unlicensed ocean freight forwarding activity in question began with the revocation, effective June 8, 1978, of STC's independent ocean freight forwarder license. The record reveals, however, that the unlicensed ocean freight forwarding activity was initiated by Respondent when it hired Mr. Sada on May 1, 1978, and thereafter began utilizing STC's license to forward ocean freight shipments. The question of when Respondent was notified of the revocation of STC's license is, therefore, irrelevant. If STC's license had been valid throughout this period, Respondent would still be guilty of carrying on the business of forwarding without a license.

Respondent's unlicensed ocean freight forwarding activities did not cease with the departure of Edward A. Sada, Sr., in December 1978. Immediately thereafter, Respondent continued to perform ocean freight forwarding services. In early December 1978, Respondent's current qualifying officer, Armand Ventura, discussed an arrangement with Freight whereby Freight's New York branch office (FBNY) would handle ocean freight shipments for Respondent. In accordance with this arrangement, FBNY would prepare ocean freight documents based on information supplied by Respondent and bill Respondent for this service.

Respondent proceeded to utilize Freight's independent ocean freight forwarder license, FMC License Number 1963, to forward ocean freight shipments. As evidenced by Tonny Mosholt's Affidavit, FBNY did not prepare any ocean freight documents for Respondent in November or December of 1978. Nevertheless, Respondent's name, as forwarding agent, and FMC License Number 1963 appeared together on ocean freight documents dated as early as November 28, 1978. Further, Respondent apparently directed Edward A. Sada, Sr., in late December 1978 and early January 1979, to utilize FMC License Number 1963 in completing the documentation process on shipments handled by him while employed by Respondent.

Upon receipt of protests from FBNY, Respondent placed one of its employees, Todd Randell, on FBNY's payroll. Though officially employed by FBNY, Mr. Randell continued to work at Respondent's office. Mr. Randell maintained the complete files representing ocean freight shipments forwarded by him at Respondent's office. All documents in these files carried export reference numbers assigned by Respondent.

FBNY's files on shipments forwarded by Mr. Randell contained only a copy of the ocean bill of lading and a brokerage invoice. FBNY had files pertaining to, and seemed to be aware of, only a limited percentage of the ocean freight shipments Mr. Randell handled.

The record establishes that Respondent arranged to have FBNY employ one of Respondent's employees and have him prepare Respondent's ocean freight documents. Through Mr. Randell Respondent continued to carry on the business of forwarding ocean freight shipments. FBNY's involvement in the ocean freight forwarding process was limited to the payment of Todd Randell's salary. Mr. Randell was responsible for performing precisely the same duties as an FBNY "employee" that he engaged in as an employee of Respondent. Throughout the period he was on FBNY's payroll, Mr. Randell worked at Respondent's office and utilized the facilities located therein. Respondent did not even bother to provide him with a separate office or telephone line. Of foremost importance, however, Mr. Randell remained subject to Respondent's control and direction. FBNY was apparently not even aware of a large number of the ocean freight shipments Mr. Randell forwarded while on its payroll.

All of the criteria normally referred to in determining the existence of an employment relationship, barring the payment of the employee's salary by the employer refute Respondent's argument that Respondent acted as an agent for Freight. FBNY's employment of Mr. Randell was purely *pro forma.* By designating Mr. Randell as an FBNY employee, Respondent and FBI effectuated a trade off. Respondent was allowed to utilize FBI's license number and FBNY collected brokerage on ocean freight shipments forwarded by Respondent.

Having secured access to FMC License Number 1963, Respondent continued to hold itself out as an ocean freight forwarder. Ocean bills of lading issued in November and December of 1978 listed FMC License Number 1963 but designated Respondent as the forwarding agent. Respondent's letterhead appeared on invoices to shippers, dated through March 1979. Shippers assessed by these invoices for ocean freight forwarding services naturally made payments directly to Respondent.

As evidenced by the Affidavits of Winston E. Davis and Frank J. Decibus, Respondent's shipper clients considered Respondent to be the party responsible for forwarding their ocean freight shipments. In late 1978 and early 1979, GESCO apparently detected no change in its course of dealings with Respondent. GESCO always perceived Respondent to be its forwarding agent.

Respondent contracted in its own name with Foster Wheeler Energy Corporation (FWEC) to perform ocean freight forwarding services on FWEC project shipments to Venezuela. The Purchase Order, representing that contract, identified to Respondent as the ocean freight forwarder. The following notation appeared on an ocean bill of lading prepared by Respondent for a project shipment forwarded in accordance with this contract:

Cargo Systems International
As Forwarding Agents For Foster
Wheeler Energy Corporation

In addition, invoices submitted to FWEC bore Respondent's letterhead. FWEC clearly considered Respondent to be the party responsible for forwarding its ocean freight shipments.

The extent of Respondent's involvement with Cargo Export Corporation (CEC) is unclear. The record in this regard is somewhat sketchy. Respodent was apparently created as a spin-off of CEC and staffed by employees drawn from that firm. Among the employees placed with Respondent by CEC were Armand Ventura, Respondent's current qualifying officer and Stephen Larzelere.

During the early months of 1978, Respondent and CEC entered into an arrangement whereby Respondent was able to forward ocean freight shipments utilizing FMC License Number 1498. Somewhat similar to the agreement later entered into with Freight, the arrangement with CEC, involved the placement of one of CEC's employees, Rochelle Karmel, in Respondent's office. In accordance with the arrangement, CEC continued to pay Ms. Karmel's salary. Ms. Karmel apparently designated Respondent as the forwarding agent and FMC License Number 1498 as the governing license number on ocean freight documents she prepared during this period. Following the arrival of Edward A. Sada, Sr., Ms. Karmel remained with Respondent and continued to receive her salary from CEC. She thereafter performed ocean freight forwarding services in conjunction with Mr. Sada. Her name appears on Respondent's independent ocean freight forwarder application.

Further indications of Respondent's arrangements with CEC surfaced in March 1979. CEC assumed the long term contract previously entered into by Respondent with FWEC. In so doing, CEC agreed to forward FWEC's project shipments to Venezuela. CEC indicated that among those responsible for handling these shipments would be Armand Ventura and Stephen Larzelere. In addition, CEC directed all correspondence regarding these shipments to Respondent's office. Respondent's telephone number was also listed by CEC.

Due to the limited amount of information available it cannot be concluded that Respondent's involvement with CEC clearly violated the statute.

The Commission noted in its Order of Investigation and Hearing that the ultimate issue to be determined in this proceeding was:

> whether . . . Cargo Systems International 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 44(b), Shipping Act, 1916 (46 U.S.C. § 841b(b)) mandates, in pertinent part, that:

> A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant is . . . fit, willing, and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules, and regulations of the Commission issued thereunder . . .

The question raised by Respondent's application for an independent ocean freight forwarder license is whether Respondent and its corporate officers, in view of the findings that Respondent repeatedly violated section 44(a) of the Shipping Act, 1916, meet the statutory standard for licensing.

The Commission has addressed the issue of the impact of past violations of the Shipping Act, 1916, on an applicant's "fitness" to be licensed on numerous occasions.

In a recent decision, *Concordia International Forwarding Corporation,* 18 SRR 1364, 1371 (FMC Docket No. 78-34, December 18, 1978), the Commission noted:

In determining whether an applicant possesses the requisite fitness, a past violation of the Shipping Act militates against the issuance of a license.

The Commission remarked in an earlier decision, *Independent Ocean Freight Forwarder Applicant—Lesco Packing Co., Inc.,* 16 SRR 1023, 1029 (FMC Docket No. 74-31, May 25, 1976), that:

[p]ast disregard for the shipping laws and the Commission's regulations, coupled with the absence of convincing evidence that positive steps have been taken to reasonably assure against the repetition of such incidents, is alone sufficient basis for not placing Lesco in the position of trust and responsibility enjoyed by licensed freight forwarders.

Elaborating as to the reasons for its reluctance to grant a license to an applicant who has violated section 44(a), the Commission concluded in *Independent Ocean Freight Forwarding Applicant—Fabio A. Ruiz D/B/A Far Express Company,* 15 F.M.C. 242, 243 (1972), that:

If the licensing statute is to achieve its desired ends, it necessarily follows that any applicant who conducts a freight forwarding activity without a license must do so at his peril.

Though past violations of law are not determinative of the question of an applicant's fitness (See *Independent Ocean Freight Forwarder Applicant—Air-Mar Shipping, Inc.,* 14 SRR 1250, 1252 (FMC Docket No. 71-85, November 27, 1974)), they are certainly a major factor in the Commission's decision to grant or deny a license application See *Harry Kaufman D/B/A International Shippers Co. of N.Y.,* 16 F.M.C. 256 (1973). In cases where it is found that applicants have engaged in carrying on the business of forwarding without benefit of a license issued by the Commission, the Commission will explore the context in which the violations occurred. Applicants are urged to present to the Commission any circumstances which would mitigate against the denial of their licenses on the basis of past violations. See *Independent Ocean Freight Forwarder License Application—Guy G. Sorrentino,* 15 F.M.C. 127 (1972). The Commission has, in the past, weighed such factors as the substance of, the extent of, and the motive for the violations in question.

During the preceding year, Respondent forwarded hundreds of ocean freight shipments without benefit of a license. In *Independent Ocean Freight Forwarder Application—Alvarez Shipping Co., Inc.,* 16 F.M.C. 78, 81 (1973), the the Commission distinguished between that case and two others in which licenses were granted on the basis that "Respondent's violations cover a much greater period of time (fourteen months) and a greater number of instances (at least 142)."

While the Commission has dealt leniently with those applicants whose violations stem from misunderstandings of the law (See *Bolton & Mitchell, Inc.—Independent Ocean Freight Forwarder License No. 516,* 15 F.M.C. 248, 255 (1972)), or whose motives were of an admirable nature (See *Independent Ocean Freight Forwarder License Application—L.T.C. Air Cargo, Inc.,* 13 F.M.C. 267, 277 (1970)), it has treated knowing and intentional violations less leniently. In *Concordia, supra,* at 1371, the Commission noted the knowledge and experience of the applicant and concluded that "the applicant knew or should have known that its activities were in violation of the Shipping Act." On this basis, despite arguments that applicant had been "acting as a good samaritan for stranded shippers," the Commission refused to issue the license.

The record in this case closely reflects that presented in *Independent Ocean Freight Forwarder Applicant—K & S Forwarder* (Initial Decision), 13 SRR 551 (FMC Docket No. 72-55, January 24, 1973). As in that case, "[t]here appears to be little doubt that (Respondent) was motivated principally by impatience to acquire a substantial number of freight forwarder accounts which were readily available and, thus, to establish and operate a lucrative business." 13 SRR at 555. The striking similarity between the two cases continues. Like K & S Forwarders, Respondent made a "deliberate and conscious" decision to forward ocean freight shipments without a license. However, it too "attempted to clothe continuance of (its) freight forwarding activities with legality." 13 SRR at 555. In denying K & S Forwarders' application, the Presiding Administrative Law Judge declared:

> To permit one to avoid the impact of section 44(a) by entering into the type of arrangement here involved with the avowed purpose of continuing what admittedly otherwise would constitute illegal freight forwarding, would be to vitiate the regulatory and remedial purposes of the statute.

13 SRR at 555

The Commission echoed this sentiment in *Concordia, supra,* when it asserted that it would "not countenance a flagrant disregard of the statutes (it is) charged with enforcing."

The Commission is obliged to maintain and preserve the integrity of the ocean freight forwarding industry. As it stated in *Sorrentino, supra,* at 128:

> [w]e are charged with maintaining the high degree of responsibility required in the profession of ocean freight forwarding. Congress has required us to review license applications and to limit access to the profession to those who are "fit, willing, and able." . . . We have therefore established a high standard of moral conduct to which an applicant . . . must conform.

CONCLUSIONS

In consideration of the record in this case and for all of the foregoing reasons it is concluded and determined that Respondent and its corporate officers have violated section 44(a) of the Shipping Act, 1916. It is further concluded and determined that Respondent is not 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. Respondent's application for a license as an independent ocean freight forwarder should be and is hereby denied.

(S) STANLEY M. LEVY
Administrative Law Judge

WASHINGTON, D.C.
June 25, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-57

H & H CRANES, INC.

v.

PORT OF HOUSTON AUTHORITY OF
HARRIS COUNTY, TEXAS

NOTICE

August 16, 1979

Notice is given that the time within which the Commission could determine to review the July 10, 1979, order of discontinuance of the Administrative Law Judge in this proceeding has expired. No such determination has been made and, accordingly, that order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 76-57

H & H Cranes, Inc.

v.

Port of Houston Authority of
Harris County, Texas

MOTION FOR APPROVAL OF SETTLEMENT GRANTED; PROCEEDING DISCONTINUED

Finalized August 16, 1979

Complainant and respondent have filed a joint motion seeking approval of a settlement which they have reached and ask for discontinuance of this proceeding. This settlement, if approved, would bring to a conclusion another one of a series of cases which emanated from the Commission's decision in Docket No. 75-51, *Perry's Crane Service, Inc. v. Port of Houston Authority of Harris County, Texas,* 19 SRR 517 (1979). Moreover, it would achieve this result without the need of continuing with complicated litigation in which considerable time and effort would have to be expended to determine the extent of financial injury which complainant experienced as a result of practices which respondent has long since discontinued, as I recently had occasion to note in issuing my ruling approving a similar settlement in Docket No. 75-51. See Docket No. 75-51, Motion for Approval of Settlement Granted; Proceeding Discontinued, June 21, 1979.

The reasons which support approval of the settlement in this case are similar to those advanced by the parties in the lead case, Docket No. 75-51, which was also settled. As in that case, the parties have canvassed records relating to instances of crane "bumping" and have attempted to verify and agree upon the number of such instances. However, the parties have recognized that if the proceeding were to continue with further litigation, they would have to enter into extremely complicated factual areas relating to the number of jobs which complainant might have lost to a Port crane which was not as suitable for a job as one of complainant's as well as items of expense or loss which complainant might have suffered. Furthermore, the relevant period of time for such facts extends over approximately two and one-half years, from October 1974 to

March 1977. All of these facts would have to be developed under the Commission's decision in Docket No. 75–51, which established that respondent's practices, which have long since been discontinued, were unlawful under sections 16 First and 17 of the Shipping Act, 1916 (the Act) because respondent had "bumped" private crane operators like complainant from jobs already commenced and had given Port cranes first call on jobs even though it was possible that a Port crane had not been equally suitable to one of complainant's cranes for a particular job. In addition to the above, there also remained the question under law of what items of complainant's expenses would be compensable under section 22 of the Act in cases of this kind.

Because of all of difficulties of litigation described above with attendant cost, which both parties wish to avoid, they have agreed to settle this case on condition that respondent pay complainant $5,500.00 with costs, if any. Again, as in my ruling in Docket No. 75–51, cited above, I find that this settlement comports with the principles of law followed by the courts and this Commission which favor settlements and that there are no complicating factors, such as the need to process the settlement under section 15 of the Act or to observe the requirements of tariff law under section 18(b)(3) of the Act, which might require that approval be withheld pending further study or investigation.[1]

Accordingly, I find that the settlement which the parties have submitted for approval as a means to terminate this case is reasonable, violates no law or policy, and fully comports with the Commission's policy which encourages settlements. Therefore, subject to rule 227(c), as amended (i.e., subject to Commission review), the settlement is approved and this complaint case is discontinued.

(S) NORMAN D. KLINE
Administrative Law Judge

June 10, 1979

[1] In the ruling cited in Docket No. 75–51, cited above, I examined case law which holds that settlements are favored and cited several decisions of the Commission which followed this principle, e.g., *Organic Chemicals v. Atlanttrafik Express Service,* 18 SRR SRR 1536a, 1539 (1979); *Old Ben Coal Company v. Sea-Land Service, Inc.,* 18 SRR 1085, 1091–1099 (I.D. 1978, F.M.C. adoption, December 29, 1978). Furthermore, I noted that in some cases, unlike this one, a settlement may constitute a section 15 agreement and must therefore undergo separate processing under that law or, if it involves tariff matters under section 18(b)(3), requires special scrutiny to ensure good faith. 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); *Organic Chemicals v. Atlanttrafik Express Service, Supra.* Finally, I followed the principle that the presiding judge must examine the settlement to ensure that it does no violence to any statutory schemes involved and that the amount to be paid in settlement is a matter for the parties to determine. See, e.g., Docket No. 78–44, *Pierpoint Management Company and Retla Steamship Company v. Holt Hauling and Warehousing Systems, Inc.,* (F.M.C. Order, June 13, 1979) 19 SRR 435; *Inter Equip, Inc. v. Hugo Zanelli & Co.,* 17 SRR 1232, 1234 (1977).

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-41

AGREEMENT NOS. 8200, 8200-1, 8200-2 AND 8200-3
BETWEEN THE PACIFIC WESTBOUND CONFERENCE
AND THE FAR EAST CONFERENCE

ORDER ON RECONSIDERATION

August 17, 1979

The Pacific Westbound Conference (PWC) and Far East Conference (FEC) have filed Petitions for Reconsideration of the Commission's April 18 order disapproving an interconference ratemaking agreement[1] between PWC member lines and FEC member lines.[2] For the reasons set forth below, the Petitions are denied.

FEC contends that the proceeding was before the Commission only on the Port of Seattle's exceptions to the Initial Decision, Seattle opposing but one provision in the Agreement. By reviewing and disapproving the entire Agreement without notice that it intended to do so, FEC alleges, the Commission deprived FEC of the opportunity to be heard other than on the issue complained of by Seattle.

The Commission's Rules of Practice and Procedure state at 46 C.F.R. section 502.227(a), in pertinent part:

> Where exceptions are filed to, or the Commission reviews, an initial decision, the Commission, except as it may limit the issues upon notice or by rule, will have all the powers which it would have in making the initial decision.

As the Commission did not limit the issues for consideration in this proceeding, its review of the entire Agreement was proper under section 502.227(a).[3]

FEC also alleges an incorrect finding of fact, in that the Commission's decision states, at 11:

[1] Agreement Nos. 8200, 8200-1, 8200-2 and 8200-3 (collectively the Agreement).

[2] Intervenors the Port Authority of New York and New Jersey and the Maryland Port Administration concurred in FEC's Petition.

[3] We also note that at oral argument, the parties were questioned not only on Seattle's ground for protest but on other aspects of the Agreement as well.

On the other hand, there are several indications that destructive rate practices between the conferences are not likely to occur. The Agreement specifically does not apply to the relationship between PWC overland rates and FEC rates, yet the midwestern-source cargo, to which PWC overland rates are most likely to apply, is the most probable source of competition between the two conferences.

FEC characterizes this observation as a condemnation of the Agreement for not applying to PWC overland rates. FEC cites the large revenue figures on commodities moved pursuant to both conferences' tariffs, and the written testimony of PWC Chairman D. D. Day, Jr. to the effect that overland cargo is a relatively minor part of PWC's total cargo, and claims that the Commission's observation about overland rates is contrary to the record evidence.

FEC misconstrues the Commission's observation. Contrary to the conferences' contentions, the record does not indicate that the cargo movements covered by the Agreement are likely subjects of destructive rate practices. The sentence excepted to merely points out that, considering this absence of evidence, the only remaining source of genuine PWC-FEC competition is cargo which is not covered by the Agreement. Although large quantities of similar commodities are transported pursuant to the tariffs of both conferences, the particular commodities which would be likely to cause real competition between the two conferences are midwestern-source cargo, as opposed to cargo the source of which is the East or West Coast.

PWC's arguments, as well as the remaining arguments of FEC, are based on alleged violations of the principles of *United States Lines v. Federal Maritime Commission,* 584 F.2d 519 (D.C. Cir. 1978). The conferences argue that the Commission's citation of several "recent developments in the trades" constitutes improper reliance on extra-record information which the parties did not have the opportunity to address. Specifically, the conferences protest the statements that the recent growth of intermodalism diminishes the value of the Agreement; that PWC overland rates, which are not covered by the Agreement, are the most probable source of interconference competition; that there has been a decline in all-water transport from East Coast ports; and that there has been a change in PWC and FEC membership since the record closed.

The FEC membership, which now consists entirely of PWC members, is a proper subject for official Commission notice. *See* 46 C.F.R. § 502.226(a). That the Commission relied on this critical recent development as a major indication that destructive rate practices between the conferences are unlikely, does not violate *United States Lines, supra.* The Commission is not required to reopen a proceeding to obtain current conference membership information which is already filed with the Commission pursuant to 46 C.F.R. § 523.2. Similarly, the Commission properly took notice of another post-record event: that Agreement No. 10135-6 had been conditionally approved, and that it overlaps considerably the subject matter in the instant Agreement.

Moreover, the allegedly objectionable statements in the April 18 order are not essential to the Commission's determination. There are numerous grounds for disapproval of the Agreement. The Agreement provides but minimal assistance to the stability of the trades. The record reflects that the rate differential provisions have proven completely ineffective. The conferences have failed to produce evidence of a likelihood of destructive rate practices absent approval; indeed, the record indicates stability in the Far East trade during the 1965-1968 period when the Agreement was not in effect. The conferences' memberships are such that destructive competition is more unlikely than ever. All these factors sufficiently support the Commission's decision independently of the observations objected to by the conferences.

Nor is the Commission persuaded that this proceeding should be reopened in conjunction with Agreement Nos. 8200-5, which would cover overland cargo transportation, and 10135-6, the PWC-FEC Discussion Agreement. Agreement No. 8200-5 depends upon agreements which are disapproved, and cannot be considered in its present form. It should either be withdrawn, or redrafted and refiled with proper justification. We strongly urge continuation of the dialogue commenced in Agreement No. 10135-6 regarding the future of the trades in issue.

THEREFORE, IT IS ORDERED, That the Petitions for Reconsideration are denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-14

AGREEMENT NO. 10116-3—EXTENSION OF POOLING ARRANGEMENT IN THE U.S. PACIFIC COAST/JAPAN TRADES

ORDER DENYING RECONSIDERATION

August 23, 1979

The proponents of Agreement No. 10116-3, have petitioned the Commission to reconsider its April 26, 1979 Order in the above-captioned matter.[1] It is contended that the Commission's April 26th Order was erroneous insofar as it found that Proponents had not filed a "complete copy" of Agreement No. 10116-3, as modified, on April 5, 1979.[2] In support of this position, Proponents argue that "Agreement No. 10116-3" is a term of art which describes only the brief document containing the most recent amendment to Agreement No. 10116, and that when the Commission has required the submission of a fully integrated document, it has more clearly said so.[3]

The Petition shall be denied. The use of the words "complete copy" sufficiently advised Proponents of the need to file the *entire pooling arrangement* under which they would be operating through August 22, 1980.[4]

A proposed amendment may be conveniently referred to during its processing stage as a document separate and distinct from the existing agreement which would be modified. However, once an amendment is approved by the Commission, there is only *one* agreement outstanding. In this instance, that agreement was designated as "Agreement No. 10116-3." Agreement No. 10116-3 fully incorporates the unaltered aspects of the Proponents' original pooling agreement as well as prior Amendments No. 1 and 2. Agreement No.

[1] The Proponents are six Japanese-flag common carriers in the foreign commerce of the United States. Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., Nippon Yusen Kaisha, Showa Line, Ltd. and Yamashita-Shinnihon Steamship Co., Ltd.

[2] Proponents had submitted a two-page version of the modifications (Amendment No. 3) to their pooling arrangement, rather than a copy of the entire pooling agreement which incorporated the instant modifications as well as Amendment Nos. 1 and 2.

[3] *E.g.*, the April 13, 1978 Order conditionally approving Agreement No. 7680-36 contained the following language:

A complete copy of Agreement No. 7680, as amended through the 36th amendment thereto, as modified in accordance with clause (1) and (2) of this paragraph . . . .

[4] If nothing else, the very brevity of Amendment No. 3 (a simple extension of the agreement's term) should have put Proponents on notice that "complete copy" contemplated more than the submission of the amendment alone.

10116 exists only as a point of historical interest or as a useful generic reference.

The fact that the Commission's Rules (46 C.F.R. §522.4(b)) routinely require the submission of a complete copy of an agreement only after the agreement has been amended three times, does not preclude the Commission—on a case-by-case basis—from requiring a complete copy after a lesser number of amendments.

THEREFORE, IT IS ORDERED, That the Proponents' May 29, 1979 "Petition for Reconsideration" is denied.

By Order of the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–20

TERFLOTH AND KENNEDY, LTD.

v.

AMERICAN PRESIDENT LINES, LTD.

NOTICE

August 30, 1979

Notice is given that no appeal has been taken to the July 24, 1979, dismissal of the complaint in 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. 78-20

TERFLOTH AND KENNEDY, LTD.

v.

AMERICAN PRESIDENT LINES, LTD.

SETTLEMENT APPROVED; COMPLAINT DISMISSED WITH PREJUDICE; PROCEEDING DISCONTINUED

Finalized August 30, 1979

By joint motion filed May 9, 1979, the complainant, Terfloth & Kennedy, Ltd.—(T&K), and the two respondents, American President Lines, Ltd.—(APL) and Seaport Shipping Co. (Seattle)—(Seaport), request approval of a release and settlement agreement, dismissal of the complaint and discontinuance of the proceeding. In my judgment the release and settlement agreement should be approved, the complaint should be dismissed with prejudice, and the proceeding should be discontinued.

FACTS

T&K, a Canadian corporation, filed a complaint seeking reparation in the sum of $4,626.76 from APL, a common carrier by water in the foreign commerce of the United States. T&K alleged violations of sections 16 First, 17, 18(a),[1] 18(b)(5)[2] and 15 of the Shipping Act, 1916, 46 U.S.C. §§815 First, 816, 817(a), 817(b)(5) and 814, in connection with a shipment, consisting of two containers of frozen french fried potatoes, from Seattle, Washington, to Hong Kong under a bill of lading issued January 21, 1977. APL filed an answer in which, among other things, it denied it had violated any section of the Shipping Act.

[1] By its terms, section 18(a) applies only to shipments in interstate commerce. It was therefore jurisdictionally defective and incorrectly invoked in this proceeding.

[2] Even if the assailed rate were "so unreasonably high . . . as to be detrimental to the commerce of the United States" within the meaning of section 18(b)(5), there would be no right to reparation because the Commission's powers under section 18(b)(5) are prospective only. See *Federal Maritime Commission v. Carragher*, 364 F.2d 709 (2d Cir. 1966). In other words, section 18(b)(5) created no "justiciable legal right," *T.I.M.E. Incorporated v. United States*, 359 U.S. 464, 468-472 (1959), to reparation."

Subsequently, T&K filed an amended complaint seeking the same amount of reparation from Seaport, an independent ocean freight forwarder licensed by the Federal Maritime Commission,[3] alleging violations of 46 C.F.R. §510.23 and section 44(c) of the Shipping Act, 1916, 46 U.S.C. §841b(c).[4] Seaport's answer, among other things, denied liability for the amount claimed but accepted limited liability for damages in the sum of $525.16.

The agreement to settle was reached without any party engaging in the discovery procedures. Consequently all the particulars surrounding the transaction have not surfaced. However, there is general agreement on the following basic facts.

Sometime in November 1976, T&K asked Seaport for ocean freight rate quotations on frozen french fries and frozen vegetables to various places in the Far East, including Hong Kong. Seaport complied by telex on November 29, 1976. On December 14, 1976, T&K instructed Seaport by telex, to book two forty-foot refrigerated containers of frozen french fries at a rate of $150.00 per measurement ton for shipment in January 1977.

The rates which Seaport furnished to T&K in November 1976 were those which were published in Pacific Westbound Conference's Local Freight Tariff No. 4-FMC 12.[5] APL was at all pertinent times a member of the Pacific Westbound Conference (PWC). For a variety of reasons, including conversion of the PWC tariff to the metric system, the rate applicable to frozen french fried potatoes was constantly being changed and this unsettled rate situation apparently caused some confusion concerning the applicable rate on a given day.

On and before November 14, 1976, the ocean freight special contract rate was $136.00 per ton of 2000 pounds. There was also a terminal receiving charge of $5.50 per ton of 2000 pounds. While these rates were in effect, PWC member lines carried shipments of frozen french fried potatoes to Hong Kong. Also, while these rates were in effect, the comparable rate to Japan for frozen french fried potatoes was $125.00 per ton of 2000 pounds.

On November 15, 1976, the ocean rate and the terminal receiving charge were changed to a revenue ton basis (meaning that the shipper would be charged the greater of the weight or measurement of the shipment).[6] T&K alleged that this charge amounted to a 92.8% increase in freight and terminal charges and that while this rate was in effect there was no carriage of frozen french fried potatoes to Hong Kong by PWC member lines. T&K also alleged that while this rate was in effect the comparable rate to Japan remained at $125.00 per 2000 pounds.

Effective January 1, 1977, the tariff was converted to the metric system and the freight rate was set at $120.00 per W/M of 1000 kilos or cubic meter and

[3] License No. FMC 126.

[4] The amended complaint resulted from comments appearing in Order Allowing Leave to Amend Complaint, served September 14, 1978, and similar remarks made at the prehearing conference held February 15, 1979.

[5] Prior to January 1, 1977, frozen french fried potatoes' rates appeared at Item No. 054.6100 of PWC's Local Tariff No. 4. Thereafter those rates were shown at the same line item and number in PWC's Local and Overland Freight Tariff No. 5—FMC 13.

[6] Weight (W) = 2000 pounds; Measurement (M) = 40 cubic feet. Wherever a tariff provides a rate of W/M it means that the rate shall be applied to the greater of the two.

the terminal receiving charge at $5.50 per W/M of 1000 kilos or cubic meter. T&K alleged that the conversion retained the previous ocean rate but increased the receiving charge by 11.7%. T&K alleged that while this rate was in effect, the comparable Japan rate was $138.00 per 1000 kilos (no change on conversion to metric).

On January 19, 1977, the Conference met and decided to reduce the ocean rate, effective January 26, 1977, to $165.00 per 1000 kilos and the terminal charge to $5.50 per 1000 kilos. This lowered the ocean rate by 42.9% and the terminal cost by 58.5% below the rate which became effective on November 15, 1976. T&K claims that, as a result of this change, frozen french fried potatoes again began to move to Hong Kong via PWC member lines. PWC did not take any action in regard to the rate to Japan on January 19th. T&K alleged that after the metric conversion on January 1, 1977, there were shipments of frozen french fried potatoes to Japan at the $138.00 per 1000 kilo rate.

Believing that the PWC tariff action of January 19, 1977, was effective immediately, but without rechecking the tariff, one of Seaport's traffic clerks mistakenly thought that T&K's instructions could be followed by booking the shipment for the January 21st sailing of the *PRESIDENT TRUMAN*. Had he waited a few days, until January 26th, to make the shipment, the total charges would have been $5,992.05 instead of $10,618.81, the amount APL was required to charge under tariff rates in effect on January 21st. The difference between those two figures—$4,626.76—is the amount of reparation sought by T&K.

T&K paid charges of $10,618.81 in March 1977.[7]

One of the allegations made by T&K, but denied by APL, in effect claims that if a shipment similar to the one at bar had been made to Japan on January 21st, it would have cost only half as much as the one to Hong Kong.[8]

T&K claims against APL that by reason of the facts it was subjected to payment of rates for transportation and terminal services which were unduly and unreasonably preferential, prejudicial or disadvantageous in violation of section 16 First; were unjustly discriminatory and prejudicial in violation of section 17; and were unjustly discriminatory and unfair in violation of section 15.

Against Seaport, T&K claims that it was damaged because the licensed freight forwarder failed to "exercise due diligence to ascertain the correctness of any information which he imparts to a principal with reference to any forwarding transaction" in violation of 46 C.F.R. §510.23(d) and section 44(c).[9]

THE SETTLEMENT

In order to avoid costly and time consuming litigation, Seaport and APL have agreed to pay T&K the sum of $1,550.00 each in consideration of T&K's release. All parties agree that nothing contained in their agreement shall be construed as an admission on the part of Seaport or APL that either violated the Shipping Act or regulations promulgated thereunder by this Commission.

[7] Prehearing transcript, p. 4.

[8] See Exhibit B of complaint.

[9] Section 44(c) empowers the FMC to prescribe reasonable rules and regulations to be observed by freight forwarders. The cited regulation was promulgated pursuant to the rule making authority contained in section 44(c).

The parties also agree that the agreement shall be effective only upon approval by the Commission.

DISCUSSION AND CONCLUSION

It is well settled that legislative and Commission policy foster the settlement of administrative proceedings. The right to seek settlement of administrative proceedings carries the same Congressional mandate as the right to submit proposed findings of fact and legal arguments.[10] The Commission has implemented its mandate by rule[11] and thereafter emphasized "The law, of course, encourages settlements and every presumption is indulged in which favors their fairness, correctness and validity generally." *Merck Sharp & Dohme v. Atlantic Lines,* 17 F.M.C. 244, 247 (1973).

In furtherance of this policy the Commission has authorized settlements of administrative proceedings on the basis of a compromised reparation payment absent admissions of findings of violation of the Shipping Act. *Com-Co Paper Stock Corporation v. Pacific Coast-Australasian Tariff Bureau,* 18 SRR 619 (1978); *Robinson Lumber Co., Inc. v. Delta Steamship Lines, Inc.,* 18 SRR 744 (1978); *Old Ben Coal Co. v. Sea-Land Service, Inc.,* 18 SRR 1085 (1978); *Organic Chemicals v. Atlanttrafik Express Service,* 18 SRR 1536a (1979).

I find it to be in the public interest to accept the offer of settlement. This was a vigorously contested proceeding and would have required an evidentiary hearing had the complaint not been amended to bring in Seaport as a respondent. The respondents continue to adhere to the position that there has been no wrongdoing under the Shipping Act. Nevertheless, they engaged in good faith negotiations with the shipper and with each other and, as a result, struck a bargain by which all the parties bear an approximately equal share of the amount in dispute. Because there are novel legal aspects to this proceeding and because an evidentiary hearing would have entailed considerable expense to all parties, the settlement represents a realistic estimate of the costs of litigation and the likelihood of success. The settlement is not in the nature of a rebate or other violation of the Shipping Act.

THEREFORE IT IS ORDERED, That the terms and conditions of settlement are approved.

IT IS FURTHER ORDERED, That the complaint be dismissed with prejudice and the proceeding be discontinued.

(S) SEYMOUR GLANZER
Administrative Law Judge

July 24, 1979

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[10] Section 5(b)(1) of the Administrative Procedure Act, 5 U.S.C. §554(c)(1), provides: "The agency shall give all interested parties opportunity for—(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit;"

[11] Rule 91 of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.91, provides in pertinent part: "Where time, the nature of the proceeding, and the public interest permit, all interested parties shall have the opportunity for the submission and consideration of facts, argument, offers of settlement, or proposal of adjustment. . . ."

Pragmatically, even though unilateral offers of settlement seemingly are authorized in both investigation and complaint proceedings, it would appear that, in the exercise of its judgmental function, the Commission is more likely to look favorably upon joint or unopposed offers of settlement.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-54
FOSS ALASKA LINE INC. PROPOSED GENERAL
RATE INCREASE BETWEEN SEATTLE, WASHINGTON
AND POINTS IN WESTERN ALASKA

NOTICE

September 5, 1979

Notice is given that the time within which the Commission could determine to review the August 1, 1979, order of discontinuance of the Administrative Law Judge in this proceeding has expired. No such determination has been made and, accordingly, that order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-54

FOSS ALASKA LINE INC.—PROPOSED GENERAL RATE INCREASE BETWEEN SEATTLE, WASHINGTON AND POINTS IN WESTERN ALASKA

OFFER OF SETTLEMENT APPROVED; RESPONDENT ORDERED TO COMPLY WITH TERMS OF OFFER OF SETTLEMENT BY ROLLBACK/REFUND OF PORTION OF RATE INCREASE; MOTION TO TERMINATE PROCEEDING GRANTED; PROCEEDING DISCONTINUED

Finalized September 5, 1979

In accordance with an understanding reached at the hearing on July 11, 1979, on July 18, 1979, Foss Alaska Line, Inc. (FAL), respondent, submitted a written offer of settlement and motion to terminate the Commission's investigation of a general rate increase in the Seattle, Washington/Western Alaska Trade (hereafter alternately referred to as "Westward Alaska Service" or "Service" or "Trade"). On July 25, 1979, Hearing Counsel, the only other party in the proceeding, submitted a written response to the offer and motion endorsing the offer and supporting the motion.

In my judgment, the offer of settlement should be accepted, the motion to terminate the proceeding should be granted, and the proceeding should be discontinued.

THE BACKGROUND OF THE PROCEEDING, THE OFFER AND THE MOTION

The parties are in substantial, if not literal agreement, on all aspects of the proceeding, the offer and the motion. These are the pertinent facts concerning those matters.

On March 15, 1979, FAL filed a 7 percent general rate increase (with certain exceptions) on cargo transported in its Westward Alaska Service.[1]

[1] As initially filed, the increase applied to all rates and charges except those for gillnet boats (Item 551) and groceries (Item 810) listed in FAL Tariff FMC-F No. 18. Thereafter, effective May 18, 1979, the increase was withdrawn on rates and charges involving cargo moving to the town of Dillingham, Alaska.

FAL's Service is a seasonal tug and barge operation between Seattle, Washington, and points in Western Alaska, including Nome, Bethel and Dillingham. It is operated in direct competition with three other carriers in the same trade.[2] The long and severe winters of Western Alaska so limit the annual navigation season as to permit only three or four voyages by FAL.

No protests against the rate increase were filed with the Commission. The rate increase became effective on May 18, 1979. Thereafter, on May 22, 1979, the Commission ordered an expedited investigation of the rate increase, limited essentially to consideration of the two issues of rate of return and the proper method of allocating fixed vessel costs for the equipment used in the Service by FAL.[3]

Because the revenue to be derived from the increase was small in both absolute and relative terms (only $71,000), because FAL felt that then existing differences between FMC's Bureau of Industry Economics, Office of Financial Analysis (Staff) were not that great and should be resolvable, and because the cost and work effort involved in participating in a formal adjudicatory proceeding would be substantial, FAL immediately initiated discussions with the Staff and Hearing Counsel (sometimes referred to collectively as Staff) in an effort to settle the matter without the necessity of going to formal hearing. As a result of those discussions, FAL made several revisions to and updatings of the G.O.11 material which it had submitted.

While substantial progress was achieved in the discussions, FAL and the Staff ultimately were unable to agree on a settlement, and the matter was then set for hearing commencing July 11, 1979. Failure to reach agreement was based primarily on the different positions taken by FAL and the Staff with respect to the proper methodology to be employed in allocating fixed vessel costs to the Service.

In the period between the initial filing of its G.O.11 material and the date of the hearing, FAL experienced a precipitous increase in the cost of its fuel, an increase which could reasonably be expected to continue through the Westward Alaska navigation season. Accordingly, FAL again updated its G.O.11 filing to reflect these increases in fuel costs. The result of that updating was to reduce the difference between the allowable revenue under the allocation methodology utilized by the Staff (but not by FAL) and the amount of revenue produced by FAL's rate increase to a minimal amount—later agreed by the parties to be $31,852 in before tax revenue.

The Staff takes the position that FAL should be permitted to earn a return on investment of 12.27 percent, while FAL proposed a 14.4 percent return on investment. Utilizing the methodology proposed by the Staff for allocating expenses and investment and calculating return on investment, FAL's projected

[2] FAL's market share is estimated at 30% to 35%.

[3] The investigation related to tariff revisions in FAL's Tariffs FMC-F Nos. 17 and 18. The Commission stated the two issues to be:

1. The proper method of allocating investment and expenses applicable to the tugs and barges leased by FAL from its parent corporation, Foss Launch and Tug, and utilized by FAL in the Alaska trade.

2. Whether the proposed rates are unjust, unreasonable or otherwise unlawful in that they will provide FAL with an excessive rate of return as measured by accepted analytical methods.

rate of return on investment is 13.3 percent. The 1.03 percent differential separating the above figures translates into a dollar difference of $31,852. In its offer of settlement, FAL has proposed a 1.4 percent rollback/refund of its proposed general rate increase which reduces the above dollar difference to a mere $15,926. The resulting 5.6 percent adjusted rate increase will produce a projected rate of return on investment of 12.79 percent and a .515 percent differential.

Even though it was clear that FAL and the Staff had irreconcilable differences as to methodology, the narrowing of the dollar difference in revenue at issue, even under the methodology employed by the Staff, led FAL to initiate a further effort at settlement.[4] This was undertaken just prior to commencement of the hearing and continued under my supervision and with my support.

In the course of those further negotiations, FAL and the Staff agreed that the dollar difference between them was, as noted above, $31,852. Recognizing that the amount involved was far less than the costs which each would incur in litigating their irreconcilable differences in position as to allocation methodology, each side sought to avoid what would be a substantial and expensive litigation effort and to remove the uncertainty of the final outcome of litigation. FAL and the Staff agreed to compromise and settle their differences by means of a rollback/refund of the rate increase.[5]

That rollback/refund, which constitutes the major ingredient of FAL's offer of settlement, reduces the revenue estimated to be generated by the rate increase by one-half of the dollar difference between the parties—that is one-half of the difference in the amount of allowable revenue under the allocation methodology and rate of return utilized by the Staff and the amount of revenue which the rate increase was calculated to produce. This reduction of $15,926 ($31,852 divided by 2) is a 1.4 reduction of FAL's rate increase, and results in an adjusted rate increase of 5.6 percent.

JUSTIFICATION FOR OFFER OF SETTLEMENT

While there continues to be an irreconcilable difference between FAL and the Staff on the issue of what is the proper method of allocating fixed vessel costs for the equipment used by FAL in the Service, FAL and the Staff have

[4] Under the methdology espoused by FAL, FAL believes that the additional revenue generated by the rate increase would still leave FAL with a far from adequate return on its investment.

[5] The matter of allocation methodology was and would continue to be a hotly contested issue in the proceeding. In addition, because of the impact which such methodology has upon the level of carrier return on investment, FAL made it clear that if the Commission's ultimate decision were unfavorable to FAL, it would be compelled to appeal that decision to the courts.

Choice of methodology is not the only issue which would have to be litigated. Among other matters pertinent to the litigation is the question of inconsistent treatment by the Commission of rate increases by competing carriers in the same trade—a question which also bears upon the equities of this investigation and the resolution of the proceeding proposed herein. The Staff's I&S Memorandum No. 937, dated May 11, 1979, which was obtained through a Freedom of Information Act, 5 U.S.C. §552, (FOIA) request, makes no reference to the fact that increases of similar magnitude in the rates of FAL's competitors in the trade had previously been permitted to go into effect by the Commission without investigation. In response to a further FOIA request for copies of Staff I&S Memoranda dealing with the rate increases of FAL's competitors, FAL was advised there were none.

The upshot is that the proceeding would be prolonged by the introduction of evidence bearing on opposing, but compatible, legal philosophies which, on the one hand, hold that a regulatory agency is free to select out one person from others similarly situated for formal scrutiny, *United States v. Wabash R. Co.*, 321 U.S. 403 (1944), but on the other hand, hold that under certain circumstances, good sense requires a comparative hearing in the case of competing carriers, *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945); *Blue Bird Coach Lines, Inc. v. United States*, 328 F. Supp. 1331 (W.D.N.Y. 1971).

reached general agreement on the calculation of revenue which the rate increase will produce.

That calculation establishes there is but a small relative and absolute difference between the amount of additional revenue which FAL's rate increase would produce and the amount of additional revenue which the Staff would allow as reasonable, calculated according to the rate of return and fixed vessel cost allocation methodology which the Staff believes to be appropriate. That small difference ($31,852) forms the basis for the proposed settlement of this litigation. To settle the matter, FAL has proposed to roll back its rate increase from 7.0 percent to 5.6 percent.[6] This will reduce by half (to $15,926) the difference between the revenue generated by the increase and the Staff's calculation (untested at this point in the adversary process) of the permissable revenue level.

There can be no dispute that the cost of litigation to FAL and the Commission individually would far exceed the remaining dollar amount in dispute. Settlement on the proposed basis therefore eliminates for FAL and the Commission the cost, effort and uncertainty of litigation. As seen by FAL, this latter factor is signficant in at least three particular respects. First, any determination of the reasonableness of rates is certainly an imprecise exercise. That is why the courts, regulatory agencies and economists often speak of the reasonableness of rates not with specificity but rather in terms of a zone of reasonableness. Second, it is by no means settled that the allocation methodology utilized by the Staff, which has been employed as a benchmark for the purposes of settlement discussions only, would be utlimately upheld as the correct methodology to determine the reasonableness of FAL's rate increase.[7] Third, the density of the traffic at issue is so thin that the entire dollar amount at issue ($31,852) reflects the gross revenue of only about six containers. Since the projected traffic is of necessity merely an estimate, the actual results could depart from the estimated results by as much as, if not more than, the difference between the revenue targets of FAL and the Staff.

It is Hearing Counsel's position that acceptance of the offer and termination of the proceeding would serve the public interest because it would result in avoiding the expense of unnecessary litigation and at the same time provide a public benefit to ratepayers. Hearing Counsel explains:

> The Commission's resources, both in terms of funds and staff, are limited. These limited resources should be allocated so as to produce the optimum public benefit. It is Hearing Counsel's belief that additional expenditure of Commission funds and staff time in the present investigation would not produce a significant public benefit. As FAL has noted, the costs of litigation would far exceed the remaining dollar amount in dispute. Further, there can be little doubt that the ratepayers in the Western Alaska trade would utlimately bear the costs of this litigation. If, however, FAL's offer of settlement is accepted and litigation is thereby avoided, not only will these ratepayers be guaranteed a 1.4 percent rollback in FAL's proposed general rate increase, but they will benefit immediately from that adjustment.

[6] In furtherance of its offer of settlement, FAL has already filed supplements to its Tariffs FMC-F Nos. 17 and 18, effective August 24, 1979, providing for a 5.6 percent general rate increase.

[7] In making this statement, FAL does not intend to engage in a substantive dispute over methodology with the Staff, but merely to point out that even though that methodology has been used for settlement purposes, the issue of the appropriate methodology has not been resolved here, nor is it intended to be resolved by this offer of settlement. FAL, of course, does not agree that the Staff's methodology is the correct one. By endorsing the offer of settlement, Hearing Counsel does not also implicitly endorse FAL's methodology as the proper means of calculating FAL's rate of return on investment.

In addition to the relatively small amount of money involved in this proceeding, Hearing Counsel is mindful of the inexactness of the projected cost and revenue figures sumitted [sic] by FAL. As FAL has indicated, "the entire dollar amount at issue ($31,852) reflects the gross revenue of only about six containers." Given the margin of error necessarily involved in the calculation of projected results, coupled with the imprecision inherent in the science of economics, the remaining dollar amount in dispute appears all the less significant.

Discussion and Conclusions

It is well settled that legislative, judicial and Commission policy foster the settlement of administrative proceedings.

The right to seek settlement of administrative proceedings is expressly mandated by section 5(b)(1) of the Administrative Procedure Act, 5 U.S.C. § 554(c)(1), which provides:

The agency shall give all interested parties opportunity for—

(1) The submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceedings, and the public interest permit;

The United States Court of Appeals for the District of Columbia Circuit perceives this provision and its legislative history "as being of the 'greatest importance' to the functioning of the administrative process."[8] *Pennsylvania Gas & Water Co. v. Federal Power Commission,* 463 F.2d 1242, 1247 (D.C. Cir. 1972). The court emphasized that "[t]he whole purpose of the informal settlement provision is to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest." *Id.*

The Commission has implemented its mandate by rule[9] and reinforced the rule with the policy statement that: "The law, of course, encourages settlements and every presumption is indulged in which favors their fairness, correctness and validity generally." *Merck, Sharp & Dohme v. Atlantic Lines,* 17 F.M.C. 244, 247 (1973).

In furtherance of this policy, the Commission has authorized settlements of administrative proceedings on the basis of a compromised reparation payment

[8] Senate Judiciary Comm., Administrative Procedure Act—Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 203 (1945). In considering the settlement provision in S. 7, 79th Cong., 1st Sess. (1945), which ultimately became Section 554(c) of the Administrative Procedure Act (see note 5, *supra*), the Senate Judiciary Committee stated:

Subsection (b) [now Section 554(c) of the Administrative Procedure Act] provides that, even where formal hearing and decision procedures are available to parties, the agencies and parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the Administrative process. . . . The statutory recognition of such informal methods should both strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations. It should be noted that the precise nature of informal procedures is left to development by the agencies themselves.

S. Doc. No. 248, *supra,* at 24.

[9] Rule 91 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.91, provides in pertinent part: "Where time, the nature of the proceeding, and the public interest permit, all interested parties shall have the opportunity for the submission and consideration of facts, argument, offers of settlement, or proposal of adjustment. . . ."

Rule 94(a)(1), 46 C.F.R. § 502.94(a)(1) provides in pertinent part: "Prior to any hearing the Commission or presiding officer may direct all interested parties, by written notice, to attend one or more prehearing conferences for the purpose of considering any settlement under § 502.91 (Rule 91). . . ."

Rule 147(a), 46 C.F.R. § 502.147(a), provides, as relevant: "The officer designated to hear a case shall have authority to . . . hold conferences for the settlement . . . of issues. . . ."

absent admissions of findings of violation of the Shipping Act. *Com-Co Paper Stock Corporation v. Pacific Coast-Australasian Tariff Bureau,* 18 SRR 619 (1978); *Robinson Lumber Co., Inc. v. Delta Steamship Lines, Inc.,* 18 SRR 744 (1978); *Old Ben Coal Co. v. Sea-Land Service, Inc.,* 18 SRR 1085 (1978); *Organic Checmials v. Atlanttrafik Express Service,* 18 SRR 1536a (1979).

More particularly, there is Commission precedent granting a motion to discontinue a general rate investigation, unopposed by Hearing Counsel,[10] on the carrier's promise to effectuate a partial rollback of rates. Docket No. 1068, *Leeward & Windward Islands & Guianas Conference General Increase in Rates in the Atlantic/Gulf U.S. Virgin Islands Trade* (unreported, 1963).[11]

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:[12]

> 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.

The offer is an equitable solution to a difficult situation and represents a responsible approach to rate regulation. FAL has offered to give up a perceived need for certain revenues in order currently to conserve part, if not all, of the anticipated return from the general rate increase which otherwise would be consumed by litigation expenses. Thus, the ratepayers and consumers are immediately benefited by the roll/back refund. As Hearing Counsel has pointed out, there is a deferred benefit, too. The potential additional costs of litigation, because they will be eliminated, will not ultimately be borne by the ratepayers and consumers.

Hearing Counsel's endorsement of the proposal also reflects a sound and mature judgment in coping with the problem of bringing agency proceedings "within the bounds of reason and the agencies competence to deal with them." *Pennsylvania Gas & Water Co. v. Federal Power Commission, supra,* 463 F2d at 1246. The support given by Hearing Counsel offers pragmatic assistance to FAL's responsible initiative, and it does so by placing the using public's interest ahead of important, but technical, methodology issues without in any way abandoning Hearing Counsel's belief in the validity of its position. Moreover, Hearing Counsel's response to the offer permits the Commission and Staff to conserve considerable time and energy by obviating the need for formal resolution of a controverted rate case. This, too, is an appropriate factor to be considered by the Commission in determining whether and under what circumstances to terminate a rate proceeding. *Wisconsin v. Federal Power Commission,* 373 U.S. 294, 311 (1963).

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[10] The court, in *Pennsylvania Gas & Water Co. v. Federal Power Commission, supra,* 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.

[11] It is interesting, historically, to note that movant's counsel was Harold Leventhal, now a Judge of the United States Court of Appeals for the District of Columbia Circuit.

[12] 1978 Report, Administrative Conference of the United States, at 36.

Accordingly, it is ordered[13] that:

1. Offer of settlement be approved.

2. FAL shall refund that portion of its general rate increase, already collected, which exceeds 5.6 percent.

3. Supplement No. 3 to FAL's Tariff No. 17 and Supplement No. 3 to FAL's Tariff No. 18, which became effective August 24, 1979, shall not be increased during the 1979 Seattle, Washington/Western Alaska navigation season without prior approval from the Commission.

4. The motion to terminate this proceeding is granted.[14]

5. The proceeding is discontinued.

(S) SEYMOUR GLANZER
Administrative Law Judge

August 1, 1979

[13] "[I]f on examination [settlements] are found equitable by the regulatory agency, then the terms of the settlement form the substance of an order binding on all the parties. . . ." *Pennsylvania Gas & Water Co. v. Federal Power Commission, supra,* 463 F2d at 1246.

[14] In recognition of the procedural time constraints established by the recent Public Law 95-475, amendments to sections 3 and 4 of the Intercoastal Shipping Act, 1933, FAL's offer states that if the Commission were to reject the offer, FAL would have no objection to ultimate decision of the matter within 240 days rather than 180 days. Hearing Counsel supports this position, noting that the Commission, in its discretion and for good cause may extend the 180-day time period for Commission action by 60 days and suggests that delay occasioned by a bona fide attempt to resolve controverted issues by settlement qualifies as a proper showing of good cause. I agree. However, because of those time constraints, it is suggested that the Commission consider whether to shorten the time period established by Rule 227, 46 C.F.R. §502.227, for review of this order.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 594(I)

GIRTON MANUFACTURING COMPANY

v.

HELLENIC LINES LIMITED

PARTIAL ADOPTION OF DECISION OF SETTLEMENT OFFICER

September 5, 1979

The Commission has undertaken a review of the decision of Settlement Officer James K. Cooper, served July 13, 1979, in which Girton Manufacturing Company (Complainant) was awarded reparation of $409.30 from Hellenic Lines Limited (Respondent). Complainant alleged, and the Settlement Officer found, that Respondent overcharged Complainant $409.30 by charging the rate for Cargo NOS, Nonhazardous instead of Machinery, NOS for a beverage crate washer transported by Respondent from Philadelphia, Pennsylvania to Dubai, United Arab Emirates on February 22, 1977. We agree with the ultimate conclusion of the Settlement Officer and his award of reparations for the reasons set forth in his decision.

We disagree, however, with the Settlement Officer's denial of Complainant's claim for interest on the amount of reparation. Respondent failed to respond to Complainant's overcharge claim filed April 3, 1978,[1] and to Complainant's three subsequent tracings in June, July, and September, 1978. No explanation for the application of the Cargo, NOS rate was made either to Complainant or to the Commission.

Award of interest, like award of reparations, is discretionary with the Commission. *Flota Mercante Grancolombiana v. Federal Maritime Commission*, 373 F.2d 674 (D.C. Cir. 1967). The Commission concludes that the facts of this case justify an award of interest on the reparation at 6% accruing from April 3, 1978, the date that Complainant filed its informal overcharge claim with Respondent.

[1] The Settlement Officer's decision erroneously notes this date as April 3, 1979.

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

IT IS FURTHER ORDERED, That interest on the reparation is awarded at 6% accruing from April 3, 1978, until payment is made; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 594(I)

GIRTON MANUFACTURING COMPANY

v.

HELLENIC LINES LIMITED

DECISION OF JAMES K. COOPER, SETTLEMENT OFFICER*

Partially Adopted September 5, 1979

Reparation Awarded

Girton Manufacturing Company (complainant) in a claim filed October 5, 1978, claims $409.30 as reparation from Hellenic Lines Limited (respondent) for a alleged overcharge on a shipment described on the bill of lading as "1 crate: Beverage Case Washer." The shipment moved on the respondent's vessel Hellenic Laurel, under bill of lading number P-001, dated February 22, 1977. The shipment had a weight of 4,260 lbs. and measured 490 cubic feet. The shipment was loaded on board the respondent's vessel at Philadelphia, PA, and moved to the port of Dubai, U.A.E. The freight charges were paid by the complainant on March 25, 1977.

The complainant states that the respondent rated the shipment as "Cargo NOS, nonhazardous," per Item 215 of Tariff No. 5, FMC 5 published by the "8900" Rate Agreement, of which respondent is a participating member.

The complainant states that the respondent should have rated the shipment as "machinery, NOS" per Item 565 of Tariff No. 5, FMC 5 published by the "8900" Rate Agreement.

The complainant stated the respondent failed to respond to its overcharge claim BZS-46 filed on April 3, 1979, and failed to respond to tracings dated June 26, 1978; July 19, 1978; and September 19, 1978.

*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.

According to the complainant, the overcharge is determined as follows:

Item 215, Cargo NOS, nonhazardous		
Rate $188.25 per 40 cubic feet		
plus surcharges	Total Charges	$3,805.00
Item 565, Machinery NOS		
Rate $168.00 per 40 cubic feet		
plus surcharges	Total Charges	3,395.70
	Overcharge	$ 409.30

A review of the complaint, supporting documentation and the involved tariff items confirms the complainant's overcharge allegation. The shipment was clearly described on the bill of lading as a "Beverage Case Washer." The supporting invoice and advertising material clearly indicate that the commodity in question was in fact a machine to be utilized for the purpose of washing cases and boxes. Therefore, the shipment would fall clearly within the description of Tariff Item 565, 5th Revised Page 96-A, effective January 24, 1977, which bears the heading "Machines and Machinery and Parts thereof, NOS, INDUSTRIAL," at a rate of $168.00 W/M.

Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to retain compensation greater than it otherwise would be entitled under its applicable tariff. Accordingly, the complainant is awarded reparation in the amount of $409.30. The claim for interest on the amount of reparation is denied.

(S) JAMES K. COOPER
Settlement Officer

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 387(I)

PAN AMERICAN HEALTH ORGANIZATION

v.

MOORE-MCCORMACK LINES, INC.

REPORT ON REMAND

September 12, 1979

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

This matter is now before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit.

The proceeding was instituted by a complaint filed by Pan American Health Organization (PAHO) alleging that Moore-McCormack Lines, Inc. (Respondent), had violated section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(3)), by collecting freight charges in excess of those provided in the applicable tariff[1] on a shipment described in the bill of lading as "stationery," carried from Baltimore, Maryland, to Rio de Janeiro, Brazil.

Respondent assessed the rate provided in the Tariff for "PAPER, VIZ.: Stationery."[2] PAHO contended that the description in the bill of lading was erroneous and that the shipment should have been described instead as "PAPER, VIZ.: Bond, Sulphite or Sulphite and rag mixed—see PRINTING PAPER" for which the Tariff provided a lower rate.[3]

With the consent of both parties, the proceeding was conducted under the Informal Procedure for the Adjudication of Small Claims provided in subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.301, *et seq.*).

[1] Inter-American Freight Conference—Section A Tariff No. 3 (FMC No. 7), hereinafter referred to as "Tariff."

[2] 7th Rev. page 148 effective April 1, 1975.

[3] 10th Rev. page 146, effective November 1, 1974, and 19th Rev. page 147, effective April 1, 1975.

In a decision issued October 14, 1977, the Settlement Officer awarded reparation upon finding that PAHO had sustained its burden of proving that the shipment consisted of sulphite bond paper and should have been so rated.

On review, the Commission reversed the Settlement Officer's decision and determined that the tariff description "PAPER, VIZ.: Stationery" was more specific than "PAPER, VIZ.: Bond, Sulphite . . . see PRINTING PAPER." It, therefore, concluded that the carrier had properly classified and rated the shipment and denied reparation.[4]

On September 8, 1978, PAHO filed with the United States Court of Appeals for the District of Columbia Circuit a Petition for Review of the Commission's Report. The Court by Order served July 18, 1979, remanded the record to the Commission for:

(1) an explanation as to why "'stationery' is a more specific description than 'PAPER, VIZ.: Bond, Sulphite and Sulphite and Rag Mix—see PRINTING PAPER;'" and

(2) a delineation of the scope of petitioner's burden on the question of the appropriate tariff description.

Discussion

In determining which of the two descriptions at issue[5] is more specific, the Commission took into consideration the fact that while bond paper is commonly used for stationery, it may also be employed for other purposes such as, the making of documents,[6] or for printing, as contemplated in the Tariff, and could thus come in different shapes such as sheets or rolls. The making of stationery would require a further step in the manufacturing process, that is the cutting of the paper to specified sizes in order to obtain the end product. The finished article, therefore, rather than the raw materials used in its manufacture, provides a more specific basis for the tariff classification of the product. The conclusion that the carrier properly classified and rated the shipment rests on these grounds.[7]

With respect to the burden of proof, although the shipper is conclusively presumed to have knowledge of the carrier's tariff,[8] the Commission has recognized the bona fide errors may occur in the preparation of shipping documents, and a complainant seeking reparation under section 22 of the Shipping Act,

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[4] A petition filed by PAHO requesting the Commission to reconsider its decision was subsequently denied.

[5] The description in the bill of lading is based on the Statistical Classification of Domestic and Foreign Commodities Exported from the United States, U.S. Department of Commerce, Bureau of the Census (1971), page 140, Schedule B commodity #642.3040, a copy of which is in the record.
The description "Stationery" is found on 7th Rev. page 148 of the Tariff, effective April 1, 1975.

[6] According to the Third New International Dictionary of the English Language Unabridged (1964), bond paper is:

a strong durable paper of a type orig. made for documents (as government bonds) and now commonly used for letterheads and other stationery. At p. 250.

[7] *U.S. v. Gulf Ref. Co.*, 268 U.S. 542 (1925); *Associated Press v. F.C.C.*, 452 F.2d 1290 (D.C. Cir. 1971) [p]rovisions under a specific tariff designation prevail over those included under a more general heading." at 1296; *Corn Product Co. v. Hamburg-Amerika Lines*, 10 F.M.C. 388 (1967).

[8] *Kansas City So. Ry. Co. v. Carl*, 227 U.S. 639, 653 (1913).

1916 for freight overcharges caused by such error, must set forth sufficient facts to prove with reasonable certainty and definiteness the validity of its claim by a preponderance of the evidence.[9] Here, in fact, the carrier is not denying that the office stationery was made of sulphite bond paper so that no facts are disputed and in need of further proof.

In the absence of disputed facts, the interpretation of the tariff becomes a question of law. Under section 304 of the Informal Procedure for the Adjudication of Small Claims the parties to a proceeding may file with their pleadings memoranda, briefs, arguments, citing legal authority and precedents in support of their position. 46 C.F.R. § 502.304(a) and (e). As is evident from the record, PAHO availed itself of this opportunity.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[9] *Olin Construction Company, Inc. v. Occupational S. & H. Rev. Com'n*, 525 F.2d 464 (2d Cir. 1975). McCormick on Evidence (1972 ed.) at 853.

The Commission held that once the shipment has left the custody of the carrier, and is no longer available for inspection, the shipper has a "heavy burden" of proving that the shipment is other than described on the bill of lading. *Western Publishing Co. v. Hapag Lloyd A.G.*, 13 S.R.R. 16 (1972). This, "heavy burden" however, relates to the shipper's difficulty in obtaining the necessary evidence rather than to the weight to be given to such evidence.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-56

WEST GULF MARITIME ASSOCIATION

v.

THE CITY OF GALVESTON
(BOARD OF TRUSTEES OF THE GALVESTON WHARVES)

An indemnification requirement in a terminal tariff which would relieve a port from liability for its own negligence is an unreasonable practice violative of section 17 of the Shipping Act, 1916.

A terminal tariff requirement that steamship agencies and stevedoring companies obtain general liability and property damage insurance is reasonable, especially in light of the recent history of accidents at the port.

A terminal tariff requirement that the port be reimbursed litigation expenses if the port succeeds in litigation, but which does not require the port to pay such expenses if it unsuccessfully initiates litigation, imposes a unilateral obligation which is unreasonable and a violation of section 17 of the Shipping Act, 1916.

A terminal tariff item which would permit application of a port user's payments of port charges to the account of another user is unreasonable and violative of section 17 of the Shipping Act, 1916.

Robert Eikel for West Gulf Maritime Association

Benjamin R. Powel and *Carl S. Parker, Jr.* for the City of Galveston (Board of Trustees of the Galveston Wharves).

David M. Schacter, Richard L. Landes, Robert W. Parkin and *Leslie E. Still, Jr.* for California Association of Port Authorities.

Charles H. Lombard for Alabama State Docks Department.

Aaron W. Reese and *John Robert Ewers* for Bureau of Hearing Counsel.

REPORT AND ORDER

September 14, 1979

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

This proceeding was initiated upon the complaint of West Gulf Maritime Association (WGMA),[1] filed November 15, 1977, alleging that nine items of

[1] WGMA is a trade association composed of steamship agents and stevedore companies, using port facilities along the Gulf of Mexico.

Tariff Circuilar No. 4-D of the Galveston Wharves (the Port) violate sections 16 and 17 of the Shipping Act, 1916 (46 U.S.C. §§815, 816). Parties to the proceeding are WGMA, the Port, and Intervenors the California Association of Port Authorities (CAPA), the Alabama State Docks Department, and the Commission's Bureau of Hearing Counsel (Hearing Counsel).[2] Administrative Law Judge William Beasley Harris (Presiding Officer) issued an Initial Decision on May 1, 1979, in which he found three of the tariff items to violate section 17, three to be just and reasonable, and three to be "subjects for review and adjustment by the wharves."[3] The proceeding is now before the Commission on exceptions to the Presiding Officer's decision filed by WGMA, the Port, and CAPA. WGMA and Hearing Counsel filed Replies to these Exceptions.

Discussion and Conclusions

Although WGMA alleges section 16 and 17 violations in its complaint, it has neither persuasively argued its section 16 contentions in its briefs nor presented evidence during the hearings of undue preference or advantage. In fact, a WGMA witness testified that the provisions in issue have proved no disadvantage even to his three-person family enterprise. WGMA has failed to carry its burden in demonstrating any violation of section 16 of the Act. The remaining issues to be decided involve the allegations of section 17 violations.

In the discussion that follows, the tariff items at issue will be set forth *seriatim*, followed by the position of the parties and the Commission's conclusion on each.

Item No. 5(r):

"*USER, DEFINITION OF:* A user of the facilities managed and controlled by the Board of Trustees of the Galveston Wharves shall include, but not be limited to:

1. Any steamship agency and/or stevedoring company doing business on or in connection with such facilities.
2. Any person, partnership, corporation or other entity doing business on or in connection with such facilities.
3. Any person, partnership, corporation or other entity owning or having custody of cargo on or moving over such facilities."

The Presiding Officer found this item to be reasonable, to which finding WGMA excepts. WGMA argues that the definition of user is unnecessarily broad in that it includes steamship agents, persons without business connections with the Port, and persons not on the Port's premises. The Port, CAPA,[4] and Hearing Counsel argue that steamship agents are quite properly considered "users"; that the definition of user is not otherwise as broad as WGMA suggests; and that the definition is consistent with the Commission's decision in

[2] United States Lines, Inc. filed a petition to intervene on June 25, 1979, following the close of the hearing in this proceeding. When filed after hearings have been closed, a petition for intervention will not normally be granted. 46 C.F.R. section 502.72(a). Moreover, the petitioner's interest in the subject matter of the instant proceeding is adequately protected in Docket No. 78-15, *United States Lines, Inc. v. Maryland Port Administration*. Accordingly, the petition is denied.

[3] The context of these three findings indicates that the Presiding Officer found the items to be violative of section 17.

[4] CAPA concurs with the Port on every tariff item, except as otherwise indicated.

West Gulf Maritime Association v. Port of Houston Authority, 18 S.R.R. 783 (1978).

The Commission finds the definition of "user" to be a reasonable one. The rationale of *West Gulf Maritime Association v. Port of Houston Authority, supra,* is consistent with our finding that steamship agents are sufficiently involved in the use of port facilities to be subject to those tariff provisions which the Commission herein concludes are reasonable. Furthermore, the Commission has found, *infra,* that several of the tariff items in issue violate section 17, and this, too, diminishes the effect imputed to the definition by WGMA.

Item 98.1:

"*INDEMNITY:* Each User of the facilities of the Board of Trustees of the Galveston Wharves shall indemnify and save harmless the Board of Trustees of the Galveston Wharves and the City of Galveston from and against any and all claims, actions, damages, liability and expense, including reasonable Attorneys' fees and litigation expenses, in connection with loss of life, bodily injury and damage to property (including the property of such User), occurring in connection with the use of or arising from the use of any of the facilities of the Board of Trustees of the Galveston Wharves caused in whole or in part by any such User, such User's employees (including loaned employees), agents, contractors and invitees (other than those steamship agencies and stevedoring companies subject to Item No. 98.3), or arising from or incidental to such User's operations on the facilities of the Board of Trustees of the Galveston Wharves. Each User of the facilities of the Board of Trustees of the Galveston Wharves waives all claims such User may have against the Board of Trustees of the Galveston Wharves and/or the City of Galveston for loss or damage covered by any insurance policy or policies covering in whole or in part such Users' doing business on or in connection with the facilities of the Galveston Wharves, and each such User shall cause its insurance carrier or carriers to waive any right of subrogation with respect thereto and to so notify the Board of Trustees of the Galveston Wharves of such waiver."

The Port excepts to the Presiding Officer's finding that this item is unreasonable. The Port points out that indemnification is required only where the user is at least partially responsible for damage to cargo, and not where the Port is solely responsible. The Port argues that exculpatory clauses in tariff provisions are not void as a matter of law. It also contends that the subrogation clause in Item No. 98.1 is reasonable, because it requires a waiver only if the user is covered by an insurance policy, and properly places the risk of insured losses on the insurance company writing the primary coverage.

WGMA opposes Item No. 98.1, claiming that the item would require users to indemnify the Port against the Port's own negligence. Hearing Counsel concurs with WGMA that Item No. 98.1 is unreasonable, and emphasizes that the tariff item would require indemnification and waiver of claims and subrogation even when the Port is primarily negligent in an incident and the user but only slightly at fault.

It is well established that exculpatory clauses are invalid as a matter of law in common carrier and public utility relationships. *See, e.g., Bisso v. Inland Waterways Corp.,* 349 U.S. 85 (1955); *Express Co. v. Caldwell,* 21 Wall. 264 (1874). The Port relies heavily on *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.,* 360 U.S. 411 (1959), citing that case for the proposition that the *Bisso* rule does not apply to exculpatory clauses in tariffs filed with regulatory agencies. In *Southwestern Sugar,* however, the Court merely chose to let the Interstate Commerce Commission, rather than the Court, have the first opportunity to rule on the legality of the clause, and suggested that perhaps the towing rates in question reflected savings derived from application of the exculpatory clause. *Southwestern Sugar* is not authority for the permissibility of exculpatory clauses in tariffs such as the Port's. Moreover, the *Bisso* rule exception suggested in *Southwestern Sugar* does not apply in the instant proceeding. The record below does not indicate that any savings resulting from the exculpatory clause are passed on to users.[5]

Exculpatory clauses in terminal tariffs have been found by the Commission to violate section 17 of the Act. In *Truck and Lighter Loading and Unloading Practices at New York Harbor,* 9 F.M.C. 505, 515 (1966), the Commission found unreasonable a terminal operator's disclaimer of responsibility for truckers' delays, because the clause would exculpate the operator for delays for which it is at fault. The Commission's decision was upheld in *American Export Isbrandtsen Lines, Inc. v. Federal Maritime Commission,* 389 F.2d 962 (D.C. Cir. 1968). In *Lucidi v. Stockton Port District,* 19 S.R.R. 441 (June 8, 1979), a terminal tariff item which disclaimed responsibility for damage to cargo caused by rodents was found unreasonable. The Initial Decision, which became administratively final upon absence of review, stated:

> To permit the Port to isolate itself from liability, if such liability accrued by reason of the Port's negligence by the mere publication of an exculpatory tariff provision, is unjust and unreasonable, in violation of section 17 of the Act..

Lucidi, supra, 19 S.R.R. at 449

Although the Port's indemnification requirement in the instant proceeding would not apply if the Port were wholly responsible for an occurrence, it would apply in situations in which the Port were partially responsible, even if more so than the user. We find that the indemnity requirements and the waiver of claims and subrogation provisions of the Port's tariff are unreasonable for precisely the reasons enunciated in *Bisso, Truck and Lighter,* and *Lucidi,* and conclude that Item No. 98.1 is violative of section 17.

Item 98.3:

> *INSURANCE:* Each steamship agency and each stevedoring company doing business on or in connection with the facilities of the Board of Trustees of the Galveston Wharves shall keep in full force and effect Public Liability and Property Damage Insurance covering its operations to be carried out upon or in connection with the facilities of the Board of Trustees of the Galveston Wharves. The limits of liability shall be not less than $5,000,000 per occurrence. The Policy or Policies shall contain an endorsement insuring to such limits of liability the indemnity set forth in Item No. 98.1 of this Tariff, and shall contain a clause that the insurer will not cancel or change the insurance without first giving the Board of Trustees of the Galveston Wharves thirty (30) days prior written notice. Such insurance shall be placed in a company or companies having a current Best's General Policyholders Rating of A+ or A and a Best's Financial Rating of at least XII, or their equivalents, and a copy of the Policy or Policies of Insurance, or Certificate or Certificates of Insurance, shall be delivered to the Board of Trustees of the Galveston Wharves. Certificate or Certificates of Insurance so furnished shall certify that the Policy or Policies comply with the requirements of this item."

The Presiding Officer rejected Item No. 98.3 in its entirety. The Port excepts, contending that the item is a reasonable business necessity, especially in light of serious accidents at the Port in recent years resulting in payment of millions of dollars in settlements of claims. WGMA argues that Item No. 98.3

[5] *See also Dixilyn Drilling Corp. v. Crecent* Towing & Salvage Co., 372 U.S. 697, 698 (1963).

is unreasonable in requiring insurance of the indemnity set forth in Item No. 98.1, because no carrier or public utility may require a user to procure insurance for the carrier's or utility's benefit. Also, WGMA protests that the minimum $5,000,000 limit is excessively high. WGMA does not contest the general liability and property damage insurance requirements of the tariff item. Hearing Counsel considers the general insurance requirements and the $5,000,000 liability limit of Item No. 98.3 reasonable, but agrees with WGMA that the tariff item's requirement that users insure the indemnity set forth in Item No. 98.1 is unlawful.

For the reasons set forth in our discussion of Item No. 98.1, we conclude that the indemnity insurance requirement of Item No. 98.3 violates section 17. It is unreasonable to require a user to indemnify the Port against the Port's own negligence, and it is equally unreasonable to require the user to insure that indemnity. However, the record clearly establishes the need for users to obtain liability and property damage insurance. Accidents at the Port in recent years have caused millions of dollars in losses, and the Port has experienced increasing difficulty in obtaining sufficient insurance coverage. The record also reflects that obtaining insurance in the amounts required by the tariff has not proven prohibitive to users. It is concluded that the portions of Item No. 98.3 requiring steamship agencies and stevedoring companies doing business with the Port to obtain general liability and property damage insurance, and establishing a $5,000,000 minimum limit of liability, are just and reasonable practices.

Item 108.2:

"*LITIGATION EXPENSE*: In case suit shall be brought by the Board of Trustees of the Galveston Wharves through the City of Galveston to collect any monies due, enforce any provision or remedy any default under this tariff by a User of the facilities of the Board of Trustees of the Galveston Wharves, and the Board of Trustees of the Galveston Wharves through the City of Galveston shall prevail, such User shall pay all expenses incurred by the Board of Trustees of the Galveston Wharves through the City of Galveston in connection with such suit, including reasonable Attorneys' fees."

Item 108.3:

"*DELINQUENT INVOICES:* Any invoice unpaid on the last day of the month following the month in which the invoice was issued is delinquent. Delinquent accounts on which collection efforts require use of a legal counsel and/or litigation shall be assessed interest charges at the rate of ten percent (10%) per annum from the first date the invoice becomes delinquent, and in case of litigation, reasonable attorneys' fees (at least 10% of the amount due and owing) and litigation expenses will also be assessed."

Item Nos. 98.2 and 108.3[6] were ordered "reviewed and adjusted" by the Presiding Officer. WGMA argues that the litigation expense provisions of the items are invalid because each party to a dispute should pay only its own expenses. Hearing Counsel also challenges the litigation expense provisions.

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[6] Item No. 98.2 was cancelled at the Port's June 27, 1979 Board of Trustees meeting, and Item No. 108.3 was revised, effective August 1, 1979, to read as follows:

Any invoice unpaid on the last day of the month following the month in which the invoice was issued is delinquent. Delinquent accounts upon which suit is filed for the collection thereof shall be assessed interest charges at the rate of ten percent (10%) per annum *from the first day the invoice becomes delinquent until paid. If Judgment is obtained, Attorneys' fees of ten percent (10%)* of the amount adjudged due and owing shall be assessed.

Hearing Counsel is of the opinion that because these provisions are not reciprocal and do not provide that the Port will pay a user's litigation expenses in the event the user prevails in court, they are unreasonable. Thus, Hearing Counsel also excepts to the Port's amendment to Item No. 108.3, noting that the item still requires an award of attorneys' fees if the Port obtains judgment, but does not require the Port to pay attorneys' fees if it loses.[7] Hearing Counsel agrees, however, with the Port's deletion of Item No. 98.2. The Port defends the items, claiming that requiring litigation expenses to be borne by those who wrongfully give rise to that litigation is just and reasonable.

These tariff items impose a unilateral obligation on one party—the user. They do not require the Port to recompense users if the Port unsuccessfully initiates legal action. The Commission has found comparable one-sided requirements to be violative of section 17.[8] We conclude that Item Nos. 98.2 and that portion of 108.3 dealing with attorneys' fees are therefore unjust and unreasonable within the meaning of section 17.[9]

Item 98.4:

"*CARE, CUSTODY & CONTROL OF CARGO:* The rates published in this tariff do not provide for, and the Board of Trustees of the Galveston Wharves does not accept care, custody and control of any cargo or other property while on or in the wharves, docks, transit sheds, warehouses or other facilities managed and controlled by the Board of Trustees of the Galveston Wharves; except for cargo delivered to and receipted for by Pier Point Packers Division of Galveston Wharves for subsequent crating and further handling."

The Presiding Officer ordered the Port to "review and adjust" this tariff item. WGMA contends that the item is unjust in that it would absolve the Port from the necessity to maintain its facilities properly. The Port alleges, and Hearing Counsel agrees, that the disclaimer of care, custody and control of cargo was not intended as an exoneration from liability for the Port's negligence but rather indicates that the Port does not become a custodian or bailee of inbound or outbound cargo.[10]

The Commission finds that Item No. 98.4 does not, contrary to WGMA's contentions, disclaim liability for the Port's negligence in its occasional loading and unloading of trucks and railcars. The item merely reflects that the Port is not an operating port; its personnel do not regularly perform typical terminal services, unless specifically requested to do so for a fee. The Port admits, and the record reflects, that the Port honors claims for cargo damaged by its negligent handling. With the understanding that this tariff item does not imply a disclaimer of liability for negligent cargo handling, it is concluded that it is not in violation of section 17.

[7] WGMA, however, expresses no opposition to the Port's revision of Item No. 108.3.

[8] *See, e.g., Baton Rouge Marine Contractors, Inc. v. Cargill, Inc.*, 18 F.M.C. 140, 164 (1975), *aff'd, Cargill, Inc. v. Federal Maritime Commission*, 530 F.2d 1062 (D.C. Cir. 1976), *cert. den.*, 429 U.S. 868 (1976), in which a terminal operator's imposition of an indemnity requirement on stevedores for delays caused by failure to provide sufficient crews was found to be an unreasonable practice, because it awarded no compensation to stevedores for delays caused by the terminal operator.

[9] The revised version of Item No. 108.3 is also unacceptable, because it continues to require that attorneys' fees be paid only if the Port is the successful litigant.

[10] Except for cargo delivered to and receipted by the Pier Point Packers Division of the Port, as expressly noted in the tariff item.

Item 108.2(c):

"*PAYMENT OF CHARGES:*

(c) The Board of Trustees of the Galveston Wharves reserves the right to apply any payment received against the oldest bills rendered against vessels, their owners and/or agents, or other Users of the facilities."

This item was found unlawful by the Presiding Officer. WGMA, CAPA, and Hearing Counsel contend that it is unjust in that it enables payments made by an agent on one principal's account to be applied to another's. The Port argues the item's legality on the ground that a steamship agent should be the party held primarily responsible for port charges.[11]

We find Item No. 108.2(c) to be a violation of section 17, and reject the Port's contention that the Commission should take action only upon the tariff's "abusive application" rather than to find it unlawful on its face. This tariff item would permit a user's payment to the Port to be applied to another user's account, if the latter were delinquent in its payments and the two shared an agent. Despite the Port's assurances that such an effect was not intended, the unreasonableness of the provision is readily apparent.[12]

Item 108.4:

"*DELINQUENT LIST:* All vessels, their owners and/or agents, stevedoring companies, or other Users of the facilities of the Board of Trustees of the Galveston Wharves whose account becomes delinquent as set forth in Item No. 108.3 may be placed on the delinquent list and may be denied further use of the facilities until all such charges together with any other charges due, shall have been paid."

Item No. 108.4 was found lawful by the Presiding Officer, despite WGMA's and Hearing Counsel's contention that the item would subject an agent to denial of use of facilities when one of its principals' accounts becomes delinquent. The Port argues that the tariff item would impose such sanctions only on the delinquent parties.

The Commission does not interpret Item No. 108.4 to permit denial of use of facilities by users not actually delinquent in making payments. We interpret this tariff item to permit sanctions only on the actual deliquent parties, unlike Item No. 108.2(c), which, prior to revision, clearly authorized sanctions on users not actually delinquent. With this understanding, we find that Item No. 108.4 is reasonable and does not violate section 17.

Item 109.1(b):

"*CARGO STATEMENTS REQUIRED:*

(b) *Certified Pier Demurrage Statements*

All vessels, their owners and/or agents using the facilities of the Board of Trustees of the Galveston Wharves shall file with the Billing Department of the Galveston Wharves a Certified Statement of Pier Demurrage on all outbound cargo loaded from such facilities. Such Certified Statement of Pier Demurrage must be filed on the forms and in the manner prescribed by the Executive Director and General Manager. A supply of the prescribed form may be obtained from the Galveston Wharves Billing Department.

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[11] This tariff was also revised, effective August 1, 1979. Item No. 108.2(c) now reads:

The Board of Trustees of the Galveston Wharves reserves the right to apply any payment received against the oldest bill rendered against vessels, their owners and/or agents, or other users of the facility, except that payment made on behalf of specific vessels and/or owners will be applied, as specified by the payor.

[12] *The Port's revision of this tariff item eliminates its fatal defect, however, and the Commission approves the amendment.*

In lieu of filing a Certified Statement of Pier Demurrage, the vessel, its owner and/or agent, may file a certified copy of the vessel's manifest of outbound cargo and copies of all Receiving Reports on cargo loaded aboard the vessel along with a sworn statement certifying that the copies furnished are true and correct copies of the Receiving Reports.

The Certified Statement of Pier Demurrage, or in lieu thereof, copies of Receiving Reports and manifest of outbound cargo, must be filed not later than ten (10) days after sailing. Failure to file Certified Statement of Pier Demurrage, or Receiving Reports and manifest, within time specified shall constitute cause for suspension of preferential berth assignment, suspension of credit, or suspension of other vessel privileges until remedied."

WGMA, protesting the Presiding Officer's approval of this tariff provision, argues that the pier demurrage statement requirements are unjust in that they are ambiguous and permit suspension of privileges of vessels which are not delinquent. The Port and Hearing Counsel disagree, finding them reasonable in all respects.

We do not read Item No. 109.1(b) to permit suspension of vessel privileges of those not actually delinquent in submitting pier demurrage statements. We conclude, therefore, that the provision's requirements and sanctions for noncompliance are reasonable.

In conclusion, Item Nos. 98.1, 98.2, 108.2(c) (prior to amendment), the portion of Item No. 108.3 dealing with attorneys' fees and litigation expenses (even as amended), and the portion of Item No. 98.3 requiring insurance of the indemnity set forth in Item No. 98.1, are found to be unjust and unreasonable practices in violation of section 17 of the Shipping Act, 1916. Item Nos. 5(r), 98.4, 108.4, and 109.1(b), as interpreted by the Commission, are found to be reasonable, as are those portions of Item Nos. 98.3 and 108.3 not found unreasonable.[13]

THEREFORE, IT IS ORDERED, That Item Nos. 98.1, 98.2, 108.2(c), and those portions of Item Nos. 98.3 and 108.3 found unlawful, are cancelled, effective immediately; and

IT IS FURTHER ORDERED, That the Board of Trustees of the Galveston Wharves file an amended tariff within 30 days, deleting the provisions found to be unlawful; and

IT IS FURTHER ORDERED, That the Exceptions of West Gulf Maritime Authority are denied; and

IT IS FURTHER ORDERED, That the Exceptions of the City of Galveston (Board of Trustees of the Galveston Wharves) and of the California Association of Port Authorities are granted to the limited extent indicated, and denied in all other respects; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

[13] Exceptions not specifically referred to in this Order have nevertheless been fully considered by the Commission.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-17

FARRELL LINES, INC.

v.

ASSOCIATED CONTAINER TRANSPORTATION (AUSTRALIA LTD.)
REDERIAKTIEBOLAGET TRANSATLANTIC
PAD SHIPPING AUSTRALIA PTY. LTD.

NOTICE

September 17, 1979

Notice is given that no appeal has been taken to the August 10, 1979, dismissal of the complaint in 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) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

No. 79-17

FARRELL LINES INCORPORATED

v.

ASSOCIATED CONTAINER TRANSPORTATION (AUSTRALIA) LTD.; REDERIAKTIEBOLAGET TRANSATLANTIC; AND PAD SHIPPING AUSTRALIA PTY. LTD.

DISCONTINUANCE OF PROCEEDING

Finalized September 17, 1979

PAD Line moves that the subject proceeding be discontinued. Farrell Lines has withdrawn its complaint, and Columbus Lines has withdrawn its intervention. These withdrawals were the result of a "Stipulation of Settlement" entered into by Farrell, Columbus and PAD Line. This stipulation is self-contained and constitutes the only and complete agreement made by Farrell, Columbus and PAD to settle their differences. Blue Star Line, in its capacity as a member of the Pacific Coast Australasia Tariff Bureau (PCATB) also consents to the above stipulation.

Hearing Counsel were permitted to intervene. Hearing Counsel now request that the complaint be dismissed, but subject to any action the Commission may wish to take to review the allegations contained in the complaint. Hearing Counsel request that the Administrative Law Judge find that the Stipulation of Settlement entered into by the parties constitutes a section-15 agreement and that it requires Commission approval.

For reasons stated below, the motion to discontinue is granted, and it is further found that the "Stipulation of Settlement" does not contain any provisions which require filing and approval under section 15 of the Shipping Act, 1916 (the Act).

This complaint was filed by Farrell Lines against the three-named respondents, which operate a joint service, pursuant to FMC Agreement No. 9882, in the trade between the Pacific Coast of the United States and Australia. The three respondents (under the flags of the United Kingdom, Sweden, and Australia) operate their joint service under the trade name of Pacific Australia Direct Line (PAD Line). PAD Line was operating three ro/ro vessels, and had advised Farrell that PAD Line would introduce a fourth ro/ro vessel into the trade at the end of April or early in May 1979.

Farrell and PAD Line, as well as intervener Columbus, are members of the Pacific Coast Australasia Tariff Bureau (PCATB). PCATB[1] is a conference created pursuant to FMC Agreement No. 50, and fixes rates in the trade herein to Australia, New Zealand, and numerous Pacific Islands.

PAD Line had announced its intention to withdraw from PCATB as of May 14, 1979, about the same time as the fourth ro/ro vessel would be available for service in the trade. The only other operators in the trade (besides Farrell, PAD, Columbus and Blue Star) are two nonconference lines (Karlander Kangaroo Line and FESCO).

There were said to be as of March 13, 1979, eighteen common carrier vessels in the trade, PAD with three, Farrell four, Columbus four, Karlander four, and FESCO four.

Farrell believes that it and the other carriers in the trade were experiencing insufficient cargo at remunerative rates. Farrell alleged that the fourth vessel to be put into the trade by PAD would not be owned or chartered exclusively by PAD, but rather that it is owned or chartered, at least in part, by Seaboard Shipping Company (Seaboard).

Further, it was alleged that Seaboard is itself, or through an affiliate, a shipper of lumber from British Columbia to Australia, and that Seaboard would receive special rates from PAD Line, with such rates not available to any other shipper. Farrell alleged violations of sections 15, 16 and 17 of the Act.

The "Stipulation of Settlement" recites five covenants, which are hereby summarized as followed:

1. The parties to the settlement, (PAD Line, Farrell Lines and Columbus Line), as PCATB members have agreed on a current tariff of rates which are compensatory and permit these PCATB members to be competitive in the trade.
2. For PCATB to function better, communications amongst its members require improvement, and the needs of the trade should be kept under regular review.
3. PAD Line is withdrawing its pending resignation from PCATB.
4. Farrell Lines is withdrawing its "Petition for Order to Show Cause" filed with the FMC, and Farrell Lines and Columbus Lines are withdrawing respectively their Complaint and Intervention in the subject proceeding (No. 79-17).
5. Farrell Lines, Columbus Line, and PAD Line expressly reserve their rights to raise the matters and issues referred to in such Petition and in such Complaint and Intervention, and their withdrawals are "without prejudice."

However, so long as PAD Line remains a PCATB member, Farrell Lines and Columbus Line will not oppose the introduction of the fourth ro/ro ship in the PAD Line fleet.

[1] On or before May 14, 1979, Blue Star Line apparently also became a member of PCATB. Blue Star apparently was not a member when the complaint in No. 79-17 was filed March 13, 1979.

"In addition, as long as PAD Line remains a PCATB member and operates no more than its existing four ships (or replacement vessels of comparable tonnage) plus occasional spot charters of temproary duration, Farrell Lines and Columbus Lines will not raise the issues or matters referred to in such Petition and in such Complaint and Intervention."

From a careful examination of the "Stipulation of Settlement," it is found and concluded that the stipulation does not contain any provisions which require filing and approval under section 15 of the Act.

Paragraph 1 of the stipulation briefly says that PCATB conference members have agreed on compensatory rates. This agreement in no way changes or goes beyond the approved PCATB agreement.

Paragraph 2 of the stipulation merely expresses the desire to improve communication among PCATB members.

Paragraph 3 of the stipulation provides that PAD Line withdraws its pending resignation from PCATB. PAD Line retains the right to withdraw from PCATB at any time. PAD Line makes no pledge to remain or not to remain in the Conference.

Paragraph 4 of the stipulation contains only the withdrawal of the complaint, intervention, etc.

Paragraphs 1 through 4 of the stipulation clearly contain no terms requiring section-15 approval.

In paragraph 5 of the stipulation, the three parties expressly reserve the right to relitigate the matters and issues in their Petition and Complaint-Intervention.

In addition, in paragraph 5, and this is the main matter stressed by Hearing Counsel, the three parties agree that as long as PAD Line remains a member of PCATB and operates no more than its existing four ships plus occasional spot charters, Farrell and Columbus will not relitigate the matters raised in their Petition and Complaint-Intervention.

The stipulation in paragraph 5 does *not* say that PAD Line will or will not expand its fleet beyond four vessels. Further, the stipulation in paragraph 5 does *not* say that PAD Line will or will not remain a PCATB Member.

Thus, none of the parties has made any binding commitment or agreement concerning its future continuing operations. The FMC's jurisdiction under section 15 applies to agreements of a continuing nature, but not to agreements such as the one herein.

The agreement herein is merely a promise not to litigate and the policy of this agency generally is to encourage the termination of litigation.

The Petition and Complaint-Intervention referred to above have been withdrawn without prejudice.

The subject proceeding hereby is discontinued.

The "Stipulation of Settlement" is not subject to Commission jurisdiction under section 15 of the Act.

(S) CHARLES E. MORGAN
Administrative Law Judge

August 10, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-47

SEA-LAND SERVICE, INC. (SEA-LAND) PROPOSED FIVE PERCENT GENERAL RATE INCREASE IN SIX PUERTO RICO AND VIRGIN ISLANDS TRADES

NOTICE

September 19, 1979

Notice is given that no exceptions have been filed to the August 17, 1979, initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

No. 79-47

SEA-LAND SERVICE, INC. (SEA-LAND) PROPOSED FIVE PERCENT GENERAL RATE INCREASE IN SIX PUERTO RICO AND VIRGIN ISLANDS TRADES

Finalized September 19, 1979

A five percent general rate increase, filed by Sea-Land Service, Inc., applicable to six Puerto Rico and Virgin Islands trades found to be just and reasonable.

Donald J. Brunner for respondent, Sea-Land Service, Inc.
William Blum for protestant, Government of the Virgin Islands.
John Robert Ewers, C. Douglass Miller and *Polly H. Frawley* as Hearing Counsel.

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

Pursuant to authority of sections 18(a) and 22 of the Shipping Act, 1916, as amended, 46 U.S.C. §817(a) and sections 3 and 4 of the Intercoastal Shipping Act, 1933, as amended, 46 U.S.C. §§845 and 845a, the Commission instituted an expedited investigation[2] into the lawfulness[3] of a five (5) percent general rate increase filed by respondent, Sea-Land Service, Inc. (Sea-Land). The rate increase was proposed in tariff matter[4] filed January 26, 1979, and was scheduled to become effective April 1, 1979, but its effective date was postponed to May 1, 1979, to coincide with a similar increase filed by a competing carrier, Puerto Rico Maritime Shipping Authority.

[1] The 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 investigation was instituted by Order of Investigation and Hearing (OIH) served April 30, 1979.

[3] The statutory test of lawfulness is whether the increased rates are just and reasonable; see 46 U.S.C. §§817(a) and 845.

[4] The OIH placed the following tariff matter under investigation:

1. FMC-F No. 27 (applying between U.S. Atlantic and Gulf Ports and Virgin Island Ports); Supplement No. 6 and 49 specified revised tariff pages.
2. FMC-F No. 34 (applying between U.S. Atlantic Ports and Ports in Puerto Rico); Supplement No. 8.
3. FMC-F No. 36 (applying from U.S. South Atlantic Ports to Ports in Puerto Rico); Supplement No. 6.
4. FMC-F No. 37 (applying from Ports in Puerto Rico to U.S. South Atlantic Ports); Supplement No. 6.
5. FMC-F No. 40 (applying from U.S. Gulf Ports to Ports in Puerto Rico); Supplement No. 5.
6. FMC-F No. 41 (applying from Ports in Puerto Rico to U.S. Gulf Ports); Supplement No. 5.
7. FMC-F No. 45 (applying from Rail Carrier's Terminals at U.S. Pacific Seaport Cities to Ports in Puerto Rico and the U.S. Virgin Islands); Supplement No. 6.*

The second ordering paragraph of the OIH ordered that "The proceeding be limited to an investigation of [six] areas." Six questions posed by the Commission delineated those areas. The paragraph was properly construed to mean that within the context of the overall inquiry into the lawfulness of the rates, the Commission was stressing the need for factual development of areas of special concern in this proceeding.[5]

The OIH named the following as parties to the proceeding: Sea-Land was named the respondent; the Government of the Virgin Islands (Government or VI) and Puerto Rico Manufacturers Association (PRMA)[6] were named protestants; Hearing Counsel was named a party pursuant to Rule 42 of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.42.

The OIH, among other things, also established a procedural schedule for the proceeding pursuant to P.L. 94–475, a law amending provisions of the Intercoastal Shipping Act, 1933.[7]

Background

After the filing of the increase and General Order 11 submissions and before the investigation was instituted, the Commission's Bureau of Industry Economics (Staff) conducted an analysis of the financial data submitted by Sea-Land. The Staff detected certain errors which Sea-Land corrected after discussions between Staff and Sea-Land's financial representative. The OIH took notice of those events, stating, at 5, "a number of areas regarding Sea-Land's data have been clarified."

8. FMC–F No. 46 (applying from Ports in Puerto Rico and the U.S. Virgin Islands to Rail Carrier's Terminals at U.S. Pacific Seaport Cities).*
9. FMC–F No. 53 (applying between San Juan, Puerto Rico and Canadian Ports with Interchange at New Jersey—Intermodal Tariff); Supplement No. 2 and 32 specified revised tariff pages.**

*Prior to the hearing, Sea-Land filed a motion to discontinue that portion of the investigation involving tariffs FMC–F No. 45 and FMC–F No. 46. The motion was based upon the recent decision in *Trailer Marine Transport Corp. v. F.M.C.*, 602 F. 2d 379 379 (D.C. Cir. 1979) (*TMT* case), which held that the Interstate Commerce Commission has exclusive jurisdiction over rail-water movements in the domestic offshore trades. In its reply to the motion, Hearing Counsel urged (1) that the motion was not then ripe for decision because the time for filing a petition for writ of certiorari in the *TMT* case had not expired, and (2) that the cited tariffs, insofar as they provide for motor-rail-water routings (they also provide for rail-water routings), are distinguishable from the rail-water operations under review in the *TMT* case. Inasmuch as (1) the Commission has not sought certiorari in the *TMT* case and the time for doing so has expired, and (2) the physical transfer of shipments at the United States ports named in the motor-rail-water routings are, in fact, rail-water interchanges and the movements are thus regulated by the Interstate Commerce Commission as rail-water operations—the *TMT* case appears to be controlling. This, of course, means that the cited tariffs, insofar as the questions of the lawfulness of the rates is concerned, are beyond the jurisdiction of this Commission. Accordingly the motion to discontinue should be granted. Nevertheless, because the proceeding was tried on the theory that the water portion of the rail-water tariffs were subject to the jurisdiction of the Commission, this ruling will not disturb the factual presentation agreed to by the parties.

**The Commission has determined that shipments of goods by motor carrier from Canada to Elizabeth, N.J., and thence by water to San Juan, Puerto Rico, under a through bill of lading, are in the domestic offshore trade and not in the foreign commerce of the United States and are regulated under the Intercoastal Shipping Act, 1933, as amended. *Pan American Industries, Inc. v. Sea-Land Service, Inc.*, 18 SRR 1697 (1979).

[5] The parties participating in the proceeding have agreed that Exhibit No. 3, as supplemented by portions of Exhibits Nos. 5 and 6, all of which were received in evidence, constitute the answers to the six questions. The full text of the questions and responses appears as an Appendix to this decision.

[6] PRMA notified Administrative Law Judge Stanley M. Levy, then the presiding judge in the proceeding, that it would not appear at the prehearing conference on May 10, 1979. PRMA did not thereafter participate in the proceeding.

[7] The rate increases were filed subsequent to the effective date of P.L. 95-475, but prior to the effective date of the Commission's Procedural Rules implementing P.L. 95–475. (The Commission Rules (46 C.F.R. §502.6) became effective February 14, 1979). Therefore, Sea-Land filed an historic General Order No. 11 submission covering the fiscal year ending November 30, 1978, and a projected General Order No. 11 submission commencing May 1, 1979, in accordance with the rules in effect on January 26, 1979, the date when the general increase was filed.

At the prehearing conference, Judge Levy issued a number of procedural orders (which led, ultimately, to a stipulated record and a shortened proceeding) and scheduled the hearing for June 25, 1979.

Following up on the prehearing conference, between May 21, 1979 and June 25, 1979, there were numerous contacts between Sea-Land, the Government, Staff and Hearing Counsel. (Hereafter, references to Staff may sometimes include Hearing Counsel). The purpose was to reconcile differences, to have Sea-Land provide additional data to Staff and the Government and to arrive at a stipulated record. Understandably, the problems of distance and communication between the contiguous states and the Virgin Islands hampered the parties' efforts to reach agreement on a stipulation prior to the hearing.

I presided at the hearing because Judge Levy was temporarily incapacitated by a physical injury. However, consistent with Judge Levy's undertakings and the initiative of the parties, I immediately recessed the hearings to permit the parties to continue discussions. The additional discussions were fruitful and led to a stipulated record and proposed findings of fact, jointly submitted by all parties. While Judge Levy was recovering from surgery, the case was reassigned to me for all purposes.

It should also be noted that the Government's petition for reconsideration of the OIH, filed May 22, 1979, which was opposed by Sea-Land and Hearing Counsel, was denied by Order of the Commission, served July 3, 1979. The petition sought to have the effect of the proposed rate increase on the economy of the Virgin Islands included as a specified issue in the proceeding.

FACTS

Sea-Land serves the United States Atlantic, Gulf and Pacific Coast ports and the offshore domestic trade of Puerto Rico and the Virgin Islands with five vessels on two separate itineraries. The first, called the Crescent service, serves the following ports, in sequence: Elizabeth, San Juan, Kingston (Jamaica), New Orleans, Houston, Kingston, San Juan, Elizabeth. The Crescent service is weekly and requires four ships. The second, called the South Atlantic service, serves the following ports, in sequence: Baltimore, Charleston, Savannah, Jacksonville, San Juan, Baltimore. The South Atlantic service is biweekly and requires one ship.

The West Coast/Puerto Rico–Virgin Islands tariffs are joint rail/water tariffs with the cargo moving via the port of Houston.[6] The Atlantic/Gulf Virgin Islands trade is served via transshipment at San Juan. The Canadian/Puerto Rico service is overland via rail or truck between Canada and Elizabeth and thence by water. All other services are port to port.

[6] See n. 4*, *supra*.

In its General Order No. 11 filing, Sea-Land computed its rate base in the trade as follows:

	Historic Year	*Projected Year*
Canada/Puerto Rico	$ 327,557	$ 241,000
East Coast/Virgin Islands	505,816	442,000
U.S. North Atlantic/Puerto Rico	6,503,812	4,852,000
U.S. South Atlantic/Puerto Rico	1,299,790	1,859,000
U.S. Gulf/Puerto Rico	3,815,816	3,672,000
U.S. Pacific/Puerto Rico Islands	5,610,619	4,170,000
Total	$18,063,455	$15,236,000

The net income and rate of return for the historic year and Sea-Land's forecast of net income and rate of return for the projected year are:

	Historic Year Net Income	*Rate of[9] Return*	*Projected Year Net Income*	*Rate of[9] Return*
Canada/Puerto/Rico	$ 32,736	10%	($55,620)	loss
East Coast/Virgin Islands	(33,408)	loss	(76,140)	loss
U.S. North Atlantic/ Puerto Rico	(637,905)	loss	(1,170,180)	loss
U.S. South Atlantic/ Puerto Rico	103,935	8%	129,060	6.94%
U.S. Gulf/Puerto Rico	(52,604)	loss	(103,140)	loss
U.S. Pacific/Puerto Rico-Virgin Islands	(830,086)	loss	(466,020)	loss
Total	($1,417,332)	loss	($1,742,040)	loss

Staff recomputed Sea-Land's projected rate of return by applying its projected volume to the historic data. The calculation involved multiplying the historic terminal and container expense by the projected volume factor to arrive at a projected terminal and container expense. This projected terminal and container expense was then used to recompute vessel operating expense, vessel operating expense relationship, administrative and general expense, and working capital. The Staff's computation does not include any factor for inflation which may have occurred from the end of the historic year (November 30, 1978) to the beginning of the projected year (May 1, 1979); nor does it consider a factor for increased expense due to inflation during the projected year. Staff

[9] Net income/rate base = Rate of Return.

shows the following rate base, net profit and rate of return for the projected year:

	Rate Base	*Net Profit*	*Rate of Return*
Canada/Puerto Rico	$ 238,000	$ 4,160[10]	1.74%
East Coast/Virgin Islands	460,000	3,640	.79
U.S. North Atlantic/Puerto Rico	4,659,000	[146,000]	loss
U.S. South Atlantic/Puerto Rico	1,927,000[11]	240,760[12]	12.49%
U.S. Gulf/Puerto Rico	3,653,000[11]	319,800	8.75%
U.S. Pacific/Puerto Rico Virgin Islands	4,160,000[11]	[34,000]	loss
Total	$14,642,000	$456,360	3.1%

Fair Rate of Return

The lawfulness of a general rate increase is measured by the fairness of a carrier's rate of return on equity. *Matson Navigation Company—Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Offshore Trade*, 18 SRR 1351, 1354–1357 (1978) (hereafter, *Matson III*). John Shipman, a staff economist, was the only witness to testify on this issue.

His testimony demonstrates that, following accepted analytical methods approved by the Commission in *Matson III*, he determined that the projected rate of return on equity would be 17.3% and that this rate would be fair.

Mr. Shipman concluded that 17.3% would be the rate of return on equity by also finding the rate of return on rate base to be 12.73% (a rate that he found Sea-Land to be entitled); the imbedded cost of debt rate to be 9.86%; and Sea-Land's debt equity ratio to be 1.387. Where those three factors (rate of return on rate base, imbedded cost of debt rate and debt equity ratio) are known, the rate of return on equity is susceptible of computation by mathematical formula. *Matson III, supra*, 18 SRR at 1354 n. 8.

Knowing the rate of return on equity, however, does not establish its fairness. This remains to be determined under the tests established in *Bluefield Waterworks and Improvement Company v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923) and *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). Those cases hold, in effect, that a carrier is allowed to earn a rate of return, equal to that generally made on investments in other businesses having corresponding risks, and which generates enough

[10] In response to Question 1 of the OIH, Sea-Land stated that the terminal & container expense in this trade was increased by $154,000 as a result of an accounting change in the treatment of overland costs. See Appendix, Attachment 1. In Staff's recomputation, this figure was subtracted from Sea-Land's income projections.

[11] In response to Question 3 of the OIH, Sea-Land stated that facility and crane investment for the projected year should not have been allocated evenly between South Atlantic and Gulf "locations," but that 20% of the investment should be charged to South Atlantic locations and 80% to Gulf locations. (See Appendix). As a result of this change in allocation, Staff shifted $474,000 in facility and crane investment from the U.S. South Atlantic/Puerto Rico trade to the U.S. Gulf/Puerto Rico trade. However, the $474,000 investment should have been allocated to both the U.S. Gulf/Puerto Rico and U.S. Pacific/Puerto Rico-Virgin Islands trades, with $227,000 allocated to U.S. Gulf/Puerto Rico and $246,000 to U.S. Pacific/Puerto Rico-Virgin Islands as each trade serves Gulf locations.

[12] Projected terminal and container expense in this trade was increased by $152,000 as a result of the addition of direct vessel calls at the port of Savannah, Georgia.

revenue to allow it to maintain its credit and attract capital. Mr. Shipman compared the 17.3% with industries analyzed by *Standard and Poors* for 1977 and found that Sea-Land would rank in the third decile for average return on equity for United States industries. He also compared the 17.3% with 1978 earnings of airlines (22.1%), common carrier trucking (18.4%) and total transportation 8.2%)[13] and again found the 17.3% to be fair, especially in view of the economic and business risks associated with the trades in which Sea-Land is engaged.

Mr. Shipman was not cross-examined because Sea-Land's rate of return for any individual trade under investigation does not exceed what Mr. Shipman considers reasonable. (Note, the Staff computes the average return for all the trades to be 3%—Sea-Land computes a loss for all the trades). Thus, for purposes of this proceeding, only, the parties concede the accuracy of Mr. Shipman's determinations that 12.73% is the maximum permissible (fair) rate of return on rate base and that 17.3% is the maximum permissible (fair) rate of return on equity for Sea-Land in the trades.

Discussion and Conclusion

In post hearing briefs all parties agree that the general rate increase is lawful. There is nothing in the record to the contrary. The preponderance of the evidence discloses that Sea-Land needs the additional projected revenues which the general rate increase was designed to produce.

Accordingly, I find that Sea-Land has met its "burden of persuasion" and has shown that the rates contained in the tariff matter under investigation are just and reasonable and, therefore, lawful.

I find, further, that the answers to the six specified questions which appear in the Appendix satisfy the Commission's special inquiry.

Additional Matters

Sea-Land submitted a post hearing brief for the purpose of showing that if Staff has included an inflation factor in Staff's projections, which Sea-Land considers to be on the conservative side, it would be shown even more conclusively that Sea-Land's rate of return on rate base and equity in the individual trades and for all trades were well within Staff's perimeters.

Hearing Counsel concedes that Staff's approach, which did not take any inflation factor into account, was conservative. It agrees that if the inflation factor were considered the result would be a lower than 12.73 percent return on rate base and lower than 17.3 percent return on equity.

The Government asks the inflation factor issue not enter into the decision because the allowable rate of return calculated by Staff has not been exceeded without taking inflation into account. It also notes affirmatively that inflation factors should not be considered because there is no foundation in the record to support various conclusions which might be reached, as urged by Sea-Land.

[13] Total transportation is not an apposite indicator because it includes the depressed rate of return (1.3%) of Class I Railroads.

The Government's position is well taken. Absent evidentiary support there is no basis for deciding what inflationary factor to use (among others, e.g., consumer or wholesale price index). Moreover, it would be a moot exercise inasmuch as the lawfulness of the general rate increase stands on the evidentiary record without the need for anything further.[14]

In the light of the foregoing findings and conclusions, the investigation is ordered discontinued.

(S) SEYMORE GLANZER
Administrative Law Judge

August 14, 1979

[14] The Government hes also commented on two other matters which it acknowledges are not central to the disposition of the case, but which it wishes to be brought to the attention of the Commission.

The first is procedural and refers to the presentation and distribution of data, beginning with the carrier's General Order No. 11 submissions. Some but not all of the problems encountered by the Government seem to have been corrected by the new Rules of Practice and Procedure governing general increase cases which went into effect after this proceeding began. See 46 C.F.R. §502.67.

The second comment refers to a substantive matter—Sea-Land's method for projecting its investment in vessels. The Government is concerned about Sea-Land's listing the class of vessel expected to be used rather than the specific vessel.

The final substantive rules (usually referred to as General Order No. 11 rules) implementing P. L. 95-475 have not been issued. It is understood that the last day for comment on the proposed substantive rules (46 C.F.R. §512) proposed in Docket No. 78-5 was August 8, 1979.

Because the matters raised by the Government are not essential for resolution of the issues in this proceeding and given the expedited nature of this proceeding under the time constraints of P.L. 95-475, it would be inconvenient to discuss them further here. However, the Government is not without recourse even though the procedural rulemaking proceeding implementing P.L. 95-475 hes ended and the substantive rulemaking proceeding has been closed for comment. Rulemaking proceedings are "open-ended," *United States v. Florida East Coast R. Co.*, 410 U.S. 224, 242 (1973), and the standing Domestic Offshore Rates Committee, under its Chairman, Commissioner Leslie Kanuk, is open for business.

APPENDIX

AGREED ANSWERS TO THE SIX QUESTIONS POSED IN THE OIH

Question 1

What effect did Sea-Land's change in the treatment of overland costs from a reduction of revenue to an increase in "terminal and container expense" have on the calculation of projected revenue and, in light of the change, how can the projected revenue be compared with prior period revenues?

Answer

An analysis of Sea-Land's projected versus historical revenue (see Attachment 1) shows that after adjusting the projection for miscellaneous income, the projected 5% GRI, and accounting reclassification, projected revenues in all but one trade reflect a higher rate per load than has historically been attained. Overall, revenue declined by 10% and volume by 19%. This optimism is based on the need to improve returns by upgrading the mix of cargo carried. In the Canada-Puerto Rico trade, revenue declined by 7% more than the volume decline would justify. The remaining $35,000 rate variance is not enough to impact significantly the rate of return projected for this trade.

In addition to the $154,000 increase resulting from the accounting change, the projected terminal and container expense were further explained in Exhibit Nos. 5 and 6 as follows:

East Coast/Virgin Islands

The difference in terminal and container expense for this trade as originally reported was $317,780, but the actual historical expenses were understated by a total of $240,424—$133,610 for warehouse expense plus $106,814 for assessments (Appendix, Attachment 4). After increasing the base year for the amount of the understatement, the difference between the actual year and projected year is $77,356 or 15 percent.

U.S. South Atlantic/Puerto Rico

In addition to the 40 percent volume increase projected in this trade, the addition of the Savannah, Georgia facility for a full year in the projection (only partially reflected in the actual year) accounts for $152,000 of the difference in expense for this trade.

U.S. Pacific Coast/Puerto Rico and Virgin Islands

Omitted from Sea-Land's historic expenses were portions of the Houston, Texas terminal and container expenses allocated to this trade. The appropriate allocations are explained as follows:

Operating Statistics and Expense

Total loads handled at Houston during the period were 45,665. The service portion was 15,827 or 34.66% of the total. The trade percentages of the service were 27% for the Gulf trade (4,275 + 15,827), and 45% for the West Coast Trade (7,145 + 15,827).

The total terminal and container expense at Houston amounted to $10,534,551 and $3,651,275 was allocated to the service per the 34.66% factor noted above. By applying the West Coast Trade allocation factor of 45% to the service expense, after eliminating warehouse charges, (West Coast trade cargo not platformed at Houston), produces $1,377,033.

This figure is a product of the following calculation:

$$3,651,275 − $591,202 = $3,060,073
$3,060,073 × .45 = $1,377,033

The effect of this adjustment is to raise the terminal and container expense reported in the historical G.O. 11 to $3,416,858 ($2,039,825 + $1,377,033), which, when compared to the projected level, shows a decline of $14,858.

Question 2

Why are direct vessel and port and cargo expenses in the South Atlantic/Puerto Rico trade projected to increase by 60% while the volume of traffic is projected to increase by only 40%?

Answer

Vessel expense increased by $358,972 or 64% over the level of expense in the actual year ending November 30, 1978. As the Order of the Commission noted, a substantial portion of the additional direct vessel expense arises from the projected volume increase in the South Atlantic trade of 40%. Through the allocation technique prescribed in assigning vessel expenses to the various trades, it is correct to expect a fairly proportionate increase of expense with increases in trade cargo volume, particularly when the capacity in the Service remains constant. In other words, while the overall trade direct vessel expenses are projected to decline by $280,445, the container-mile relationship for each trade increases or decreases in relation to the percentage trade container-miles bears to overall service container miles.

While the capacity in the Service is projected to remain constant, the daily cost of operating these vessels is increasing. For example, the average daily payroll cost of the class of vessels deployed in the Americas Service during 1978 was $5,284. This figure results from an average daily rate of $4,984 during the first six months of the year and $5,584 during the last six months. The comparable figure built into direct vessel expense for the projected year is $6,170 per day. Thus, for increased crew payroll costs alone, the projection is 16.8 percent higher than during the actual year. This economic assumption accounts for a large share of the difference in increased vessel expenses not accounted for by projected volume increase.

Port and cargo expenses are projected to be higher by $331,121, an increase over the base year of 59%. This increase in expense cannot be measured solely by the 40% increase in traffic volume because of significant operating differences between actual and projected results. The primary reason for the increase in port and cargo expenses in this trade is due to the fact that

Sea-Land commenced direct vessel calls at the port of Savannah, Georgia August 24, 1978.

As a result, the actual expenses for the Savannah location represented only three months of operation. By contrast, the projected port and cargo expenses include a full year experience operating at the port of Savannah. A comparison of the expense dollars both actual and projected clearly demonstrates the effect of serving Savannah in late 1978.

Sea-Land's actual operating results in the South Atlantic trade for the year ending November 30, 1978 include $182,634 of port and cargo expenses. Our projected expenses for similar categories of costs amount to $482,900. Thus, almost all of the projected increased expense $300,266 ($482,900–$182,634) can be attributable to the annual effect of operating at Savannah per the full year. The balance of additional projected expenses amount to $30,855 ($331,121–$300,266) represents an increase in port and cargo expense of only 5%.

Question 3

Why is there a projected 103 percent increase in "other property and equipment" as a rate base item in the South Atlantic/Puerto Rico trade?

Answer

Property and equipment accounts consist primarily of rolling stock (container, chassis, and power units) and facilities and cranes. A breakdown of this asset group together with their average investment value in the historical and projected year follows:

South Atlantic Trade Net Investment
In Other Property and Equipment

	History 12-1-77 to 11-30-78	*Projection 5-1-79 to 4-30-80*	*Percentage Change*
Rolling Stock	$774,300	$1,124,000	45%
Facilities & Cranes	165,236	790,000	378%
Total P & E	$939,536	$1,914,000	103%

While total Property and Equipment investment increased by 103%, the most substantial portion of the asset group, namely rolling stock, only increased by 45% which is reasonable in light of the 40% growth in traffic volume. The reason for the overall increase in asset value of 103% is a result of the inordinate increase in facilities and cranes from $165,236 in the base year to $790,00 in the projected year, a rise of 378%.

The facility and crane assets in the South Atlantic and Gulf operating area were not identified by specific location in the underlying data to Sea-Land's 1979 budget. Since an allocation was required to separate net investment to the South Atlantic trade (Charleston, Savannah, and Jacksonville) and the Gulf trade (New Orleans and Houston) an estimate was made to charge the investment equally between the two trades. Upon analysis, Sea-Land concedes that a more appropriate separation in view of the projected activity between the two coastal ranges is to charge 20% of the facility and crane investment to the South Atlantic locations and 80% to the Gulf locations. On an adjusted basis, the chart about would be revised to read as follows:

Adjusted South Atlantic Trade Net Investment
In Other Property and Equipment

	History *12-1-77 to 11-30-78*	*Projection* *5-1-79 to 4-30-80*	*Percentage* *Change*
Rolling Stock	$774,300	$1,124,000	45%
Facilities & Cranes	165,236	316,000	91%
Total P & E	$939,536	$1,440,000	53%

From the foregoing chart, the adjusted increase in property and equipment investment in the South Atlantic trades is $150,764 ($316,000 - $165,236), an increase of 91%. $46,745 of the additional investment can be accounted for by the projected volume growth in the trade which would be proportionately charged to the South Atlantic trade. For example, $73,347 of net investment included in the base year property and equipment category consisted of vessel leasehold improvements, gain or loss of sale and exchange of vessels, and vessel spare parts ashore. These assets were allocated to the trades on the basis of the container-mile ratios. Assuming that the 40% growth in South Atlantic projected volume would cause a corresponding increase in the allocation factor, an additional $29,339 ($73,347 × .40) would logically be assigned to the South Atlantic trade.

We have discussed the effect of rolling stock, facilities, and miscellaneous vessel assets in explaining the increased investment. We now turn to the portion of Sea-Land's assets located in Puerto Rico. In the base year $43,516 of net investment resulted in Puerto Rico. The shift in volume changes where some trades are projected to decline and others projected to increase will affect the assignment of Puerto Rico's net investment. The 40% increase in the South Atlantic trade in which all of the volume must move through Sea-Land's Puerto Rico facilities, will mean an additional allocation of $17,406 ($43,516 × .40) to the South Atlantic trade.

All of the foregoing explanation accounts for all of the increase in the property and equipment investment except for $104.019. In view of the fact that anticipated additional capital expenditures of $1.4 million (Attachment 2) was earmarked in Puerto Rico during 1979, it stands to reason that a portion of such new investment should be born by the South Atlantic trade. It should be noted that the projected year commences May 1, 1979. Thus, the majority of the increased capital expenditures will occur in the 2nd and 3rd quarter of the projected year (as opposed to the 3rd and 4th quarter of the budget year).

Question 4

Why is there a projected increase in "working capital" for all trades despite a decreasing volume of traffic in all but one trade?

Answer

Working capital requirements are not directly related to changes in traffic volume as the Order of Investigation seems to suggest. As may be noted in Schedule IV of Sea-Land's projected operating results, the notation "estimate" was indicated in Line 17, which shows the allocation to the various trades. The estimate was simply based on raising the working capital amounts in each trade in the base year to the highest ten thousand or hundred thousand as applicable. Sea-Land would have preferred to determine projected working capital pursuant to the requirements of General Order 11. However, the detail necessary to reflect voyage expenses after adjustment for insurance, was not available. Essentially, working capital is to provide sufficient funds to carry out business activity between any lag time that might exist between collection of receivables and payment of expenses. To the extent that at the end of the fourth period of the current year, approximately 50% of our San Juan receivable file ranges anywhere from over 30 days due to in excess of 365 days due, the amount of working capital projected by Sea-Land is not excessive.

We have, however, at the request of Hearing Counsel, attempted to calculate working capital for the projected year in Attachment 3 hereto, by utilizing the same relationship of insurance expense that existed in the base period. The results of that calculation reflect only small differences in the working capital originally estimated by Sea-Land.

Question 5

Why are direct vessel and port cargo expenses in trades other than South Atlantic/Puerto Rico trade projected to decrease by only 15% while the volume of traffic is projected to decrease by 29%?

Answer

Vessel expenses for the five trades other than the South Atlantic/Puerto Rico trade are projected to decline by 8% which is explained by two factors. First, total vessel expense for all trades declined to 97% of history. Secondly, the percent relationship of loads for the five trades to total loads for all six trades declined from 92% (actual) to 86% (projection). The overall decline can then be expected to equal 8.6% (92% × 100 less 86% × .97) assuming the mix of vessel miles in the percent relationship remained constant.

In all trades, other than the South Atlantic trade, port and cargo expenses in the base period and projected year amounted to $5,367,772 and $3,883,000 respectively. A recap and percentage change of this group of expenses is provided hereunder:

Port and Cargo Expenses and Volume of Cargo
In All Trades Excluding South Atlantic Trade

	Historical Year	*Projected Year*	*Variance*	*Percent Change*
Port and Cargo Expenses	$5,367,772	3,883,000	(1,484,772)	(27.7%)
Volume of Cargo (Loads)	25,237	19,016	(6,221)	(24.7%)

As might be expected, the reduction in projected port and cargo expenses closely parallels the reduction in projected traffic volume because changes in handling costs, which have a high degree of variability, change in almost direct proportion to changes in traffic volume.

Question 6

Why is the rate-of-return in the East Coast/Virgin Islands trade declining?

Answer

Analysis of the history for the East Coast/Virgin Islands trade revealed that two major factors contributed to an overstatement of the historical return on assets.

1) The historical warehouse cost is substantially understated. The historical cost calculation incorrectly assumed that San Juan loads are handled through the Elizabeth and Baltimore warehouses. This is not the case. The resulting impact was to reduce the allocation of warehouse cost to the East Coast-Virgin Island trade (see Attachment 4).

   In reevaluating the historical cost allocation, an amount equal to the projection of $159,000 is reasonable. This represents a $134,000 increase over the cost originally presented. Assuming that approximately 250 loads moving to the E/C-VI trade is LTL, the U.S. warehouse cost per load would be about $636, which is in line with expectations.

2) The historical assessment cost allocated to the East Coast/Virgin Islands trade of $52,000 is substantially understated. Using an assessment cost equal to the projection of $159,000 results in an average cost per load of $195 which is in line with expectations for the impact of actual tonnage and hourly assessments at Elizabeth. (See Attachment 4).

It should be noted that the projected revenue included $96,000 of miscellaneous income. After adjusting projected revenue by the $96,000 the resulting ocean revenue projection is about 3% lower than the historical figure. This is in line with expectations based on a 10% volume decline and a 5% rate increase.

The foregoing adjustments are reflected in the following schedule:

Comparison of Actual and Projected Operating Results for East Coast/Virgin Islands Trades after Revenue Reclassification and Certain Expense Adjustments

	Historical Year		*Projected Year*	
	As Reported	*Adjusted*	*As Reported*	*Adjusted*
Revenue	$1,021,181	$1,021,181	$1,090,000	$994,000[1]
Vessel Operating Expenses				
Vessel	235,868	235,868	262,000	262,000
Port & Cargo	165,310	165,310	111,000	111,000

[1] Reclassification of miscellaneous income to separate line item to reflect same basis as actual year.

Terminal & Container	260,220	500,642[2]	578,000	578,000
Brokerage	28,173	28,173	53,000	53,000
Miscellaneous Income	117,245	117,245	—	96,000[1]
Net VOE	572,326	812,748	1,004,000	908,000
A & G	123,576	145,000[3]	252,000	159,000[4]
Inactive Vessel	6,024	6,024	—	—
Depreciation/Amortization	84,667	84,667	68,000	68,000
Other Deductions	5,468	5,468	—	—
Total Expense—Net	792,061	1,053,907	1,324,000	1,135,000
Pre-Tax Income	229,120	[32,726]	[234,000]	[141,000]

The adjusted historical Profit and Loss statement shows a pre-tax loss of $32,726, compared with an adjusted projected pre-tax loss of $141,000. In view of the volume decline and economic cost increases, this declining performance is a reasonable expectation.

[2] To correct actual year terminal and container expense to reflect additional $133,608 of warehouse expense properly chargeable to LTL Trade; and to correct understatement of allocation of NYSA cost of $106,814 in line with actual experience.

[3] Estimated increase in A & G expenses attributable to adjusted increase in vessel operating expenses.

[4] A & G adjustment made by FMC staff.

ATTACHMENT 1

Analysis of Projected vs. Historical Revenue
($000)

	Canada/ P.R.	*E.C./ V.I.*	*N.Atl./ P.R.*	*S.Atl./ P.R.*	*Gulf/ P.R.*	*Pacific/ P.R.&V.I.*	*Total Trades*
Original Revenue Projection	$601	$1,090	$8,294	$4,242	$6,767	$8,051	$29,045
Adjustment:							
1) Misc. Income	(30)	(96)	(625)	(393)	(495)	(890)	(2,529)
Sub-Total	571	994	7,669	3,849	6,272	7,161	26,516
2) 5% GAL	(27)	(47)	(365)	(183)	(299)	(341)	(1,262)
Sub-Total	544	947	7,304	3,666	5,973	6,820	25,100
3) Accounting Change	(154)*	—	—	—	—	—	(154)
Adjusted Revenue Projection	390	947	7,304	3,666	5,973	6,820	25,100
Historical Revenue	519	1,021	9,790	2,380	6,124	7,978	27,812
Difference	(129)	(74)	(2,486)	1,285	(151)	(1,158)	(2,712)
% Change in Revenue	(25%)	(7%)	(25%)	54%	(2%)	(15%)	(10%)
Projected Loads	363	730	7,158	3,239	5,149	5,616	22,255
Historical Loads	443	813	10,989	2,318	5,846	7,146	27,555
Difference	(80)	(83)	(3,831)	921	(697)	(1,530)	(5,300)
% Change in Volume	(18%)	(10%)	(35%)	40%	(12%)	(22%)	(19%)

*This figure reflects payouts to truckers which are treated as an expense item in projected terminal and container costs. During the historical period, this was treated as a revenue reduction by Sea-Land.

ATTACHMENT 2

Puerto Rico

Location Name	Budg. No.	Description	Foreign Currency	Type: Maint.	Type: New Venture	1979 Quarter 1st	1979 Quarter 2nd	1979 Quarter 3rd	1979 Quarter 4th	1979 Total Year
San Juan	4–42	Fac. maint. & improv.—new area		X				500	500	1000
	4–43	Replace 6 vehicles		X				33	33	66
	4–43	Replace pick-up vans		X				10	10	20
	4–44	Chassis rebuild program		X		74	74	74	78	300
		Total Puerto Rico				74	74	617	621	1386

ATTACHMENT 3

Sea-Land Service, Inc. Domestic-Offshore Trade Working Capital
Pro-Forma May 1, 1979–April 30, 1980

Item	*Canada/ PR*	*East Coast/ VI*	*US No. Atl./ P. Rico*	*US So. Atl./ P. Rico*	*US Gulf Coast/ P. Rico*	*US Pac. Coast/ PR & VI*	*Total Trade*
1. No. of Term. Voyage Days in the Period	1,025	1,825	1,825	1,825	1,825	1,825	
2. No. of Voyage Terminations	78	78	78	74	78	74	
3. Average Length of Term. Voyages (Item 1 ÷ Item 2)	23.40						
4. No. of Calendar Days in the Period	365	365	365	365	365	365	
5. Vessel Years (Item 1 ÷ Item 4)	5.0	5.0	5.0	5.0	5.0	5.0	
6. Gross Vessel Operating Expense (Sch. VI)	$73,876,000						
7. A & G Exp. Allocated (Per VOE Ratio)	11,680,000						
Total	$85,536,000						
8. Deduct Insurance Expense (Same as Appendix A)	1,053,835						
9. Net Operating and Overhead Expense	$84,482,065						
10. Voyage Expense Per Day (Item 9 ÷ Item 1)	46,292						
11. Average Expense Per Voyage (Item 10 × Item 3)	1,003,223						
12. Avg. Voy. Exp. Cacl. Insurance (Item 11 × Item 5)	5,416,165						
13. Insurance Expense Per Day (Item 8 ÷ Item 1)	577						
14. Insurance Exp. Per 90 Days (Item 13 × 90 Days)	51,930						
15. Avg. Voy. Insurance Expense (Item 14 × Item 5)	259,650						
16. Average Voyage Expense (Item 12 ÷ Item 15)	5,675,815						
17. Allocated to the Trade	$ 44,271	$77,191	$640,800	$242,925	$415,470	$544,878	$1,965,535

ATTACHMENT 4

Comparison of Actual and Projected U.S. Warehouse Expense and Assessments Showing Impact of Understatement in Actual Year Operating Results

East Coast/Virgin Islands Trade

	Warehouse Expense Originally Reported For Historical Year*	*Projected Year*	*Amount Understated*
Elizabeth	$19,392	$129,000	$109,608
Baltimore	5,098	29,100	24,002
Total	$24,490	$158,100	$133,610

	*Assessments** Originally Reported For Historical Year*	*Projected Year*	*Amount Understated*
Elizabeth	$52,186	$159,000	$106,814

*Note that $24,490 divided by 250 LTL trade loads would produce a warehouse cost of only $93 per load substantially below the typical cost per load for warehouse operations.

**Assessments of $52,186 divided by total trade loads resulted in a cost per load of $63 in the actual year. This was entirely too low in view of average NYSA tonnage charge of $5,85 per assessable ton during 1978.

FEDERAL MARITIME COMMISSION

46 C.F.R. CHAPTER IV

DOCKET NO. 79–18

EXEMPTIONS FROM PROVISIONS OF THE SHIPPING ACT, 1916 AND THE INTERCOASTAL SHIPPING ACT, 1933

September 21, 1979

ACTION: Discontinuance of Proceeding

SUMMARY: This proceeding was instituted by notice of inquiry published March 28, 1979 (44 Fed. Reg. 18537) requesting comments on proposed exemptions under section 35 of the Shipping Act, 1916. Comments have been received and are now being analyzed by the Commission.

It was not anticipated that any proposals would ensue from this particular proceeding. Rather, specific exemptions would be proposed in separate proceedings which will give further opportunity for comment thereon. Accordingly, this proceeding is discontinued.

SUPPLEMENTARY INFORMATION: None

By the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-76

DECLARATORY ORDER REQUEST RE: PACIFIC WESTBOUND CONFERENCE (AGREEMENT NO. 57-115)

ORDER OF DISMISSAL

September 24, 1979

By Petition for Declaratory Order filed July 19, 1979, Seatrain Pacific Services, S.A., requests the Commission to rule that the member lines of the Pacific Westbound Conference (PWC) invalidly adopted an amendment to their organic conference agreement by classifying the amendment as "procedural" rather than "substantive." This amendment (Agreement No. 57-115) would modify the conference's "independent action clause" by specifying that member lines must give 60 days advance notice for *all* reductions in intermodal rates, even when the rate in question is already being published as an independent rate and even when the reduction does not exceed earlier levels established by the publishing carrier.

Replies to Seatrain's petition were submitted by PWC and the Commission's Bureau of Hearing Counsel.

Agreement No. 57-115 was filed for approval on June 15, 1979. On July 26, 1979, Seatrain also filed a protest seeking disapproval of the proposed amendment for the reasons stated in the instant petition and on the additional ground that the 60-day notice period employed by the PWC Agreement is excessive.

Instructions have been given to bring Agreement No. 57-115 before the Commission on an expedited basis. Because the issues raised by the instant petition would be most clearly and efficiently resolved in the procedural context of acting on Agreement No. 57-115, Seatrain's petition will be dismissed without prejudice.

THEREFORE, IT IS ORDERED, That the "Petition for Declaratory Order" of Seatrain Pacific Services, S.A., is dismissed; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By Order of the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 575(I)

GIRTON MANUFACTURING CO.

v.

PRUDENTIAL LINES INC.

NOTICE

September 27, 1979

Notice is given that upon review of the August 24, 1979, decision of the Settlement Officer in this proceeding, the Commission has determined to adopt that decision with the following modifications.

At page 5, line 13, the phrase "statutorily prescribed standard" should read "applicable standard".

At page 6, the table regarding Bill of Lading 32 should include "Bunker surcharge \$8,25 × 17.25" rather than "Bunker surcharge \$8.25"

By the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 575(I)

GIRTON MANUFACTURING CO.

v.

PRUDENTIAL LINES INC.

DECISION OF C. DOUGLASS MILLER, SETTLEMENT OFFICER[1]

Adopted September 27, 1979

Reparation Granted

The Girton Manufacturing Company (GMC), a company engaged in the manufacture and distribution of farm and laboratory equipment, claims $952.12 plus six (6) percent interest as reparation from Prudential Lines (PL) on two shipments described on Prudential Grace Lines Bills of Lading No. 32 and No. 35, dated October 27, 1976, as steel tanks and condensing units which were transported from Philadelphia, Pennsylvania to Valparaiso, Chile.

In rating the subject shipments, PL relied on the descriptions appearing on the Bills of Lading which were provided by GMC. The shipments were described by GMC as "Crates: Steel Tanks (Stainless)" and "Crates: Condensing Units."

The first shipment (Bill of Lading No. 35) consisted of eight (8) crates Stainless Steel Tanks weighing 12,400 pounds and occupying 1,873 cubic feet and eight (8) crates Condensing Units weighing 2,400 pounds and occupying 242 cubic feet.The second shipment (Bill of Lading No. 32) consisted of three (3) crates Stainless Steel Tanks weighing 4,650 pounds and occupying 591 cubic feet and five (5) crates Condensing Units weighing 1,250 pounds and occupying 99 cubic feet. Both Bills of Lading were dated October 27, 1976.

Ocean Freight charges were assessed pursuant to Atlantic and Gulf/West Coast of South America Freight Conference Freight Tariff S.B. SA-12, FMC 1. The stainless steel tanks were assessed the Class 10 rate of $119.75 per

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

40 cubic feet plus surcharges while the condensers were assessed a Class 9A rate of $124.50 per 40 cubic feet plus surcharges. The total freight charges paid by GMC for the two shipments were $7,000.64 and $2,286.35 respectively.

On April 3, 1978, GMC filed two overcharge claims with PL. They were incorrectly addressed and GMC refiled the claims on July 3, 1978. After receiving no response from PL, GMC filed an Informal Docket with the Commission pursuant to section 22 of the Shipping Act, 1916, in order to stay the running of the two-year statute of limitations.

The basis of the GMC claim is that, contrary to GMC's original description, the various pieces of equipment shipped were actually components of bulk milk coolers. GMC claims that PL should have assessed charges for Cooler, Milk. The index of the applicable tariff refers one to Item 735, Refrigerators NOS. The rate of Refrigerators N.O.S. is $106.75 per 40 cubic feet.[2] Applying this rate to the shipments, the total charges, including surcharges, for the two shipments are $6,284.53 and $2,050.34. GML claims overcharges of $716.11 and $236.01 or a total of $952.12. In addition, GML claims 6 percent interest from November 12, 1976, the date of payment.

PL has raised several defenses regarding the claims. First, PL argues that the Commission has no jurisdiction to order the return of an overcharge and that 46 C.F.R. § 502.301 *et seq.,* to the extent it is applied to overcharges, goes beyond the underlying statutory authority. Second, PL maintains that if the claim is considered under 18(b)(3) it is time barred by the 180 day limit in that section and by a six (6) month limit in the applicable tariff. Finally, PL points out that it was GMC's own description which caused the shipments to be rated as they were.

Section 18(b)(3) of the Act provides in pertinent part that no carrier or conference of carriers in the foreign commerce of the United States:

> [s]hall charge, or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in the tariffs on file with the Commission and duly published and in effect at the time. . . .

A carrier violates the section by charging a rate for transportation of one commodity while actually transporting another. What is actually shipped determines the rate to be charged. Thus, the carrier may violate section 18(b)(3) even when it relies on a shipper-provided Bill of Lading description. The equities of the particular situations are not controlling in finding a violation. *Union Carbide Inter-America, Inc. v. Venezuelan Line,* 17 F.M.C. 181 (1973).

GMC's claim is based on an alleged violation of section 18(b)(3) which occurred when PL charged GMC the rates applicable to "Steel Tanks (Stainless)" and "Condensing Units" for transporting milk coolers. Section 22 of the Shipping Act, 1916, gives the Commission authority to investigate any violation of the Act and award reparations. The procedures set forth in 46 C.F.R.

[2] Rule 2(g) of the tariff provides that:

Whenever rates or ratings are provided for on articles named herein, the same basis will also be applicable on named parts of such articles, when so described on the ocean bills of lading, except where specific rates or ratings are provided for such parts.

§ 301, *et seq.*, permit the informal adjudication of small claims (with the consent of both parties) without resort to formal proceedings under section 22 of the Act. The claim for recovery of "overcharges" pursuant to 46 C.F.R. § 301 *et seq.* is nothing more than a claim for "reparations" as that word is used in section 22 of the Act. "Overcharges," which are defined in 46 C.F.R. § 502.302 as charges for transportation services in excess of those applicable under lawful tariffs, are simply a measure of the reparations that might be awarded for a violation of section 18(b)(3). Accordingly, it is concluded that the claims of GMC may be properly adjudicated pursuant to the procedures of 46 C.F.R. § 502.301 *et seq.*

PL's argument that the claims are time-barred by the 180 day limit in section 18(b)(3) is without merit. The limitation applies only to applications by carriers for refunds or waivers which are based on clerical or administrative error. Clearly GMC is not making a claim on this basis.

The six (6) month limitation in the applicable tariff likewise is no bar. With respect to the six (6) month limitation, the Commission has held in previous decision that if a claim is filed by the shipper within the two (2) year statutory time period, the carrier's so-called "six-month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim. *Union Carbide Inter-America, Inc. v. Venezuelan Line,* 19 F.M.C. 86 (1976); *Kraft Foods v. Federal Maritime Commission,* 538 F.2d 445 (D.C. Cir. 1976); *Carborundum Co. v. Royal Netherlands Steamship Co.,* 19 F.M.C. 431 (1977). The record clearly indicates that the claim was filed within the two-year period.

The sole question remaining to be decided is what was the actual commodity shipped. In *Western Publishing Co. v. Hapag-Lloyd,* 13 S.R.R. 16, (1972) and other cases, the Commission said that in cases where the cargo was no longer available for inspection, a complainant had a "heavy burden of proof" to establish the fact of what was actually shipped. This of course, does not alter the statutorily prescribed standard which is "the preponderance of the evidence" of record. What the Commission was obviously alluding to was the difficulty in securing probative evidence in the absence of the cargo itself.

In connection with the instant shipment, complainant has provided an invoice indicating that the shipments comprised 24 crates of bulk milk coolers with condensing units. In addition, literature along with pictures showing the commodity's purpose and its uses have also been furnished. The information indicates that the actual commodity tendered to the carrier was milk coolers with condensing units and, therefore, it would qualify for the rate of $106.75 W/M as set forth in Item 795. Accordingly, GMC is entitled to reparations in the amount of the overcharges as calculated below:

Bill of Lading 32

Eight (8) crates Steel Tanks (Stainless) and Condensing Units (Milk Coolers):

5900 lbs. 690 cubic feet

$\frac{690}{40}$ cubic feet = 17.25

Rate \$106.75 × 17.25 =	\$1,841.44
Bunker surcharge \$8.25 × 17.25	142.31
3% Chilean Tax	66.59
TOTAL	\$2,050.34
Charges per Bill of Lading	\$2,286.35
	\$2,050.34
OVERCHARGE	\$ 236.01

Bill of Lading 35

Sixteen (16) crates Steel Tanks (Stainless) and Condensing Units (Milk Coolers)

14,800 lbs. 2,115 cubic feet

$\frac{2,115}{40}$ cubic feet = 52.875

Rate of \$106.75 × 52.875 =	\$5,644.41
Bunker surcharge \$8.25 × 52.875 =	436.22
3% Chilean Tax	203.90
TOTAL	\$6,284.53
Charges per Bill of Lading	\$7,000.64
	\$6,284.53
OVERCHARGE	\$ 716.11

The allowance of interest is a matter within the Commission's discretion and may be denied where principles of equity and justice demand. See *Louisville & N.R. Co. v. Sloss-Sheffield Steel & Iron Co.,* 295 F.53 (5th Cir. 1923) and *George Allison & Co. v. Interstate Commerce Commission,* 107 F.2d 180 (D. C. Cir. 1939). It was GMC's own description which led to the misapplication of rates. Moreover, GMC failed to notify PL that the shipments were misdescribed at the time the freight charges were paid. Accordingly, the award of interest in this case would be inequitable.

(S) C. DOUGLASS MILLER
Settlement Officer

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-77

CUMMINS ENGINE COMPANY

v.

Y. S. LINE (YAMASHITA-SHINNIHON
STEAMSHIP CO., LTD.) TTT SHIP AGENCIES

DOCKET NO. 79-78

CUMMINS ENGINE COMPANY

v.

MAERSK LINES, LTD.

DOCKET NO. 79-79

CUMMINS ENGINE COMPANY

v.

U.S. LINES, INC.

NOTICE

September 28, 1979

Notice is given that no appeal has been taken to the August 27, 1979, dismissal of the complaints in these proceedings and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissals have become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

No. 79-77

CUMMINS ENGINE COMPANY

v.

Y. S. LINE (YAHMASHITA-SHINNINHON STEAMSHIP CO., LTD.) TTT SHIP AGENCIES

No. 79-78

CUMMINS ENGINE COMPANY

v.

MAERSK LINES, LTD.

No. 79-79

CUMMINS ENGINE COMPANY

v.

U.S. LINES, INC.

DISMISSAL OF PROCEEDING[1]

Finalized September 28, 1979

Respondents in these three cases have moved for their dismissal on the grounds that the basic issue in each case has already been decided adversely to

[1] Though these cases have not as yet been formally consolidated under Rule 148 of the Commission's Rules of Practice and Procedure, all three contain the same issues of fact and law. Accordingly, the three cases are disposed of in this single order.

the complainant and that those Commission decisions are *res judicata* here.[2] Complainant, subsequent to the motions to dismiss, filed motions to withdraw the three complaints.

Since complainant no longer desires to prosecute the complaints in these cases, the motions to withdraw the complaints in Nos. 79-77, 79-78, and 79-79 are hereby granted and the cases are dismissed with prejudice.

(S) JOHN E. COGRAVE
Administrative Law Judge

August 27, 1979

[2] *Cummins Engine Co. v. United States Lines,* Informal Docket 390(I) *et seq.*—April 5, 1979, 19 SRR 192; *Cummins Engine Co., Inc. v Y. S. Line,* Order on Reconsideration, Informal Docket 609(I) and 610(I) (Decision of Settlement Officer, July 3, 1979), 19 SRR 479.

FEDERAL MARITIME COMMISSION

46 C.F.R. CHAPTER IV

DOCKET NO. 79-50

NOTICE OF INQUIRY REGARDING THE UNITED NATIONS CONVENTION ON CODE OF CONDUCT FOR LINER CONFERENCES

October 5, 1979

ACTION: Discontinuance of Proceeding

SUMMARY: This proceeding was instituted by notice of inquiry published May 16, 1979 (44 Fed. Reg. 28724). Public comment was requested on a proposed international convention governing the conduct of steamship liner conferences (UNCTAD). The filing schedule has now been completed. The notice of inquiry indicated that it is not intended that a proposed rule will be issued from this proceeding. Inasmuch as no further action is contemplated in the context of this proceeding, it is appropriate that it be discontinued. It is so ordered.

SUPPLEMENTARY INFORMATION: None

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-49

EMILE BERNAT & SONS CO.

v.

UNITED STATES LINES, INC., ET AL.

ORDER OF ADOPTION

October 15, 1979

Administrative Law Judge William Beasley Harris issued an Order on August 17, 1979, in this proceeding dismissing the complaint and discontinuing the proceeding on the grounds that the Complainant had failed to appear for the scheduled hearing of this matter and had not submitted any evidence in support of its claims. The Commission by notice served September 20, 1979, determined to review the Presiding Officer's ruling.

After having fully reviewed the entire record in this proceeding the Commission finds that the Presiding Officer did not abuse his discretion in dismissing this complaint and discontinuing the proceeding. Giving due consideration to the fact that the Complainant is not represented by legal counsel, the Commission is of the opinion that the Presiding Officer handled this matter properly and afforded ample due process to all parties.

THEREFORE, IT IS ORDERED, That the Order (1) Dismissing Complaint (2) Discontinuing Proceeding, served in this proceeding on August 17, 1979, is adopted by the Commission; and

IT IS FURTHER ORDERED, That this proceeding be discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78–49

EMILE BERNAT & SONS CO.
v.
UNITED STATES LINES, INC., ET AL.

ORDER (1) DISMISSING COMPLAINT (2) DISCONTINUING PROCEEDING

Adopted October 15, 1979

The above-captioned case was (by order served June 22, 1979) set for a hearing to commence on August 15, 1979. Complainant's request for a further[1] postponement of the August 15, 1979, hearing was denied by order dated August 10, 1979, leaving the hearing to start as scheduled at 10:00 a.m. on Wednesday, August 15, 1979.

Complainant's representative in this matter had actual notice that the request for postponement had been denied and that the hearing (at which Complainant had the burden of proving its case) would commence as scheduled. Complainant chose not to attend the ordered hearing, thereby failing to provide any affirmative evidence of record to support Bernat & Son's claims for reparations and obviating the need for Respondents to defend against them.

As noted in an earlier procedural order the Presiding Officer "is keenly aware that Complainant is proceeding without counsel."[2] However, Complainant's election to be represented by one of its officers in this proceeding does not mean that Complainant may substitute the allegations in this complaint for affirmative evidence of its claims.

Also, Complainant's non-lawyer representative is not free to substitute his judgment for that of the Presiding Officer on when to appear and present his case.

Commission Rule 147, 46 C.F.R. § 502.147, provides that it is for the Presiding Officer to schedule the dates and regulate the course of hearings. Dismissal for failure to comply with such an order is certainly within the necessary

[1] Complainant Bernat & Sons had previously requested and been granted four separate postponements of the hearing date from March 21, 1979 to April 26, 1979, then to May 24, 1979, then to June 27, 1979, and finally to August 15, 1979.

[2] April 20, 1979, Order granting Complainant's second request for a postponed hearing date.

authority of the Presiding Officer. See, for example, FMC Rule 211(b)(3) on the Presiding Officer's authority to dismiss for failure to obey a discovery order; see also Rule 41 of the Federal Rules of Civil Procedure which provides that "For failure of Plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of any claim against him."

Wherefore, given the lack of any evidence record occasioned by Complainant's refusal to appear at the scheduled August 15, 1979, hearing in this matter it is hereby:

Ordered, that the complaint of Bernat & Sons, Co. for reparation against United States Lines, Inc.; Peabody & Lane; Atlantic Container-line Ltd.; Farrell Lines, Inc.; Dart Containerline, Inc.; Trans Freight Lines, Inc., and North Atlantic Westbound Freight Association, is dismissed for lack of proof and want of prosecution. And it is

Ordered, this proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

August 17, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-7

AGREEMENT NOS. 9929-3 ET AL.

ORDER DENYING FURTHER RECONSIDERATION

October 16, 1979

Now before the Commission are the "Petitions for Clarification and Reconsideration" of Sea-Land Service, Inc. and United States Lines, Inc. (Protestants), seeking withdrawal of the Commission's June 5, 1979 Order conditionally approving three agreements involving Hapag-Lloyd Aktiengesellschaft; Intercontinental Transport, B.V. (ICT); and Compagnie Generale Maritime (French Line). A reply in partial opposition was submitted by the three proponent ocean carriers. The Commission's Bureau of Hearing Counsel also replied to the extent of requesting that the June 5th Order be clarified in two respects.

Protestants contend that: (1) the parties to this proceeding had agreed that the agreements marked as Hearing Exhibits Nos. 39 and 40 should be approved and that it was improper for the Commission to have interfered with their understanding; (2) the revised agreements are unclear and may entitle Proponents to as many as five votes in the conferences serving the affected trades; (3) it is unreasonable for the Proponents to exercise more than one vote in U.S. Gulf/Europe conferences—if the Proponents had three votes they could preclude the seven-member U.S. Gulf/Europe conferences from taking any action which required a two-thirds majority; and (4) Agreement No. 10266-3 is unclear as to whether the ICT/French Line joint service will be immediately operative or whether it will take effect only upon termination of the Hapag-Lloyd/ICT/French Line space charter (Agreement No. 10374).

The petitions will be denied and the three agreements approved as modified on June 28, 1979.

The Commission intended that the ICT/French Line joint service (Agreement No. 10266-3) operate simultaneously with the space charter agreement (No. 10374) and that the joint service would be limited to 800 TEU's per week (averaged quarterly) at all times.[1] It was also intended that the parties to this

[1] More detailed limitations on the number of refrigerated containers or U.S. South Atlantic Coast containers to be carried by the ICT/French Line joint service were deemed premature in light of the Proponents' assertion that the joint service would be operating within the limitations of the three-party cross-charter (Agreement No. 10374) for the foreseeable future.

joint service would cast only a single combined vote in conferences to which the joint service may belong. These objectives are accurately reflected in the revised agreement filed by ICT and French Line on June 28, 1979.

The parties to the Combi Line joint service (Agreement No. 9929–6) are also limited to one conference vote. To the extent Hapag-Lloyd participates in conferences as an individual carrier (*e.g.*, when it operates as a container carrier under Agreement No. 10374), Hapag-Lloyd is also entitled to a single conference vote. The three parties to the three agreements may therefore cast a total of no more than three votes between them.

Voting restrictions attach only to the two joint service agreements (Nos. 9929–6 and 10266–3). Article 10 of the charter agreement (No. 10374) creates no voting privileges or restrictions whatsoever.[2] Although the language of Article 10 is potentially confusing and therefore best deleted by the Proponents, Agreement 10374 is nonetheless found to be in substantial compliance with the Commission's June 5th Order.

Protestants' contention that an arrangement which allows Proponents three votes in existing U.S. Gulf/Europe conferences is unfair and discriminatory is best examined in light of particular conference quorum and voting requirements and the actual voting patterns which may emerge once operations commence under the instant agreements. If conference voting practices related to the instant agreements produce conditions which are detrimental to United States Commerce, unfair between conference carriers or otherwise violative of the Shipping Act, the Commission can, after notice and hearing, adjust the conference voting requirements or prescribe other appropriate modifications to the agreements involved.

The instant agreements were approved because they offered improved services to shippers and, as restructured, would increase competition in the relevant trades to some extent. If all three Proponents were to cast a single conference vote, they would be directly fixing prices and generally acting more closely in concert than necessary to achieve the transportation benefits associated with their agreements.

The notion that the Commission must approve agreements in the form negotiated by private parties without independently analyzing the agreements' form, content and probable effect is erroneous. Indeed, it is clear that the Commission has an affirmative duty to independently evaluate all section 15 matters in light of relevant statutory criteria and may not rely upon the mere absence of objections as a basis for approval. *See, Marine Space Enclosures, Inc. v. Federal Maritime Commission*, 420 F.2nd 577, 584–587, 8 S.R.R. 475, 483–487 (D.C. Cir. 1969); *United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2nd 519, 531, 15 S.R.R. 411, 425–426 (D.C. Cir. 1978).

Agreement Nos. 9929–6 and 10266–3 met the conditions of the June 5th Order as filed on June 28, 1979, but should be modified to reflect the change in effective date (*i.e.,* January 1, 1980), required by the Commission's July 25,

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[2] Article 10 states that the three parties to Agreement No. 10374 may act as single members in appropriate conferences, yet ICT and French Line operate in the trade only as members of a joint service. If the ICT/French Line joint service were dissolved before its stated expiration date, the presence of the cross-charter arrangements *alone* would not require conference voting restrictions under the test articulated in *Johnson Scanstar (Agreement No. 9973–3)*, 18 S.R.R. 807 (1978).

1979 "Order on Petition for Reconsideration" and the extension of Agreement No. 9929-3 adopted by the Proponents in response thereto.

THEREFORE, IT IS ORDERED, That the "Petitions for Clarification and Reconsideration" of Sea-Land Service, Inc., and United States Lines, Inc., are denied.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

* Chairman Daschbach and Commissioner Day dissent as to the denial of the "Petitions for Reconsideration and Clarification."

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-46

EXPEDITED SURCHARGES FOR RECOVERY OF CARRIERS' INCREASED FUEL COSTS IN THE FOREIGN COMMERCE OF THE UNITED STATES

October 16, 1979

Bunker surcharges applicable to cargo carried under dual rate contracts and effective on less than ninety days' notice found lawful under section 14b of the Shipping Act, 1916.

Ronald A. Capone, James W. Pewett and *Albert E. May* for Council of American-Flag Ship Operators, Delta Steamship Lines, Inc., and Waterman Steamship Corporation.
Edward M. Shea and *Donald J. Brunner* for Sea-Land Service, Inc.
Seymour H. Kligler and *Nathan J. Bayer* for American West African Freight Conference, U.S. Great Lakes and St. Lawrence River Ports/West Africa Rate Agreement, U.S. Atlantic & Gulf-Santo Domingo Conference, Leeward & Windward Islands & Guianas Conference, East Coast Columbia Conference, Atlantic & Gulf/West Coast South America Conference, U.S. Atlantic & Gulf-Jamaica Conference.
Charles F. Warren and *George A. Quadrino* for Japan/Korea-Atlantic & Gulf Freight Conference, New York Freight Bureau, Philippines North America Conference, Trans-Pacific Freight Conference (Hong Kong), Trans-Pacific Freight Conference of Japan/Korea, and Java/Pacific Rate Agreement.
F. Conger Fawcett and *David C. Nolan* for Latin America Pacific Coast Steamship Conference, Pacific Coast-Australasian Tariff Bureau, Pacific Coast European Conference, and Pacific Coast River Plate Brazil Conference.
John R. Mahoney and *Elkan Turk, Jr.* for Far East Conference, Atlantic & Gulf-Indonesia Conference, and Atlantic & Gulf-Singapore, Malaya and Thailand Conference.
Thomas E. Kimball and *Richard C. Jones* for Pacific Straits Conference, Pacific Westbound Conference, and Pacific/Indonesian Conference.
Howard A. Levy and *Patricia E. Byrne* for North Atlantic French Atlantic Freight Conference, North Atlantic United Kingdom Freight Conference, North Atlantic Baltic Freight Conference, and Gulf/United Kingdom Conference.
Stanley O. Sher, Marc J. Fink and *Milton Babirak, Jr.* for Iberian/U.S. North Atlantic 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 & Gulf/Australia-New Zealand Conference, and West Coast of Italy, Sicilian & Adriatic Ports/North Atlantic Range Conference.
Peter B. Hirshfield for Independent Wire Producers Association.
Aaron W. Reese, Paul J. Kaller, and *John Robert Ewers* for Bureau of Hearing Counsel.

REPORT AND ORDER

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

This proceeding was initiated on April 26, 1979, by an Order of Investigation and Hearing (Order) directed to several carriers and conferences of carriers which had filed bunker surcharges effective on less than ninety days' notice and applicable to cargo carried under dual rate contracts. The investigation was to examine whether such surcharges:

1. are the result of any extraordinary conditions, which conditions may unduly impede, obstruct, or delay the obligations of the carrier or carriers; whether they are outside or beyond the carrier's or carriers' control; and whether the carrier or carriers, using a high degree of diligence and sound business judgment, should have foreseen or anticipated the conditions upon which the surcharges are based; and
2. whether the imposition of such bunker surcharges on less than 90 days' notice violates section 14b of the Shipping Act, 1916.[1]

The Council of American-Flag Ship Operators (CASO), Delta Steamship Lines, Inc., Waterman Steamship Corporation[2] and the conferences and carriers listed in Appendix A to the Order were designated respondents.[3] The Order established 46 subdockets, representing the 46 separate tariffs for which bunker surcharges had been filed. On June 1, 1979, a supplement to the Order added two additional subdockets to this proceeding.[4] The Independent Wire Producers Association (IWPA) filed a petition for leave to intervene which has been opposed by respondents in subdockets 1–11, 19 and 21.

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* Commissioner Leslie Kanuk will issue a separate concurring opinion.

[1] 46 U.S.C. §813a.

[2] CASO, Delta, and Waterman had previously filed a joint petition requesting that the Commission authorize dual rate contract bunker surcharges on less than 15 days' notice. The Commission denied this request in the above-referenced Order.

[3] Respondents and their respective subdockets are as follows: American West African Freight Conference (subdockets 1–4); U.S. Great Lakes & St. Lawrence River Ports/West Africa Agreement 9420 (subdocket 5 and 6); U.S. Atlantic & Gulf–Santo Domingo Conference (subdocket 7); Leeward & Windward Islands & Guianas Conference (subdockets 8 and 9); East Coast Columbia Conference (subdocket 10); Atlantic & Gulf/West Coast of South America Conference (subdocket 11); New York Freight Bureau (Hong Kong) (subdocket 12); Latin America/Pacific Coast Steamship Conference (subdockets 13–15); Mediterranean–U.S. Great Lakes Westbound Freight Conference (subdocket 16); Atlantic & Gulf Indonesia Conference (subdocket 17); Pacific Straits Conference (subdocket 18); U.S. Atlantic & Gulf-Haiti Conference (subdocket 19); U.S. Great Lakes/South & East Africa Rate Agreement No. 9509 (subdocket 20); U.S. Atlantic & Gulf–Jamaica Conference (subdocket 21); Trans-Pacific Freight Conference (subdocket 22); Atlantic & Gulf–Singapore, Malaya and Thailand Conference (subdocket 23); North Atlantic French Atlantic Freight Conference (subdocket 24); Far East Conference (subdocket 25); North Atlantic United Kingdom Freight Conference (subdocket 26); North Atlantic Baltic Freight Conference (subdocket 27); Philippines North America Conference (subdocket 28); Japan/Korea–Atlantic & Gulf Freight Conference (subdocket 29); U.S. Atlantic & Gulf/Australia-New Zealand Conference (subdocket 30); Pacific Westbound Conference (subdocket 31); Pacific/Indonesian Conference (subdocket 32); Mediterranean North Pacific Coast Freight Conference (subdocket 33); West Coast of Italy, Sicilian & Adriatic Ports/North Atlantic Range Conference (subdocket 34); Iberian U.S. North Atlantic Westbound Freight Conference (subdocket 35); Marseilles North Atlantic U.S.A. Freight Conference (subdocket 36); Pacific Coast Australasian Tariff Bureau (subdocket 37); North Atlantic Mediterranean Freight Conference (subdockets 38–40); Japan/Korea–Atlantic & Gulf Freight Conference (subdocket 41); Pacific Coast European Conference (subdocket 42); Gulf/United Kingdom Conference (subdocket 43); India, Pakistan, Bangladesh, Ceylon & Burma Outward Freight Conference (subdocket 44); Med–Gulf Conference (subdocket 45); and Pacific Coast River Plate Brazil Conference (subdocket 46).

[4] The additional respondents are: Java/Pacific Rate Agreement (subdocket 47) and Java/New York Rate Agreement (subdocket 48).

Respondents have filed a total of 15 memoranda plus additional affidavits of fact in response to the Order. The Commission's Bureau of Hearing Counsel submitted a reply memorandum. IWPA also filed a memorandum of law, to which Sea-Land Service, Inc. and the respondents in subdockets 24, 26, 27 and 43 replied. No party has filed a request for discovery or for an evidentiary hearing. However subsequent to the filing of opening memoranda, the respondents in subdocket 24, 26, 27 and 43 did submit an "Offer in Evidence of Public Document."[5]

DISCUSSION

A. *Preliminary Matters*

Dismissal

Hearing Counsel has filed a motion to dismiss on behalf of respondents in subdockets 16, 20 and 44. In addition, the respondent in subdocket 48 has moved for dismissal and Hearing Counsel has indicated support of it. The Java/New York Rate Agreement (subdocket 48) and the U.S. Great Lakes South & East Africa Rate Agreement (subdocket 20) do not have a dual rate tariff presently in effect. The Mediterranean–U.S.A. Great Lakes Westbound Freight Conference (subdocket 16) cancelled its dual rate system in 1978. Finally, the India, Pakistan, Bangladesh, Ceylon & Burma Outward Freight Conference (subdocket 44) has amended its tariff so that its bunker surcharge is effective on a full 90 days' notice. Based on these representations, it would serve no useful purpose to continue these parties as part of this proceeding. These four subdockets will, therefore, be dismissed.

Intervention

IWPA, a trade association of about 35 companies which fabricate steel wire and wire products, has petitioned for leave to intervene in this proceeding. It asserts that a substantial portion of foreign-manufactured wire rods purchased by its members are transported under one or more of the tariffs which are at issue and that, as a result, it will be adversely affected by any expedited bunker surcharges. Petitioner further avers that its interests will not be represented by the parties of record and that it can ensure the development of a sound record.

Respondents in subdockets 1–11, 19 and 21 oppose the petition primarily on the grounds that the petitioner lacks standing to intervene and that its inclusion would broaden the issues and unduly delay their resolution. They note that the petitioner has not identified its members nor has it represented itself to be a signatory to any of the dual rate contract agreements maintained by the conferences. Moreover, these conferences assert that none of their tariffs includes contract rates on wire rods transported *to* the United States.

With respect to the proceedings in subdockets 1–11, 19 and 21, this proposed intervenor does not possess the requisite "substantial interest," and as to these

[5] The document offered, the Commission's Domestic Circular Letter No. 1–79, issued on June 1, 1979, notifies carriers in the domestic offshore trades that the Commission will allow the filing of tariffs containing bunker surcharges constituting general rate increases on 30 days' notice rather than the 60 days' notice normally applicable.

subdockets intervention will not be granted.[6] However, intervention will be granted as to the remaining dockets because none of the other parties has objected to IWPA's intervention, IWPA has alleged that some of its raw materials are transported under the subject tariffs and the petition to intervene does not present grounds for intervention which would appear to unduly broaden the issues raised by the Commission's Order.[7]

B. *Merits*

The Order of Investigation provided that carriers seeking to invoke the emergency provisions of the Uniform Merchant's Contract to justify bunker surcharges on less than 90 days' notice would have the burden of proving " . . . that the emergency conditions actually exist, and (1) were beyond their control, (2) were not reasonably foreseeable and (3) significantly impede their operation" (Order at p. 5). The memoranda submitted generally respond to this directive.

Respondents[8] initially argue the existence of emergency conditions by noting that throughout 1978 the cost of bunker fuel remained stable, but during the first quarter of 1979 increased dramatically.[9] In addition to these dramatic price increases, respondents note a concurrent reduction in the supply of available fuel oil. Shipping companies which had projected their 1979 bunker expenses based upon 1978 costs quickly exceeded their budgets.[10] They argue that if they had to wait three months to impose a bunker surcharge rather than one month, their unrecouped expenses would be staggering and would necessitate severe mitigation measures—including, *inter alia*, reductions of speed and capacity, less frequent service and reduced scope of service.

Respondents contend that the increases in fuel costs were clearly beyond their control. The political and economic events which precipitated these increases were not subject to any form of manipulation or control by carriers or conferences of carriers. Moreover, efforts to alleviate the effects of these cost increases—*e.g.*, forward booking or stockpiling of fuel—are also allegedly unavailable to these carriers.

[6] Rule 72 of the Commission's Rules of Practice and Procedure (46 C.F.R. §502.72) states, in part, that:

(t)he petition will be granted if the proposed intervenor shows in his petition a substantial interest in the proceeding and the grounds for intervention are pertinent to the issues already presented and do not unduly broaden them . . . .

The respondents in subdockets 24, 26, 27 and 43 have also indicated, in a reply memorandum to IWPA, that they do not carry steel into the United States. Intervention will also be denied as to these subdockets.

[7] To the extent that IWPA's subsequently filed memorandum of law is not responsive to the issues raised by the Order of Investigation (as is argued by Sea-Land and the respondents in subdockets 24, 26, 27 and 43) it will not be considered.

[8] The various respondents generally raise the same or similar arguments and will, accordingly, be treated as one. The Commission has, however, thoroughly reviewed all individual responses.

[9] In the three month period commencing January 1, 1979, the cost of fuel oil in New York increased up to 47 percent. Similar increases occurred worldwide. These increases are primarily attributed to the revolution in Iran which occurred in the latter part of 1978. Iran, which had produced approximately 10% of the world's oil supplies, completely ceased production from December 1978 to March 5, 1979, and upon resumption of production has not approached prior export levels. Moreover, the Organization of Petroleum Exporting Countries (OPEC) instituted a 9% price increase effective April 1, 1979, six months earlier than had previously been announced. OPEC also permitted its individual members to impose additional surcharges over and above this price increase, and many did so.

[10] Sea-Land, for instance, exceeded its budgeted bunker expenses by $1.9 million in March 1979 and $2.2 million in April 1979.

Respondents further argue that the circumstances and events resulting in increased fuel costs (the Iranian revolution and accelerated OPEC price escalations) could not have been reasonably foreseen by them as prudent businessmen. They note that the United States Government, with its myriad agencies which specialize in predicting the course of political and economic events, was apparently surprised by the Iranian revolution and the subsequent dramatic rise in the cost of crude oil.

Finally, respondents have submitted affidavits which are intended to demonstrate that the emergency conditions are significantly impeding their operations. Among the impediments cited are the following: (1) total unavailability of fuel in certain areas; (2) shortages at some ports causing delays, last minute alternative arrangements, deviations and disruption of normal service patterns; (3) the need to purchase supplemental fuel at extraordinary prices; (4) reduction in vessel speeds with a concomitant increase in transit time; (5) severe economic harm to the carriers; (6) inability to carry out obligations under dual rate contracts; (7) removal of vessels from service; (8) cancellation of plans to introduce additional vessels into some trades; and (9) fewer calls at certain ports and in some cases complete elimination of service.

Some parties further contend that bunker surcharges can and should be imposed on less than 30 days' notice or that such surcharges are not at all subject to the Shipping Act provisions governing dual rate contracts.[11] In addition, the contention has been raised that arbitration under the Uniform Merchant's Contract is the proper or preferred forum for resolving any shipper complaints engendered by the bunker surcharges and not an investigation by the Commission.

Hearing Counsel agrees with respondents that: (1) The bunker surcharges are the result of extraordinary conditions; (2) the extraordinary conditions have impeded, obstructed, or delayed the obligations of these carriers; (3) the extraordinary conditions were outside or beyond the carriers' control; and (4) the carriers, using a high degree of diligence and sound business judgment, could not have foreseen or anticipated the conditions upon which the surcharges are based. In addition, Hearing Counsel points out that out of the tens of thousands of dual rate contract signatories, not one has served notice of cancellation, requested arbitration, or alleged any breach of the contract as a result of the imposition of the surcharges.

IWPA raises the only note of opposition to these bunker surcharges. It concedes that the increases in bunker fuel costs were beyond the control of the carriers, but nonetheless contends that these cost increases are not "extraordinary conditions," nor do they "unduly impede, obstruct or delay" the conferences' obligations under their dual rate contracts. IWPA also argues that by applying a high degree of diligence and sound business judgment the substantial increases in bunker fuel costs could have been anticipated without necessarily having had anticipated the specific cause of such increases. Finally,

[11] These arguments, which have been previously raised, were effectively disposed of in the Order (*See* Order at 4).

IWPA states that a bunker surcharge would increase "trigger prices" for imported carbon steel wire rods contrary to its and the nation's interests.[12]

Sea-Land submitted a memorandum in reply to IWPA stating: (1) that the interest of the intervenor in the proceeding is impossible to ascertain, and (2) that the argument concerning trigger prices is irrelevant and raises matters beyond the Commission's authority.

Section 14b of the Shipping Act requires dual rate contracts to:

> [p] provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days . . . .

The statute clearly contemplates circumstances in which rate increases could become effective on less than ninety days' notice—if they are not "under the control of the carrier or conference." In *The Dual Rate Cases*, 8 F.M.C. 16 (1964), the Commission affirmed this position and also prescribed specific contract clauses which would permit rate increases on less than normal notice under certain abnormal conditions. These contract clauses are presently embodied in the Uniform Merchant's Contract as paragraphs 14(a), 14(b), and 14(c) (46 C.F.R. §538.10). The first two apply where war or other governmental actions (*e.g.*, embargoes or blockades) interfere with a carrier's service, and permit suspension of the contract (Article 14(a)) or rate increases on not less than 15 days' notice to shippers (Article 14(b)). The latter clause, which applies to the circumstances of this case, provides:

> 14(c). In the event of any extraordinary conditions not enumerated in Article 14(a), which conditions may unduly impede, obstruct, or delay the obligations of the Carrier or Carriers, the Carrier or Carriers may increase any rate or rates affected thereby in order to meet such conditions: *Provided, however*, That nothing in this Article shall be construed to limit the provisions of section 18(b) of the Shipping Act, 1916, as amended, in regard to the notice provisions of rate changes.[13]

The criteria necessary to invoke the extraordinary conditions clause of the Uniform Merchant's Contract were set forth in *Surcharge at U.S. Atlantic and Gulf Ports*, 10 F.M.C. 13 (1966): (1) the condition must be outside or beyond the carrier's control; (2) the condition must impede or delay the carrier's service; and (3) there must be an emergency, an abnormal condition, or an extraordinary circumstance. The nature of the condition, *i.e.*, whether it is normal or abnormal (or emergency or extraordinary), is determined in large part by its "foreseeability"—whether the carriers, by exercising a high degree of diligence, could have anticipated the condition.

Based upon the complete record in this proceeding, the Commission finds that these bunker surcharges are the result of extraordinary conditions which were beyond the carriers' control and which were not foreseeable using a high degree of diligence. Certainly, the Iranian situation, the OPEC pricing decisions, the dramatic rise in fuel oil prices, and the severe reduction in supply are

[12] Steel wire rods are subject to the "trigger price mechanism" adopted by the Department of Treasury in connection with its implementation of the Anti-Dumping Act of 1921 (19 U.S.C. §§160-173). This system establishes "trigger prices" which are based on the full costs of production and which are then used as a basis for monitoring steel imports into the United States. The trigger price mechanism was upheld in *Davis Walter Corp. v. Blumenthal*, 460 F.Supp. 283 (D.D.C. 1978).

[13] Section 18(b)(2) requires thirty days' notice of rate increases.

abnormal conditions which were not subject to any control by the carriers. Nor do these conditions appear to have been reasonably foreseeable by anyone—whether a governmental entity or a commercial carrier. There is no evidence that the carriers in this proceeding possessed sufficient information to enable them to anticipate these conditions. Moreover, the price increases occurred suddenly and not slowly and steadily over a significant portion of time, as did the increases in *Atlantic and Gulf/West Coast of South America Conference*, 14 F.M.C. 166 (1970).

The Commission also finds that these extraordinary conditions would unduly impede, obstruct or delay the obligations of these carriers. The primary impediments which these carriers have experienced are severe financial losses, delays, and disruption of service caused by cost and unavilability of bunker fuel. These occurrences would indeed impair the carriers' ability to carry out their obligations under the Uniform Merchant's Contract—particularly that of maintaining a steamship service which shall, so far as concerns frequency of sailings and carrying capacity of vessels, be adequate to meet the merchant's requirements (Article 2).

For the foregoing reasons, we find the bunker surcharges instituted by these carriers and conferences of carriers to be lawful under section 14b of the Shipping Act.

THEREFORE, IT IS ORDERED, That the Petition of the Independent Wire Producers Association for Leave to Intervene is granted to the extent indicated above; and

IT IS FURTHER ORDERED, That the Motions to Dismiss filed by the Bureau of Hearing Counsel and the Java/New York Rate Agreement are hereby granted and, therefore, the Mediterranean-U.S.A. Great Lakes Westbound Freight Conference, the U.S. Great Lakes/South & East Africa Rate Agreement, the India, Pakistan, Bangladesh, Ceylon & Burma Outward Freight Conference, and the Java/New York Rate Agreement are dismissed from this proceeding; and

IT IS FURTHER ORDERED, That, no violations of the Shipping Act having been found, this proceeding is hereby discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NOS. 79-21/22/23/24/25/26/31/32/33/34/35/37/38/39/40/41

FAILURE TO INCLUDE PROVISIONS FOR ADEQUATE SELF-POLICING AS REQUIRED BY GENERAL ORDER 7

Conference and rate-making agreements which failed to include provisions for adequate self-policing, as required by General Order 7, are found to be inadequately policed and are, therefore, disapproved.

Charles F. Warren and *George A. Quadrino* for Deli/New York Rate Agreement, Straits/New York Conference, Philippines/North America Conference, Java/Pacific Rate Agreement, Java/New York Rate Agreement, Deli/Pacific Rate Agreement, Japan/Puerto Rico & Virgin Islands Freight Conference, Atlantic & Gulf Indonesia Conference, Thailand/U.S. Atlantic & Gulf Indonesia Conference, Atlantic & Gulf/Singapore, Malaya & Thailand Conference, and Thailand-Pacific Freight Conference.

David C. Nolan for Hawaii/Europe Rate Agreement.

Stanley O. Sher for U.S. Atlantic & Gulf/Red Sea & Gulf of Aden Rate Agreement.

Hubert Burstein for International Movers Rate Agreement.

Martin F. McAlwee, Paul J. Kaller and *John Robert Ewers* for Bureau of Hearing Counsel.

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

REPORT AND ORDER[1]

October 17, 1979

During April of 1979, the Commission issued sixteen Orders to Show Cause in the above-referenced proceedings.[2] These Orders stated that because the subject agreements failed to meet the minimum requirements for adequate

[1] These proceedings involve substantially the same issues and are, accordingly, consolidated for decision pursuant to Rule 148 of the Commission's Rules of Practice and Procedure. 46 C.F.R. §502.148.

[2] Respondents include the following rate-making groups and their individual members:

a. 79-21—Agreement No. 7190; Deli/New York Rate Agreement;
b. 79-22—Agreement No. 6010; Straits/New York Conference;
c. 79-23—Agreement No. 5600; Philippines/North America Conference;
d. 79-24—Agreement No. 191; Java/Pacific Rate Agreement;
e. 79-25—Agreement No. 90; Java/New York Rate Agreement;

self-policing, as set forth in General Order 7,[3] they were presumed not to meet the requirement of section 15 of the Shipping Act, 1916 that obligations under such agreements be adequately policed.[4] Respondents were thus ordered to show cause why their agreements should not be disapproved for failure to be adequately policed. The proceedings were limited to the submission of affidavits of fact and memoranda of law.

Three Respondents failed to file any affidavits of fact or memoranda of law or any other response to the Orders to Show Cause.[5] One Respondent requested cancellation of its rate agreement.[6] Another filed a "Petition for Exemption from the Self-Policing Provisions Set Forth in General Order 7" as its sole response to the Order.[7] Finally, a group of eleven Respondents, all represented by the same counsel, filed identical Responses to the Order to Show Cause.[8] The Commission's Bureau of Hearing Counsel, which had been made a party to these proceedings, filed reply memoranda in all dockets. The eleven Respondents filed identical responses to Hearing Counsel's replies.

Discussion

Background

Section 15 of the Shipping Act, 1916 requires the disapproval of any agreement which must be filed with the Commission, "[o]n a finding of inadequate policing of the obligations under it. . . ."[9] To effectuate this provision, the Commission adopted rules governing self-policing of Commission approved agreements which prescribed "minimum standards for judging the adequacy of self-policing activities. . . ." 46 C.F.R. § 528.0(a). Because prior self-policing systems had generally proven inadequate, these rules impose as their central requirement the establishment of an independent self-policing body with broad investigatory powers and detailed reporting requirements. *See* 46 C.F.R. §§ 528.3 and 528.5.

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f. 79-26—Agreement No. 192; Deli/Pacific Rate Agreement;
g. 79-31—Agreement No. 8190; Japan/Puerto Rico & Virgin Islands Freight Conference;
h. 79-32 Agreement No. 8080; Atlantic & Gulf Indonesia Conference;
i. 79-33—Agreement No. 8100; Thailand/U.S. Atlantic & Gulf Conference;
j. 79-34—Agreement No. 8240; Atlantic & Gulf/Singapore, Malaya & Thailand Conference;
k. 79-35 Agreement No. 8410; Hawaii/Europe Rate Agreement;
l. 79-37—Agreement No. 8530; International Movers Rate Agreement;
m. 79-38—Agreement No. 8595; Great Lakes/Japan Rate Agreement;
n. 79-39—Agreement No. 8670; Japan/Great Lakes Memorandum;
o. 79-40—Agreement No. 9474;Thailand-Pacific Freight Conference; and
p. 79 41—Agreement No. 10025; U.S. Atlantic & Gulf/Red Sea & Gulf of Aden Rate Agreement.

[3] General Order 7, which contains self-policing requirements for section 15 agreements, was published as a final rule on September 14, 1978 and became effective January 1, 1979. *See* 46 C.F.R. Part 528, General Order 7, Docket No. 73-64, Report and Order dated April 26, 1978, as amended by Order on Reconsideration served September 14, 1978.

[4] 46 U.S.C. § 814.

[5] Docket Nos. 79-38/39/41.

[6] Docket No. 79-35.

[7] Docket No. 79 37. In addition, several companies which had been named as respondents in the Order to Show Cause subsequently informed the Secretary, Federal Maritime Commission that they no longer were members of the International Movers Rate Agreement.

[8] Docket Nos. 79-21/22/23/24/25/26/31/32/33/34/40.

[9] 46 U.S.C. § 814.

The Commission's final order in this rulemaking proceeding has been appealed to the U.S. Court of Appeals for the District of Columbia Circuit.[10] One of the major issues raised is whether the final self-policing rules exceed the Commission's statutory authority. Concurrently, on December 8, 1978, members of the Trans-Pacific Freight Conference of Japan/Korea and 26 other agreements petitioned the Commission to stay the January 1, 1979 effective date of these revised self-policing regulations. The Commission denied the petition on February 16, 1979. Subsequent to the issuance of the show cause orders and over six months after the effective date of the rules, Trans-Pacific *et al.* filed an Application for Stay of the Commission's September 14, 1979 Order with the Court of Appeals. In a *per curium* opinion filed July 16, 1979, the court denied the application for stay.

Proceedings

With respect to those respondents who failed to file any responses to the Orders to Show Cause (Docket Nos. 79-38/39/41), Hearing Counsel recommends that each agreement be disapproved and that disapproval become effective 45 days from the date of this Order. The Commission would normally adopt Hearing Counsel's dispositional recommendation. However, events which occurred subsequent to the filing of Hearing Counsel's reply dictate a different result. The Commission has recently received notice that the Japan/Great Lakes Memorandum Agreement (Docket No. 79-39) and the Great Lakes/Japan Rate Agreement (Docket No. 79-38) have been cancelled. The Commission has also received notice that the U.S. Atlantic & Gulf/Red Sea & Gulf of Aden Rate Agreement (Docket No. 79-41) has been amended to comply with the requirements of General Order 7. Under these circumstances, the Commission will dismiss the proceedings against these agreements.[11]

The three members of the Hawaii/Europe Rate Agreement (Docket No. 79-35) have requested that their agreement be cancelled. They have further requested that individual lines be granted time to prepare their own tariffs, before that cancellation becomes effective. Hearing Counsel concurs in these requests. The Commission will, accordingly, disapprove this agreement effective 60 days from the date of this Order.

In lieu of filing affidavits of fact or memoranda of law in response to the Order to Show Cause, the International Movers Rate Agreement (Docket No. 79-37) submitted an affidavit petitioning for an exemption from the neutral body requirement of General Order 7. Hearing Counsel avers that the representations made in the affidavit, if true, make a "credible" case for deferring consideration of an order of disapproval until the Commission determines the merits of the requested exemptions. However, this petition for exemption is non-responsive to the Commission's Order to Show Cause and must

[10] *Trans-Pacific Freight Conference of Japan/Korea, et al. v. Federal Maritime Commission and the United States of America*, D.C. Cir., No. 78-2172; *Sea-Land Service, Inc. v. Federal Maritime Commission and the United States of America*, D.C. Cir., No. 79-1062.

[11] The "Motion to Dismiss Proceeding on the Grounds of Mootness" filed by the U.S. Atlantic & Gulf/Red Sea & Gulf of Aden Rate Agreement will also be dismissed, as moot.

be denied, though we will do so without prejudice.[12] The Commission will consequently disapprove Agreement No. 8530, but will again defer the effective date of disapproval for 60 days.

In their responses to the Orders to Show Cause the eleven remaining respondents contend that they cannot possibly overcome the presumption of inadequate policing raised by the Orders except by full and complete compliance with revised General Order 7. They also maintain that, because the question of the validity of these regulations is currently on appeal, the Commission should not engage in proceedings which collaterally interfere with the judicial process. Hearing Counsel notes that these agreements are not in fact policed by a neutral body and are, therefore, presumed to be inadequately policed. Hearing Counsel also claims that respondents err in arguing that these show cause proceedings constitute collateral interference with the judicial process. In order to allow respondents to comply with General Order 7 or to permit individual member lines to file tariffs, Hearing Counsel recommends that disapproval take effect 60 days from the Commission's final order.

The Commission has recently received notice that two of these eleven agreements have complied with the requirements of General Order 7. The proceedings against the Thailand/U.S. Atlantic & Gulf Conference (Docket No. 79-33) and the Thailand/Pacific Freight Conference (Docket No. 79-40) will, therefore, be dismissed.

As to the remaining nine respondents, they have offered little support for their contention that the Commission should not resolve these proceedings because the validity of the self-policing rules is presently on appeal. Their only legal authority—28 U.S.C. § 2342—is inapposite; it merely states that the Court of Appeals has exclusive jurisdiction to determine the validity of final agency orders.[13] Moreover, the Court of Appeals has denied the petitioners' application for a stay of the self-policing rules. These cases can, therefore, be resolved without collaterally interfering with the judicial process.

These respondents readily admit that they have submitted no affidavits of fact or memoranda of law which would demonstrate that their agreements are adequately policed under the requirements of General Order 7 and section 15 of the Shipping Act. As a result, the Commission has no choice but to proceed to disapprove each of these agreements. However, the Commission will defer the effective date of disapproval for 60 days from the date of this Order to allow members of these agreements to file individual tariffs.

THEREFORE, IT IS ORDERED, That the proceedings against Agreements Nos. 8595 (Great Lakes/Japan Rate Agreement); 8670 (Japan/Great Lakes Memorandum); 10025 (U.S. Atlantic & Gulf/Red Sea & Gulf of Aden Rate Agreement); 8100 (Thailand/U.S. Atlantic & Gulf Conference); and 9474 (Thailand-Pacific Freight Conference) are dismissed; and

[12] The Commission has determined that the filing of a petition for exemption does not relieve a conference or rate-fixing body from the independent neutral body requirements of section 528.3(b) of General Order 7 during the pendency of the petition. Statement of Federal Maritime Commission, released December 15, 1978.

[13] Because 28 U.S.C. § 2349(b) provides that, "[t]he filing of the petition to review does not of itself stay or suspend the operation of the order of the agency . . .," the rules would normally remain in effect during the process of appellate review.

IT IS FURTHER ORDERED, That the U.S. Atlantic and Gulf/Red Sea & Gulf of Aden Rate Agreement's Motion to Dismiss Proceedings on the Ground of Mootness is dismissed; and

IT IS FURTHER ORDERED, That the Petition for Exemption from the Self-Policing Provisions set Forth in General Order 7 filed by the International Movers Rate Agreement is denied, without prejudice; and

IT IS FURTHER ORDERED, That Agreements Nos. 7190 (Deli/New York Rate Agreement); 6010 (Straits/New York Conference); 5600 (Philippines/North America Conference); 191 (Java/Pacific Rate Agreement); 90 (Java/New York Rate Agreement); 192 (Deli/Pacific Rate Agreement); 8190 (Japan/Puerto Rico & Virgin Islands Freight Conference); 8080 (Atlantic & Gulf Indonesia Conference); 8240 (Atlantic & Gulf/Singapore, Malaya & Thailand Conference); 8410 (Hawaii/Europe Rate Agreement); and 8530 (International Movers Rate Agreement) are hereby disapproved; and

IT IS FURTHER ORDERED, That disapproval of these agreements shall become effective 60 days from the date of this Order; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

SUBCHAPTER A—GENERAL PROVISIONS

[GENERAL ORDER NO. 16, AMDT. 31; DOCKET NO. 79-49]

PART 502—RULES OF PRACTICE AND PROCEDURE

October 17, 1979

ACTION: Final Rule

SUMMARY: This amends the rule governing intervention in Commission proceedings to: (1) specify applicable standards for intervention; and (2) allow for limitation of intervenors' participation in Commission proceedings. Rule 24 of the Federal Rules of Civil Procedure has been used as a model for the Commission rule.

EFFECTIVE DATE: October 23, 1979

SUPPLEMENTAL INFORMATION:

This proceeding was instituted by Notice of Proposed Rulemaking, 44 Fed. Reg. 28694-28696, to amend Rule 72 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.72) to conform to the intervention standards in Rule 24 of the Federal Rules of Practice and Procedure to the extent appropriate in Commission proceedings.

As proposed to be amended, Rule 72 would:

(1) incorporate the requirements contained in the existing Commission rule as to the form and procedure for submitting petitions for intervention. (Paragraph (a))

(2) establish the standards under which petitions for intervention would be considered. This provision would require petitioners to indicate whether they seek intervention as a matter of right or in the discretion of the Commission and the extent of participation sought. Intervention as a matter of right would require a showing of either specific statutory authority or an interest relating to the matter which is the subject of the proceeding and that the proceeding may materially affect that interest, and that such interest is not adequately represented by existing parties to the proceeding.

Permissive intervention requires a showing that the petitioner's interest involves a common issue of law or fact with the matter being litigated, its intervention will not unduly broaden or delay the proceeding, duplicate the positions of, or prejudice existing parties and its participation will contribute to the proceeding in some significant way. The timeliness of the petition would also be considered in determining whether intervention should be granted. (Paragraph (b))

(3) provide the mechanism for limited intervention, *i.e.,* the presentation of evidence on specific factual issues and/or the submission of amicus curiae briefs on selected legal issues, and would allow for continuing control over such participation. (Paragraph (c))

(4) incorporate the existing Commission rule on the limitation of discovery right for later intervenors. (Paragraph (d))

(5) provide that discovery may be limited in the same manner as petitioners' participation. (Paragraph (e))

(6) allow for Commission review of intervention rulings made by the presiding officer. (Paragraph (f))

Comments to the proposed rule were received from nine parties in six submissions. Commentators consist of six conferences, one shipper, one shipowners' association, and one government agency.

The Pacific Westbound Conference, the Pacific-Straits Conference and the Pacific-Indonesian Conference suggest that those seeking permissive intervention be allowed to intervene even if their position may be duplicative of another party. It is allegedly difficult to have a common question of law or fact which is not duplicative of another party's. These commentators further point out that it may also not be possible to determine at the very early stages of a proceeding if a given party's position is in fact duplicative.

The Council of European & Japanese National Shipowners' Association proposes three areas of clarification: (1) that the rule expressly not be made applicable to rulemaking proceedings; (2) that it not preclude the intervention of trade associations; and (3) that the prohibition against a permissive intervention prejudicing the rights of an existing party be made applicable only to the *adjudication* of the rights of *original* parties.

The Japan/Korea-Atlantic and Gulf Freight Conference and Trans-Pacific Freight Conference of Japan/Korea suggest that: (1) either the requirement that the petition be served on all parties or the requirement that the Commission be provided copies for distribution be deleted; and (2) the rule be amended to allow for replies to appeals to the Commission on intervention rulings.

Outboard Marine Corporation is of the opinion that the participation of Hearing Counsel as a party representing the "public interest" should not preclude the intervention of appropriate private interests even though such intervention may arguably be duplicative. To this end, it is suggested that the term "party" as used in the rule be defined to expressly exclude Hearing Counsel.

Interamerican Freight Conference takes the position that: (1) discovery procedures not be available to intervenors filing only amicus briefs and restricted to those factual issues to which the participation was limited; (2) the provision allowing for a statutory right of intervention be deleted as no such statute exists; (3) the requirement that an intervenor show that its interests will not be adequately represented by existing parties be deleted as such a provision would require adverse representations as to the abilities of counsel for existing parties in situations where only legal issues are being argued; and (4) the rule be amended to make clear whether copies of the petition for intervention are to be served on existing parties by the party seeking intervention or the Commission, with the latter alternative being urged.

The Department of Justice (DOJ) views the proposed revised rule as making two fundamental changes to the existing rule: (1) establishing categories of intervenor petitions with different requisite showings; and (2) limiting and controlling the extent of intervenor participation. No objection is made to the establishment of categories but limitations on the extent of participation of intervening parties is objected to as "clearly inconsistent with court precedent as well as practice in other regulatory agencies."

Each of the specific proposals advanced by the commentators will now be discussed.

1. *Duplication Of Positions By Permissive Intervenors Should Not Be Prohibited*

The requirement that the petitioner's position not be duplicative of another party is not as stringent as it is apparently perceived. Clearly, one can have a common issue of fact or law at stake but take a different position on that issue. Even if the position taken is similar this does not necessarily mean it is duplicative. Moreover, even when a position taken on a common issue is close to being duplicative of another party, if the petitioner can show that it will make a significant contribution to the proceeding, the Commission may, in its discretion nevertheless grant intervention. No amendment to the rule appears to be required under the circumstances.

2. *The Proposed Rule Should Not Apply To Rulemaking Proceedings*

The proposed rule would apply to formal rulemaking proceedings.[1] Such proceedings involve hearings almost identical in nature to adjudicatory proceedings. Therefore, the reasons for controlling intervention in adjudicatory proceedings applies with equal force to formal rulemaking proceedings. Accordingly, the rule will not be narrowed in scope as suggested by this proposal.

3. *Associations Should Be Allowed To Intervene*

This proposal is already accommodated by the Commission's Rules of Practice and Procedure. Rule 41 (46 C.F.R. § 502.41) permits intervention by

[1] 46 C.F.R. § 502.53 (Rule 53) governs participation in rulemaking and makes applicable the formal hearing requirements to rules "required by statute to be made on the record after opportunity for a hearing." As to those types of formal rulemakings, Rule 53 expressly provides that: "In those proceedings in which respondents are named, interested parties who wish to participate therein shall file a petition to intervene in accordance with the provisions of section 502.72 (Rule 72)."

associations.[2] Whether the interest of an "association" is one which will, in any given proceeding, warrant intervention in the discretion of the Commission is a matter that can only be determined on an *ad hoc* basis, and is not subject to special treatment in the rule.

4. *"Prejudice The Rights Of An Existing Party" Should Be Changed To "Prejudice The Adjudication Of The Rights Of Original Parties" In Paragraph (b) (2) (ii) Of The Rule.*

Because there appears to be some uncertainty as to what "rights" of existing parties this provision was intended to protect, the language of paragraph (b) (2) (ii) will be revised to more accurately reflect its true intent, *i.e.,* that of of protecting the rights of existing parties to a fair and speedy *adjudication* of the controversy. However, the prohibition against prejudice should extend to the adjudicative rights of prior intervenors as well as those of original parties. Accordingly, paragraph (b) (2) (ii) will only be modified by the insertion of the words "the adjudication of" after the word "prejudice" in paragraph (b) (2) (ii) of the rule.

5. *The Commission Should Serve Copies of Petitions To Intervene.*

While service copies of the petition for intervention required by the rule are for the existing parties to the proceeding, the 15 copies required to be filed with the petition are for the internal use of the Commission. The Commission will not undertake to serve copies of petitions on existing parties. Because the language of paragraph (a) (1) of the rule appears to be ambiguous on this point it will be amended to make clear that a petitioner must: (1) serve all the existing parties to the proceeding with copies of its petition, and (2) file an additional 15 copies of the petition with the Commission Secretary.

6. *The Rule Should Provide For Replies To Appeals From Intervention Rulings.*

Replies to appeals to the Commission from intervention determinations by the presiding officer are provided for by Rule 74(a) (46 C.F.R. § 502.74(a)).[3] No change in the rule is required in response to this comment.

Furthermore, while the Commission originally contemplated broadening the scope of review of such determinations to allow non-petitioner appeals and *sua sponte* Commission review, upon reflection it has determined that such expanded procedures may in fact result in delaying proceedings contrary to the underlying purpose of the rule. The existing appeal mechanism contained in Rule 227 (46 C.F.R. § 502.227) appears to be adequate for purposes of this rule. Accordingly, paragraph (f) of the proposed rule will be deleted.

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[2] Rule 41 defines the term "party" to specifically include *inter alia,* an "association."

[3] Rule 74 provides in pertinent part, "[a]ny party may file a reply to any . . . petition . . . permitted under the rules in this part within fifteen (15) days after date of service thereof. . . ."

7. *Hearing Counsel Should Not Be Included In The Term "Party"*

Irrespective of Hearing Counsel's participation, private interests with a general interest in a proceeding will not necessarily be precluded from intervening. Normally, a general public interest position will not displace a specific private interest. As has been discussed, a duplicative position should not be confused with a similar position and in close cases a showing of a potential significant contribution should militate in favor of the grant of intervention. In complaint proceedings, Hearing Counsel should be treated as any other petitioner seeking intervention. Therefore, under either situation, Hearing Counsel should be included within the meaning of the term "party" as used in the rule. No change in the language of the proposed rule is necessary in this regard.

8. *Discovery Should Be Restricted For Intervenors*

This is a matter that can be addressed under paragraph (c) of the proposed rule by the presiding officer. In order to protect the due process rights of intervenors the extent to which such discovery procedures will be available to them is a matter best left to the sound discretion of the presiding officer under the facts of the particular proceeding. This is not a matter that can readily be reduced to a rule of general applicability.

9. *A Statutory Right Of Intervention In FMC Proceedings Does Not Exist And Should Be Deleted From The Rule*

A statutory right of intervention is provided for in the Federal Rule and was therefore incorporated into the proposed rule. However, because the Commission is itself not aware of any provision of law granting a right of intervention in its proceedings, nor has any such provision been cited by a commenting party, the phrase "in the absence of an absolute statutory right of intervention" will be deleted from paragraph (b) (1) in the final rule.

10. *The Adequacy Of Representation Of A Petitioner's Interests By Existing Parties Should Not Be An Issue.*

The critical issue under paragraph (b) (1) (iii) is whether the existing party has such similar interest, position, perspective and resources that its participation in the proceeding will necessarily include anything that the petitioner is able to offer. The Commission will not presume that counsel for existing parties in Commission proceedings are incompetent nor will it make rules based on that presumption. The requirement in paragraph (b) (1) (iii) is a fundamental aspect of the rule and will be retained as proposed.

11. *The Participation Of Intervenors May Not Be Limited*

The objection to one of the fundamental aspects of the proposed rule, that of limiting the participation of intervenors in proceedings to the extent necessary to protect their interests, is rejected. The Commission, however, has no intention of depriving any petitioner of its due process rights. Nor does the rule prevent a petitioner from participating in a proceeding if it has something worthwhile to offer.

In *Pepsi Co., Inc. v. F.T.C.*, 472 F.2d 179 (2d Cir. 1972), *cert. den.* 414 U.S. 876 (1973), the court found the intervention standards of the Federal Rules of Civil Procedure applicable to intervention in agency proceedings. That decision clearly contemplates limitations on the participation of intervenors in agency proceedings beyond that normally utilized in formal court proceedings. 472 F.2d at 184. The Commission finds no legal impediment to such procedures and will not reverse its policy determinations as to this fundamental aspect of the proposed rule.

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)) section 502.72 of Title 46, Code of Federal Regulations, is amended as follows.

Section 502.72 Petition for Intervention

(a) A petition for leave to intervene may be filed in any proceeding and shall be served on existing parties by the petitioner pursuant to section 502.114. An additional fifteen (15) copies of the petition shall be filed with the Secretary for the use of the Commission. Upon request, the Commission will furnish a service list to any member of the public pursuant to Part 503 of these rules. The petition shall set forth the grounds for the proposed intervention and the interest and position of the petitioner in the proceeding and shall comply with the other applicable provisions of Subpart H of this part, and if affirmative relief is sought, the basis for such relief. Such petition shall also indicate the nature and extent of the participation sought, *e.g.*, the use of discovery, presentation of evidence and examination of witnesses.

(b) (1) Petitions for intervention as a matter of right will only be granted upon a clear and convincing showing that:

(i) the petitioner has a substantial interest relating to the matter which is the subject of the proceeding warranting intervention; and

(ii) the proceeding may, as a practical matter, materially affect the petitioner's interest; and

(iii) the interest is not adequately represented by existing parties to the proceeding.

(2) Petitions for intervention as a matter of Commission discretion may be granted only upon a showing that:

(i) a common issue of law or fact exists between the petitioner's interests and the subject matter of the proceeding; and

(ii) petitioner's intervention will not unduly delay or broaden the scope of the proceeding, prejudice the adjudication of the rights of or be duplicative of positions of any existing party; and

(iii) the petitioner's participation may reasonably be expected to assist in the development of a sound record.

(3) The timeliness of the petition will also be considered in determining whether a petition will be granted under paragraphs (b) (1) or (2) of this section. If filed after hearings have been closed, a petition will not ordinarily be granted.

(c) In the interests of: (1) restricting irrelevant, duplicative, or repetitive discovery, evidence or arguments; (2) having common interests represented by a spokesperson; and (3) retaining authority to determine priorities and control the course of the proceeding, the presiding officer, in his discretion, may impose reasonable limitations on an intervenor's participation, *e.g.,* the filing of amicus curiae briefs, presentation of evidence on selected factual issues, or oral argument on some or all of the issues.

(d) Absent good cause shown, any intervenor desiring to utilize the procedures provided by Subpart L must commence doing so no later than 15 days after its petition for leave to intervene has been granted. If the petition is filed later than 30 days after the date of publication in the *Federal Register* of the Commission's Order instituting the proceeding or notice of complaint filed, petitioner will be deemed to have waived its right to utilize such procedures, unless good cause is shown for the failure to file the petition within the 30-day period. The use of Subpart L procedures by an intervenor whose petition was filed beyond the 30-day period described above will in no event be allowed, if, in the opinion of the presiding officer, such use will result in delaying the proceeding unduly.

(e) If intervention is granted before or at a prehearing conference convened for the purpose of considering matters relating to discovery, the intervenor's discovery matters may also be considered at that time, and may be limited under the provisions of paragraph (c) of this section.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 647

APPLICATION OF AMERICAN PRESIDENT LINES, LTD.
FOR THE BENEFIT OF BEVERLY COAT HANGER COMPANY

REPORT AND ORDER
PARTIALLY ADOPTING INITIAL DECISION

October 22, 1979

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

This proceeding was initiated pursuant to section 18(b)(3) of the Shipping Act, 1916, upon the application of American President Lines, Ltd. for permission to refund a portion of freight charges to Beverly Coat Hanger Company.

The Initial Decision of the Presiding Officer conditioned approval of the application upon the submission of evidence to the Commission showing the applicable tariff rates and dates of certain shipments for which the refund was requested.

The Commission determined to review the Initial Decision in view of the fact that a complete evidentiary record was not developed. The proper forum for receiving evidence in this proceeding was the administrative hearing before the Presiding Officer. Evidence upon which findings of fact can be made on these issues is indispensable to an ultimate decision on the application. Although existing procedures do not authorize a presiding officer to direct the submission of evidence to the Commission, the Commission has determined to review the supplemental evidence submitted in this case in order to avoid the unnecessary delay that would result from a remand.

The record establishes that the applicable tariff rate on file with the Commission on the dates of the shipments in question was $71.00 per cubic meter. All the sailing dates to which this application applies were within 180 days of the date of the application as required under the statute of limitations imposed by section 18(b)(3) of the Shipping Act, 1916.

All other findings in the Initial Decision are correct and are herein adopted by the Commission.

THEREFORE, IT IS ORDERED, That the Initial Decision served in this proceeding July 16, 1979 is adopted insofar as it finds that American President Lines, Ltd. is granted permission to refund $1,355.58 to Beverly Coat Hanger Company; and

IT IS FURTHER ORDERED, That American President Lines, Ltd. publish immediatly in the Hong Kong Taiwan Freight Tariff No. 5, F.M.C. No. 67 at page 110, the following notice:

NOTICE OF REFUND AUTHORIZATION

Pursuant to authority granted by the Federal Maritime Commission in Special Docket No. 647, the tariff rate for clothes hangers, all kinds, is $62.00 per cubic meter, effective December 3, 1978 and continuing through January 16, 1979, inclusive.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 647

APPLICATION OF AMERICAN PRESIDENT LINES, LTD. FOR THE BENEFIT OF BEVERLY COAT HANGER COMPANY[1]

Partially Adopted October 22, 1979

Request granted for permission to refund $1,355.58 portion of aggregate of $10,694.02 (+ $238.36 Destination Container Service Charges) freight charges actually collected provided APL supplies the Commission within 30 days with certain proofs. Failure to supply proofs will result in denial of this request for permission to refund.

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

The application in this special docket proceeding was received in the Commission June 1, 1979. The commodity involved is Wooden Clothes Hangers. The commodity was shipped in five (5) shipments under the following American President Lines, Ltd. (APL) Bills of Lading from Kaohsuing via Keelung to San Francisco:

Bill of Lading Number	*Bill of Lading Date*	*Name of Vessel and Voyage No.*	*Sailing Date*	*Measurement*
252925	12-3-78	Pres. Pierce V-42	12-17-78	51.32 M3
253107	12-11-78	Pres. Jefferson V-49	12-12-78	37.59 M3
253108	12-11-78	Pres. Jefferson V-49	12-12-78	15.87 M3
253295	12-17-78	Pres. Madison V-47	12-17-78	10.17 M3
253424	12-25-78	Pres. Johnson V-42	12-26-78	35.67 M3
			Total	150.62 M3

[1] This caption conforms to the revised format. Under date of June 5, 1979, the Secretary of the Commission sent the following letter to counsel for American President Lines:

Receipt is acknowledged of your recent special docket application on behalf of American President Lines. This application does not follow the revised format required by the Commision's recent amendment to its Rules of Practice. Inasmuch as the limitation period for filing has nearly passed, this application nonetheless will be accepted for processing. Forwarded herewith is a copy of the Commission's recent rule revision. Please consult this rule and supplement your application accordingly, to assure that all necessary information is before the Commission.

Processing of this application is being done on submissions to date.

[2] 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).

The application is filed timely as to all shipments, having been received within 180 days of the sailing date of each. (Rule 92(a)(3) of Commission's Rules of Practice and Procedure, 46 C.F.R. §502.92 (a)(3)).

The Beverly Coat Hanger Company concurs in this application and certifies that freight charges of $1,355.58 on the shipments involved herein were paid and borne as such by Beverly Coat Hanger Co. and no other. It is the amount of $1,355.58 that APL seeks permission to refund. APL in the application states it actually collected from Beverly Coat Hanger Company $10,694.02 (+$238.36 Destination Container Service Charges) a total of $10,932.38; that the rate applicable at time of shipment was $71.00 per cubic meter as per APL Hong Kong-Taiwan Freight Tariff No. 5, FMC No. 67, Item 3030—15th Revised Page 161, effective December 27, 1978 (Wood Manufactures and Woodenware, NOS including Wooden Decorative Ceiling Boards and Beams; Wooden Figures, Wooden Towel Holders; Blocks for Trophy Stands, Mahogany Boards; Wooden Weaving Looms; Match Sticks, Ramie Loose but excluding Doors, Furniture and Woodcarvings). The aggregate measurements of the shipments was 150.62 cubic meters (150.62 cubic meters × $71 = $10,694.02 + $238.36 Destination Container Service Charges = $10,932.38).

The rate sought to be applied is $62.00 per cubic meter as per American President Lines, Ltd. Hong Kong-Taiwan Freight Tariff No. 5—FMC No. 67, Item No. 0620, 10th Revised Page 110, effective January 17, 1979 (Item 0620 was made effective December 27, 1978) (Clothes Hangers, All Kinds) (150.62 cu. meters × $62.00 = $9,338.44 + $238.36 Destination Container Service Charges = $9,576.80).

($10,932.38 − $9,576.80 = $1,355.58).

In support of this application APL states, *inter alia:*

> APL (pursuant to the terms of FMC Agreement 10107 and with the concurrence of the members of said agreement) agreed to establish a local rate for Clothes Hangers, all kinds in the amount of $62.00 per cubic meter effective December 3, 1978. A copy of APL's letter to the complainant is identified as Attachment D-1.[3] Through clerical oversight, the reduction was not published until December 27, 1978 (Attachment "C").

(Agreement 10107 referred to by APL is Trans-Pacific Freight Conference (HK)/Independent Lines Rate Agreement of which APL is a member. Trade to U.S. Pacific Coast Ports from Hong Kong and Taiwan. APL publishes its own tariff.)

Discussion, Reasons, Findings And Conclusions

The information in this proceeding is that APL intended to establish a local rate for Clothes Hangers, all kinds in the amount of $62.00 per cubic meter in its tariff effective December 3, 1978. The sailing date of each shipment is as

[3] In the letter dated November 27, 1978, APL wrote to the Beverly Coat Hanger Company the following:

> This confirms our previous telephone conversation concerning a new rate for clothes hangers from Hong Kong and Taiwan to local West Coast ports in the United States.
>
> We are pleased to announce that effective December 3, 1978 the rate for the above commodity will be $62.00 per cubic meter or thousand Kilos. It is hoped that our new rate amendment will serve to strengthen your position in product quotation to your buyers.

shown above. The $62.00 per cubic meter rate desired by APL to be applied became effective December 27, 1978. The application was filed June 1, 1979, so that the Commission received an effective tariff setting forth the rate on which refund would be based prior to the filing of the application. (46 C.F.R. §502.92 (A)(2)).

What is not clear is the rate applicable at the time of shipment. APL in the application says the rate applicable at time of shipment was $71.00 per cubic meter as per APL Hong Kong-Taiwan Freight Tariff No. 5, FMC No. 67, Item 3030 (Attachment "B"). Attachement "B" is a copy of that Tariff's 15th Rev. Page 161, effective December 27, 1978. As is seen above, the Bills of Lading as well as the sailing dates of the shipments involved all precede December 27, 1978. True, the application is under oath but the supporting evidence as to the rate applicable at the time of shipment has not been made clear. Too, the supporting evidence of the date of shipment has not been supplied.

The measurements of the individual shipments are shown on the bills of lading and have been shown above and totalled.

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 application received by the Secretary of the Commission on June 1, 1979, was within 180 days of the sailing date of each shipment involved, thus 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 a clerical or administrative nature which resulted in the necessity of a refund as requested in the application; that comports with the requirements under special docket applications (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, but supporting evidence as to the rate applicable at the time of shipment has not been made clear.

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

(5) Permission to make the requested refund should be granted provided the applicant provides the information and/or documents to make clear the rate applicable at the times of each shipment involved and the supporting evidence of the date of each shipment.

Wherefore, it is ordered, that:

(A) Permission be and hereby is granted to American President Lines, Ltd. to refund a $1,355.58 portion of $10,694.02 (+ $238.36 Destination Container Service Charges) actually collected, for the benefit of Beverly Coat Hanger Company, provided the said American President Lines, Ltd. provides to the Commission within 30 days of the date of this initial Decision the evidence, satisfactory to the Commission to make clear the rate applicable at the time of each shipment involved and supporting evidence of the date of each shipment.

(B) Upon supplying the Commission with the evidence in (A) above, and providing the Commission is satisfied with what is submitted, the refund shall be made and this proceeding discontinued. Failure of APL to supply necessary proofs shall cause the request for permission to refund to be denied and the proceeding discontinued.

(C) APL at the proper time shall publish in its tariff an appropriate notice of this proceeding.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON, D. C.
July 8, 1979

FEDERAL MARITIME COMMISSION

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

This proceeding was instituted to determine the lawfulness of reduced rates on sugar cane and refined sugar, N.O.S., filed by Trailer Marine Transport Corporation (TMT).

TMT has appealed from a denial of the Presiding Judge of its motion to discontinue the investigation. The basis of that motion is that the rates under investigation herein have been cancelled.

The Commission is of the opinion that no further regulatory purpose would be served by continued investigation of the now-cancelled rates. Accordingly, the appeal is granted and this proceeding is discontinued. By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79–48

TRAILER MARINE TRANSPORT CORPORATION—
PROPOSED GENERAL INCREASE IN RATES

Rate increase will not result in an excessive return on equity in comparison to other industries facing similar business and financial risks and is consequently just and reasonable.

The reasonableness of the revenue and tonnage projections was not specifically raised as an issue by the Order of Investigation and they must, therefore, be accepted for the purposes of this proceeding.

Michael Joseph for Trailer Marine Transport Corporation.

William L. Blum for Government of the Virgin Islands.

C. Douglass Miller, Charna J. Swedarsky, and *John Robert Ewers* for Bureau of Hearing Counsel.

REPORT AND ORDER PARTIALLY ADOPTING INITIAL DECISION

October 26, 1979

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

This proceeding was initiated on May 2, 1979, by Order of Investigation and Hearing (Order) to determine the lawfulness of a 5 percent general rate increase filed by Trailer Marine Transport Corp. (TMT), to apply in the trade between U.S. Atlantic and Gulf Coast ports and ports in Puerto Rico and the Virgin Islands. Because of recent amendments to the Intercoastal Shipping Act, 1933,[1] the proceeding was specifically limited to an investigation of:

[1] P.L. 95–475, 92 Stat. 1494 (1978), imposes the following limitations on the Commission:

(1) The Commission shall not order a hearing pursuant to this subsection, on its own motion or upon protest, unless the Commission publishes in the Federal Register the reasons, in detail, why it considers such a hearing to be necessary and the specific issues to be resolved by such hearing. 46 U.S.C. §845(a).

(2) The Commission shall complete such hearing . . . within sixty days . . . and . . . shall issue a final decision thereon within one hundred and eighty days. 46 U.S.C. §845(b).

[2] Though PRMA protested TMT's general rate increase, it did not participate further in the proceeding.

1. Whether or not TMT's return on equity is excessive in comparison to other industries facing similar business and financial risks; and
2. The allocation of line haul expenses and division of assets between TMT and Gulf Caribbean Marine Lines, both subsidiaries of Crowley Maritime Corporation (CMC) for tandem barge towing services between U.S. Gulf Coast ports and Puerto Rico.

This Order was subsequently clarified and amended to include the additional question of:

3. Why is there a projected increase in revenue for the trade despite a decreasing volume of cargo carried for TMT's projected period of April 1, 1979 to March 31, 1980, as compared to TMT's actual period of December 1, 1977 to November 30, 1978? Order served July 5, 1979.

TMT was named Respondent and the Government of the Virgin Islands (GVI) and the Puerto Rico Manufacturers Association (PRMA) were named Protestants.[2] Expedited hearings were conducted on June 28 and 29, 1979, before Administrative Law Judge Seymour Glanzer,[3] resulting in a record consisting of a 296-page transcript and ten exhibits.

On August 21, 1979, Administrative Law Judge Stanley M. Levy issued an Initial Decision in which he concluded that TMT did not reasonably establish the volumes and revenues which may be anticipated by its rate increase and that, therefore, TMT had not met its burden of showing that its rates are just and reasonable. He thus found the rates in Supplement No. 1 to Tariff FMC-F No. 5 to be unlawful. Exceptions were filed by TMT, Sea-Land Service, Inc., Puerto Rico Maritime Shipping Authority (PRMSA), and GVI.[4] The Commission's Bureau of Hearing Counsel and GVI filed replies to exceptions. In addition, Hearing Counsel filed a "Petition to Strike" portions of PRMSA's argument, which GVI supports and to which TMT and PRMSA replied.[5] TMT's request for oral argument was denied.

DISCUSSION

TMT claims that the Initial Decision errs in concluding that:

1. TMT had the burden of proving that its rates are just and reasonable by proving that its forecast year revenue and tonnage projections are reasonable;
2. TMT's rates are unlawful without considering the fact that they are identical to those of its competitors;
3. TMT's rates are unlawful without considering its historical financial results; and

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[3] Judge Glanzer conducted the hearings because Judge Levy was hospitalized recovering from an operation. However, Judge Levy conducted the prehearing conference and prepared the Initital Decision.

[4] Sea-Land and PRMSA filed concurrent petitions for leave to intervene, to which TMT filed supporting replies and GVI filed an opposition. The Commission's rules of practice and procedure state that petitions to intervene which are filed after the close of hearings will not ordinarily be granted. 46 C.F.R. §502.72. The petitions offer no compelling reason for deviating from this policy and will, therefore, be denied.

[5] In light of the disposition of PRMSA's petition for leave to intervene, Hearing Counsel's petition is moot and will, accordingly, be dismissed.

4. it cannot be determined why there is a projected increase in revenue despite a projected decrease in volume for the forecast year.[6]

TMT does not except to the conclusions concerning the tandem tow issue, and, in fact, asserts that if the cargo cube allocation method is employed, its projected rate of return on equity decreases from 16.15 percent to 14.29 percent.

GVI agrees with all the conclusions in the Initial Decision but notes that the Commission must enter a further order to effectuate those conclusions. It suggests that an order directing a refund of the full amount of the rate increase, plus a rollback of the rates to a reasonable level would be appropriate.

In reply to TMT's Exceptions, Hearing Counsel contends that:

1. TMT had the burden of proof on all issues, including the ultimate issue of the justness and reasonableness of its rates;
2. TMT had ample notice that its projected revenue and tonnage figures were contested;
3. TMT's offer of proof concerning its budgeted revenue figure would not cure all the deficiencies in TMT's direct case;
4. The rates of other carriers were not made an issue by the Order;
5. TMT should not be allowed to change its test period to look at its historical rates of return on rate base for a six-year period; and
6. TMT's corrections of two of its exhibits are untimely and should be rejected.[7]

Hearing Counsel further suggests that if the Commission finds TMT's general rate increase to be unjust and unreasonable, it must order the rate increase rolled back and a refund of all revenues collected as a result of the increase.

The Commission has reviewed the entire record in this proceeding and concludes that certain findings and conclusions set forth in the Initial Decision are not warranted and must, therefore, be modified or clarified by the following discussion. In all other respects, however, the Initial Decision is correct and shall be adopted by the Commission as its own.

The Presiding Officer concluded that, if TMT's revenue projections are accepted, a return on equity to TMT in the zone of 15.8 to 16.15 percent would not be excessive and its rate increase would not, therefore, be unlawful (Initial Decision at 6). However, the Presiding Officer further concluded that whether or not TMT's projected return on equity would exceed this zone of reasonableness could not be determined on the record, because TMT failed to establish a reliable projection of its net revenues (Initial Decision at 21, 22). The Commission finds that the Presiding Officer incorrectly based his decision on the reasonableness *vel non* of TMT's revenue and tonnage projections and concludes that, for the purposes of this proceeding, these projections were not in issue and must be accepted.

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[6] TMT also asserts that the Presiding Officer's criticism of its correcting certain errors in its submissions is unwarranted. The Commission finds nothing prejudicial in these remarks, particularly in view of the decision reached herein, but does endorse the proposition that P.L. 95–475 "[p]laces a high degree of responsibility on the carrier seeking a rate increase to supply the information necessary to permit expeditious consideration." Initial Decision at 39.

[7] GVI's reply to exceptions raises several of the same points and is, therefore, subsumed in any discussion of Hearing Counsel's position.

The amended Intercoastal Shipping Act reflects a clear Congressional dissatisfaction with the lengths of time necessary to complete general rate cases. S. Rep. No. 95–1240, 95th Cong., 2d Sess. 9, 10 (1978). It prescribes strict time limits applicable to everyone involved in such rate proceedings—carriers, protestants, administrative law judges and the Commission. To enable the Commission to issue its final decision within 180 days of a rate increase taking effect, the formerly open-ended hearing process has been severely curtailed. Hearings on rate increases will not now be conducted unless the Commission details why a hearing is necessary and specifies the issues to be resolved by any such hearing.[8] 46 U.S.C. §845(a).

In compliance with P.L. 95–475's strictures, the Commission's Order of Investigation and Hearing limited the hearing to only two issues: (1) the excessiveness of TMT's return on equity, and (2) the allocation of expenses and assets for the tandem barge towing service. This Order expressly noted that in its protest to TMT's rate increase, GVI had requested that several additional issues be investigated, among them:

> Whether TMT's projection of the revenue that is designed to be produced by the proposed rates is reasonable.

But the Commission declined GVI's request. At a subsequent prehearing conference GVI requested discovery concerning TMT's revenue projections. The Presiding Officer denied this discovery request by stating:

> We will take for the purpose of this proceeding . . . [the] revenue projections as set forth in the submission to the Commisison and we will base the determination hereafter as to whether those revenues assuming those revenues are obtained, what are the consequences.
>
> And that's, in effect, what item 1 of the Commission's Order of Investigation asks.
>
> Prehearing Transcript at 23.

GVI then filed a "Petition for Clarification or Reconsideration" of the Commission's Order in which it requested that the Commission state that its intent was that the issue of revenue projections (or any other element of the rate of return on equity) not be excluded from the investigation if such issue is disputed. The Commission denied GVI's request by stating that:

> [b]ecause this was not and is not the Commission's intent, a clarification of this nature is inappropriate. . . .
>
> Order served July 5, 1979 at 2.

The Commission did, however, amend its Order to include a third issue—why is there a projected increase in revenue despite a decreasing volume of cargo for the forecast year?

In light of this chronology, the reasonableness of TMT's tonnage and revenue projections was not properly an issue in this proceeding. It was neither expressly delineated nor implicit in the scope of the first or third issues. Hearings under P.L. 95–475 must remain limited by only those issues which the Commission orders investigated. In appropriate cases the Commission may well order an investigation into the methodology employed by a carrier in projecting its revenues and volumes. This is not such a case, however.

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[8] Regardless of the specific issues stated in an order of investigation, the ultimate issue in any proceeding involving a general increase in rates remains whether the rate increase is just and reasonable. *See* 46 U.S.C. §§817 and 845(b).

As mentioned earlier, the amended Order of Investigation and Hearing raised as the third issue:

Why is there a projected increase in revenue for the trade despite a decreasing volume of cargo carried for TMT's projected period of April 1, 1979 to March 31, 1980, as compared to TMT's actual period of December 1, 1977 to November 30, 1978?

Because he concluded that the record failed to establish projected volumes and revenues, the Presiding Officer further concluded that this third issue ''cannot be determined.'' Initial Decision at 40. The Presiding Officer also stated that the main reasons offered by TMT to explain the decrease in tonnage—a shift to thru-tariffs and increased competition—were not supported by the record (Initial Decision at 34). The Commission disagrees with these conclusions and finds that TMT has adequately responded to and explained the third issue.

Within the context of TMT's operating revenue forecast (Schedule V of Exhibits 2 and 7) there are only two categories in which projected revenue tons decrease while projected revenues increase—automobiles and other. Regardless of the reasonableness of the underlying projections, the record does contain sufficient facts to explain the relationsip between tonnage and revenue for these two categories. The volume reduction for automobiles is predicated on manufacturers' automobile size reductions. However, this decrease in volume is more than offset by the general rate increase, resulting in an overall projected net increase in revenue. The ''other'' category is expected to decrease in volume by approximately 20 percent, due primarily to a shift to other TMT tariffs. This decrease will be offset by an increase in volumes of highly-rated tank and refrigerated cargoes which will again result in a net increase in revenues.

For the foregoing reasons, the Commission finds TMT's general increase in rates just and reasonable and not otherwise unlawful.

THEREFORE, IT IS ORDERED, That the Initial Decision in this proceeding, as modified and clarified by the above discussion, is adopted by the Commission; and

IT IS FURTHER ORDERED, That the Exceptions of Trailer Marine Transport Corporation are granted, to the extent indicated above, and the Exceptions of the Government of the Virgin Islands are denied; and

IT IS FURTHER ORDERED, That the Petitions for Leave to Intervene filed by Sea-Land Service, Inc. and the Puerto Rico Maritime Shipping Authority are denied, and the Petition to Strike filed by the Bureau of Hearing Counsel is dismissed; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-48

TRAILER MARINE TRANSPORT CORPORATION— PROPOSED GENERAL INCREASE IN RATES

Adopted October 26, 1979

The evidence fails to establish that the rate increase will not result in an excessive return on equity to TMT in comparison to other industries facing similar risks.

The cargo cube allocation of expenses and division of assets for the tandem barge towing service is the appropriate method of allocation.

The evidence fails to establish any reasonably accurate basis for determining volumes or revenues which may be anticipated by reason of the rate increase.

The evidence fails to establish any reasonably accurate basis for determining volumes or revenues which may be anticipated by reason of the rate increase.

The evidence being insufficient to permit a determination of volumes and revenues, it cannot be determined why there is a projected increase in revenue for the trade despite a decreasing volume of cargo to be carried.

Michael Joseph for respondent Trailer Marine Transport Corporation.

William L. Blum for protestant Government of the Virgin Islands.

John Robert Ewers, C. Douglass Miller and *Charna J. Swedarsky,* Hearing Counsel.

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

On January 31, 1979, Trailer Marine Transport Corporation (TMT) filed Supplement No. 1 to its Tariff FMC-F No. 5 proposing a 5 percent general increase in rates effective April 1, 1979. Under authority of Commission Special Permission No. 6317, TMT filed Supplement No. 2 to its Tariff FMC-F No. 5 postponing the April 1, 1979, effective date to May 1, 1979.

TMT Tariff FMC-F No. 5 establishes local, joint and proportional commodity rates between United States Atlantic and Gulf Coast ports and ports in the Commonwealth of Puerto Rico and the Virgin Islands via direct and transshipment service at Puerto Rico. The proposed 5 percent general increase would apply: to all ocean freight commodity rates to and from U.S. Atlantic and Gulf Coast ports and Puerto Rico; to the minimum ocean freight charge on a shipment under one bill of lading between terminals in Puerto Rico and U.S.

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

Atlantic and Gulf Coast ports (TMT Freight Tariff No. 7, FMC-F No. 5, Rule 5 at 29); and to rates which apply "Per Trailer," i.e., except as otherwise indicated in individual tariff items, rates on shipments loaded in trailers by the shipper, unloaded by the consignee and have specified minimum and maximum interior capacities (TMT Freight Tariff No. 7, FMC-F No. 5, Rule 15 at 36). Supporting data, as required by Commission General Order No. 11 (G.O. 11) was submitted by TMT at the time of filing of the proposed increase.

Protests were received from the Puerto Rico Manufacturers Association (PRMA) and the Government of the Virgin Islands (GVI).

In its protest GVI contended that TMT, on the basis of its G.O. 11 report failed to provide sufficient justification that its proposed rates were just, reasonable, and lawful under section 18(a) of the Shipping Act, 1916, and under sections 3 and 4 of the Intercoastal Shipping Act, 1933, as amended. The GVI alleged TMT's data was insufficient to determine: (1) that part of the embedded debt cost of Crowley Maritime Corporation (CMC) (TMT's parent corporation) which should be allocated to TMT; (2) the debt and equity ratio of CMC; and (3) the rate of return on equity that should be attributed to TMT. Further, the GVI believed additional information was required of TMT to explain the revenue projections that are contained in its G.O. 11 for the forecasted year. The GVI requested that the Commission enter into a hearing and investigation and include at least the following issues:

1. Whether the proposed rates are unjust and unreasonable in that they will provide TMT (and/or CMC) with an excessive return as measured by accepted analytical methods;
2. Whether TMT's projection of the revenue that is designed to be produced by the proposed rates is reasonable;
3. What is a just and reasonable allocation of assets and expenses from CMC to TMT;
4. Whether the proposed rates are unjust and unreasonable in that their negative effect on the Virgin Islands' economy outweighs the carrier's need, if any, for increased revenues.

Despite GVI's protest, the Commission permitted the subject rate increase to go into effect without suspension in view of it being subject to section 3(c)(1)(B) of the Intercoastal Shipping Act, 1933, as amended, which provides in part that the Commission may not suspend "[a]n increase or decrease of 5 percentum or less and filed as part of a general increase in rates or a general decrease in rates. . . ." However, the Commission was of the opinion that TMT's proposed 5 percent increase, as proposed in Supplement No. 1 to Tariff FMC-F No. 5, should be made the subject of a limited public hearing to determine whether or not TMT's return on equity is excessive in comparison to other industries facing similar business and financial risks. Moreover, the Commission reviewed data submitted by TMT regarding the tandem barge towing service with Gulf Caribbean Marine Lines (GCML—also a subsidiary of CMC) between U.S. Gulf Coast ports and Puerto Rico. This data showed that costs are divided equally between the two companies for the joint tow portion of a voyage. The Commission was of the opinion that an equal division of these expenses does not follow a benefits-received allocation principle. Therefore, it determined that this proceeding should also determine the allocation of line haul expenses and the division of assets between TMT and GCML for tandem barge towing between U.S. Gulf Coast ports and Puerto Rico.

Thereupon, the Commission ordered that an expedited investigation be instituted into the lawfulness of the tariff matters contained in Supplement No. 1 to TMT's Tariff FMC–F No. 5 for the purpose of making such findings as the facts and circumstances warrant, and further ordered that this proceeding be limited to an investigation of:

1. Whether or not TMT's return on equity is excessive in comparison to other industries facing similar business and financial risks; and
2. The allocation of line haul expenses and division of assets between TMT and Gulf Caribbean Marine Lines, both subsidiaries of CMC, for tandem barge towing services between U.S. Gulf Coast ports and Puerto Rico.

Thereafter, GVI filed a "Petition for Clarification or Reconsideration" of the Commission's Order. GVI requested that the Commission clarify its Order by stating that it had been the Commission's intent that the issue of revenue projections (or any other element of the rate of return on equity) not be excluded from the investigation if such issue is disputed.

In its Order of Investigation and Hearing, served May 2, 1979, the Commission ordered that "this proceeding shall be completed within sixty (60) days of this order." Sixty days thereafter being July 1, 1979, the hearing was concluded on Friday, June 29, 1979, 58 days from the issuance of the Commission's order and 59 days from the day the rate increase became effective. On July 5, 1979, the Commission issued an order with regard to GVI's petition for clarification.

The Commission declined to state, in accordance with GVI's request, that it had been the Commission's intent that the issue of revenue projections (or any other element of the rate of return on equity) not be excluded from the investigation. Rather, it stated that: "Because this was not and is not the Commission's intent, a clarification of this nature is inappropriate, and GVI's request, must therefore be denied."

GVI requested alternative relief, however, as follows:

> That the Commission reconsider its Order of Investigation and Hearing and amend it to include the following issue: "Why does TMT project a decrease of 16% in the number of revenue tons carried between the historical and projected years?"

With respect to the alternative relief, the Commission was of the belief, however, that the question posed for hearing by GVI was within the original scope of the Order of Investigation and Hearing and that a clarification to that effect therefore was appropriate. Thereupon it ordered the Commission's Order of Investigation and Hearing of May 2, 1979, be clarified and amended to include the following question:

> Why is there a projected increase in revenue for the trade despite a decreasing volume of cargo carried for TMT's projected period of April 1, 1979 to March 31, 1980, as compared to TMT's actual period of December 1, 1977 to November 30, 1978?

Although the Commission clarification order was not served until after the hearing was completed, the parties were aware that pursuant to GVI's petition, the matter of Commission intent was under consideration by the Commission. Administrative Law Judge Glanzer at the start of the hearing[2] stated:

I have been told that in the very near future, maybe not for a day or two, the Commission will issue an order, a written order, granting the petition for clarification as suggested by hearing counsel.

Will that create any problems for anyone in this proceeding? I think Mr. Joseph informed me earlier that he was quite prepared to go ahead with any decision that the Commission may have made in connection with the granting of that petition for clarification.

Mr. JOSEPH:[3] That is correct.

Hearings were held in this proceeding on June 28 and 29, 1979.[4] There are 295 pages of transcript and 10 exhibits.[5]

Without specific prior knowledge of how the Commission would treat the issue of revenue projections (or any other element of the rate of return on equity) considerable evidence was introduced at the hearing relating to TMT's revenue projections. The conclusion to be reached from such evidence is that, as set forth hereafter in detail, TMT's revenue projections cannot be relied upon to determine whether TMT's return on equity is excessive and consequently whether the rate increase is or is not just and reasonable and otherwise lawful.

Arithmetically, if one accepts the accuracy of the revenue projections, the return to TMT's equity is within the zone of reasonableness and as such the rate increase cannot be said to be unlawful.

Upon consideration of the evidence of record, there is set forth the following.

FINDINGS OF FACT

I.

Issue: Whether or not TMT's return on equity is excessive in comparison to other industries facing similar business and financial risks.

1. Based upon statistics published by Citibank, the following rates of return on equity have been earned by non-financial enterprises in general and by that category of the transportation industry which includes shipping (i.e., "Misc. Transportation") for the periods shown:

	1969–73	*1974–78*	*1969–78*	*1978*
Non-financial	11.4%	13.8%	12.8%	14.8%
Misc. Transportation	11.6%	17.0%	15.0%	16.7%

2. For the years 1975–1978, TMT cannot be considered dominant in the overall Puerto Rican trade, although it has increased its market penetration during the last four years, a trend which is likely to continue.

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[2] Tr. 3.

[3] Counsel for TMT.

[4] At the time of the hearing, the undersigned was hospitalized and recovering from spinal surgery on June 27, 1979. Administrative Law Judge Seymour Glanzer presided over the presentation of testimony and introduction of evidence. The parties interposed no objections to the undersigned issuing an Initial Decision on the record adduced. Tr. 3.

[5] Also an Offer of Proof.

3. TMT leases many of the assets employed in the Puerto Rican Trade from related companies, consequently the debt obligations of these assets do not appear on TMT's books.

4. For rate of return purposes, the appropriate capital structure for respondent is that of its parent corporation, Crowley Maritime Corporation, which consists of 57.68 percent debt and 42.32 percent equity.

5. The objective measure of financial risk is determined by looking at the capital structure of the firm and hypothesizing that the more and expensive the debt the company has, the more volatile will be its return on equity. The equity investor is therefore subject to more risk in a highly leveraged firm.

6. The median debt/equity ratio for all industries surveyed by *Forbes* for the latest 12 months was 0.4; the surface transportation industry had a debt/equity ratio of 0.6, the air transportation industry 0.9, and the public utility industry a ratio of 1.0.

7. The CMC debt/equity ratio as of December 31, 1978, was 1.1 as computed on the basis of *Forbes.*

8. CMC has substantially more long-term debt to equity than the average firm and it, therefore, can be concluded that CMC is more leveraged than the average firm.

9. Due to CMC's more leveraged position than other companies based on median debt/equity ratios, TMT should be given a financial risk premium of 0.5 percent.

10. Using a variation in earnings test, based on TMT's five years of earnings, including financial data for the years December 1, 1977–November 30, 1978 and January 1, 1978–December 31, 1978, TMT appears to have a high business risk.

11. As the purpose of assessing a carrier a risk premium is to allow a return capable of attracting needed capital, on the basis that TMT is subjected to an above average business risk, CMC should be allowed a business risk premium of 1.0 percent.

12. The total appropriate adjustment to the ten year average rate of return on equity for non-financial corporations for business and financial risk should be 1.5 percent for TMT.

13. Based on the high cost of attracting capital, a 1.5 percent adjustment should be attached to the ten year average return on equity to bring that return up to a reasonable level which will account for current financial trends.

14. Given all of the above average risk conditions, TMT (or CMC) should be entitled to a rate of return on equity which is 3.0 percent higher than the ten year average for non-financial U.S. corporations of 12.8 percent.

15. The reasonable return on equity that TMT should be allowed to earn for the projected year March 1979–April 1980 is 15.8 percent.

II.

Issue: The allocation of line haul expenses and division of assets between TMT and Gulf Caribbean Marine Lines, both subsidiaries of CMC, for tandem barge towing services between U.S. Gulf Coast ports and Puerto Rico.

16. TMT's forecasts include an allocation of certain expenses, and division of assets, relating to tugs to be used to tow, in tandem, both a TMT barge and a barge of Gulf Caribbean Marine Lines (GCML), an affiliate of TMT. The barges are thus towed in tandem between Lake Charles, Louisiana, and San Juan, Puerto Rico.

17. One round voyage between Lake Charles and San Juan for TMT consumes twenty-one days, of which approximately sixteen days are actual steaming time during which a single tug is towing both barges. During the remaining approximately five days the tug remains with the TMT barge alone, as the GCML barge utilizes a separate tug while calling at various additional ports in both the continental United States and Puerto Rico.

18. While both TMT's and GCML's barges carry significant amounts of cargo southbound, TMT, whose trailers are compatible with the carriage of manufactured goods, also carried significant amounts northbound. GCML, on the other hand, rarely carries any cargo from Puerto Rico to the continental United States.

19. TMT's forecast assumes the utilization of three tugs for the entire year in the tandem towing service described above, and allocates the related expenses and assets 60 percent to TMT and 40 percent to GCML. TMT arrives at this 60/40 ratio by allocating 50 percent of the round voyage tandem steaming time (approximately eight days) each to TMT and GCML and 100 percent of the remaining approximately five days to TMT. Thirteen of the twenty-one days, or approximately 60 percent, of the expenses and assets respecting the three tugs are thus allocated to TMT, and the same percentage is applied on an annual basis.

20. TMT originally allocated $4,942,610 to TMT and $2,965,607 to GCML for the assets and expenses of the tandem barge towing services, producing a 62.5/37.5 percent time allocation.

21. TMT subsequently supplied a new total line haul expense figure of $4,942,610 and an allocation of $2,965,607 to TMT and $1,977,003 to GCML which produced a 60/40 percent time allocation.

22. At the hearing, TMT stated that the $4,942,610 figure appearing in staff witness Coleman's testimony which Mr. Coleman identified as "line haul expense" actually included expenses for a greater period than that involved in the actual tandem tow. Thereafter, TMT submitted a revised total allocation of $4,078,966 of tug expense for the tandem barge towing service.

23. With few exceptions, G.O. 11 prescribes the allocation of expense and division of assets on a volume basis.

24. G.O. 11 prescribes a vessel day allocation for cargo vessels employed in The Service for less than the entire reporting period. The General Order states in relevant part that:

> For such vessels the Adjusted Cost shall be allocated between Voyages in The Service and Voyages in Other Services on the basis of the relationship the number of days in each bears to the total of both.

This provision is inapplicable to the tandem barge towing service.

25. Under the requirements of G.O. 11, direct vessel expenses are accumulated for the service and allocated on a revenue ton mile relationship which is volume affected.

26. A cargo cube allocation is based on the tonnage of cargo carried on each carrier's respective barge. Cargo cube is a volume allocation.

27. During the period when there is no tandem barge towing, but only the towing of a TMT barge or lay-up time, assets and expenses are allocated on a revenue ton mile relationship.

28. Cargo cube method of allocation for assets and expenses of the tandem barge towing services produces an allocation of 63.7 percent for TMT and 36.3 percent for GCML.

29. The amount of cargo that each carrier carries on a round-trip voyage in the tandem tow is not reflected in a time formula allocation.

III.

Issue: Why is there a projected increase in revenue for the trade despite a decreasing volume of cargo carried for TMT's projected period of April 1, 1979, to March 31, 1980, as compared to TMT's actual period of December 1, 1977, to November 30, 1978?

30. Donald C. O'Malley, Jr., Director of Tariff and Regulatory Affairs for the Caribbean Division of Crowley Maritime Corporation, prepared the projected revenue and tonnage estimates shown on Schedule V, Exhibits 2 and 7.

31. Mr. O'Malley is primarily responsible for preparation of Schedule V of Exhibits 2 and 7, the forecast of revenues on a commodity-by-commodity basis, subject to the supervision of Mr. Roush.

32. Neither of TMT's witnesses, Mr. Roush nor Mr. O'Malley, are involved in preparing the budget.

33. In developing Schedule V of Exhibit 2, Mr. O'Malley began with the total revenue figure of $48,792,000, which came from TMT's annual forecasted budget. Mr. O'Malley had nothing to do with the figures which were used to arrive at the $48,792,000. The $48,792,000 figure was first given to Mr. O'Malley at the time he was instructed to file for a rate increase.

34. The revenue and tonnage forecast as prepared by Mr. O'Malley for the fifteen leading commodities and shown on Schedule V of Exhibit 2 was not in existence at the time the forecasted budget figure of $48,792,000 was created. The budget figure became the revenue forecast and tonnage figures were adjusted to conform to the budget previously mandated.

35. Operating Revenue and tonnage for the historical year are as shown on Schedule V of Exhibit 1; these figures are taken from TMT's computer and reflect actual experience.

36. The percentage adjustments in projected cargo tonnage shown on Exhibit 5 were not used by TMT in making the original tonnage estimates shown on Schedule V, Exhibit 2. They were an "after-the-fact" calculation.

37. Mr. O'Malley does not remember how he calculated the tonnage projections for the fifteen leading commodities shown on Schedule V, Exhibit 2.

38. The forecast revenue amount figures for each of the fifteen leading commodities, as shown on Schedule V of Exhibits 2 and 7, were derived from the respective historical revenue amount figures shown on Schedule V of Exhibit 1.

39. A certain amount of cargo previously moving pursuant to the rates under investigation are now moving under through rate tariffs.

40. Mr. O'Malley adjusted the revenue figures for each of the fifteen leading commodities taking into account shifts in cargo to through rate tariffs, competition, and the proposed 5 percent increase. Mr. O'Malley could not recall the actual dollar amounts of the adjustments he made.

41. The record does not reveal the details of any calculations or analysis which may have formed the basis for the derivation of the forecast revenue amounts from the historical revenue amounts, and Mr. O'Malley could not recall how he calculated the projections for the fifteen leading commodities. However, rather than any separate analysis and calculation for each commodity, the revenue ton forecast on Schedule V of Exhibits 2 and 7 are susceptible of being derived mathematically from the figure in the revenue amount column as follows:

$$T = R \text{ divided by } (1.05 \times R'/T')$$

where T is the projected revenue tonnage figure,
R is the projected revenue amount figure,
T' is the historical revenue tonnage figure, and
R' is the historical revenue amount figure.
The 1.05 factor represents the 5% rate increase.

42. The "other" category represents all commodities carried by TMT in addition to the fifteen individual commodities producing the highest revenues.

43. Mr. O'Malley calculated the revenue figure for "Other" cargo (Schedule V, Exhibit 2) by subtracting the $27,580,588 total revenue of the fifteen leading commodities from the budget figure of $48,792,000. Mr. O'Malley does not remember how he calculated the 689,363 revenue tons for "Other" cargo as shown on Schedule V, Exhibit 2.

44. TMT's total projected revenue is higher than its total actual revenue for the actual twelve months ended November 30, 1978, despite the fact that its total projected cargo volume is lower than its total actual cargo volume for said twelve months.

45. Of the sixteen commodities categories in TMT's projection, only two—vehicles and "other"—involve both a projected increase in revenue and a projected decrease in cargo volume.

46. The reason for the projected revenue increase despite a projected volume decrease for vehicles is that while TMT projects a slight decrease in the cubic volume of vehicles as a result of manufacturers' automobile size reductions, the corresponding decrease in revenues is more than offset by the subject 5 percent rate increase. Although TMT's estimate of a 5.5 percent growth in number of vehicles carried would have resulted in an increase in both the projected revenue and the projected cargo volume over the actual 1978 results, the

vehicle size reductions (estimated at approximately 6 percent) brought about a decrease of both instead. While this resulted in a projected net decrease of .8 percent in volume, application of the 5 percent rate increase to the reduced revenue left a projected net increase in revenue for vehicles.

47. Although TMT calculated the revenue shown for "Other" cargo on Schedule V, Exhibit 2, by simply subtracting the revenue estimates for the fifteen leading commodities from the forecasted budget figure, TMT predicts that about 20 percent of the 1978 revenue and corresponding volume will move under other TMT tariffs not in the Trade, but that partially offsetting this decrease will be an increase in revenue and volume in relatively high-rated cargoes carried in tank and refrigerated trailers.

48. With the exceptions of refrigerated cargo and tank trailers, separate analysis and calculations were not performed to derive the revenue forecast for any commodities other than those within the top fifteen, rather a percent reduction for "all other" cargo was estimated not to exceed the revenue figure previously fixed.

49. TMT's market share in the U.S. Mainland-Puerto Rico trade has increased each year from 1975 through 1978, and TMT expects that its market share will continue to increase.

50. On the basis of the routine analysis of Schedule V, TMT's G.O. 11 staff witness Coleman calculated that the total revenue per ton increased from TMT's actual year to the projected year by 23 percent and that in the "Other" cargo category alone, revenue per ton increased approximately 49 percent.

51. On three separate occasions, Mr. Coleman requested Mr. Craig Wallace of CMC to explain why revenue per ton on individual line items on TMT's projected Schedule V increased from TMT's actual Schedule V on the average of about 5 percent, whereas the "Other" cargo category produced a 49 percent increase, resulting in an overall increase of 23 percent.

52. In response to a telephone inquiry of February 9, 1979, by Mr. Coleman as to why revenue tons increased 23 percent, Mr. Wallace responded that TMT would be carrying higher rated liquid tank cargo which is a low tonnage cargo.

53. In response to a telephone inquiry of March 2, 1979, by Mr. Coleman as to whether TMT included the general rate increase in its projections, Mr. Wallace responded yes, and further that the 5.94 percent increase in revenue is the result of the compounding effect of applying the 5 percent general increase, a 23 percent increase in revenue per ton, offset by a 13.88 decrease in revenue tons carried. The increase in revenue per ton is principally affected by "Other" cargo which consists of liquid or tank cargo which is low in tonnage and carried at a higher rate.

54. In response to Mr. Newton Frank, Supervisory Accountant, Federal Maritime Commission, on May 22, 1979, regarding TMT's decrease in projected revenue tons and increase in revenue, Mr. Wallace responded that tonnage was down due to the fact that more cargo was being carried under ICC tariffs. Mr. Wallace further responded that the revenue in "Other" cargo increased 48 percent, 38 percent of which is due to more reefer and special cargo which is high rated and low in tons. The remaining 10 percent is due to the projected mix in quantities.

55. On May 22, 1979, Mr. Coleman called Mr. Wallace regarding the conflicting information given Mr. Frank as compared to previous conversations regarding the increase in revenue per ton and decrease in revenue tons. Mr. Wallace stated that the 48 percent increase in revenue referred to was the revenue per ton increase of the total of "Other" cargo and that in addition to the increase in tank cargo, there is a projected increase in reefer cargo which he may have forgotten to mention earlier.

Discussion

I.

Whether or not TMT's return on equity is excessive in comparison to other industries facing similar business and financial risks.

In a prior general rate increase proceeding, Docket No. 77-27, the Commission suggested using the capital structure of the parent company CMC and/or related companies as a better indication of the true debt/equity structure of TMT. This suggestion has been carried through, although updated, in this docketed proceeding. The capital structure of CMC as computed by the company consists of 57.68 percent debt and 42.32 percent equity as of December 31, 1978.

In the case of TMT, a wholly owned subsidiary of CMC, any attempt to directly measure the cost of equity capital is highly speculative because of the diverse nature of CMC which is the stock issuing entity in the corporate chain. Although the capital structure of CMC has been used in this proceeding as a surrogate for TMT, some measure of the cost of equity capital for TMT is required.

In lieu of a direct cost of equity study, a comparable earnings test is a reasonable alternative in determining TMT's fair rate of return. The comparable earnings test entails the determination of rates of return being earned by firms similar to TMT. Generally, the analysis is centered around determining average rates of return being earned by various firms and, thereafter, attaching a risk factor according to prevailing trends for the business and financial risk TMT faces vis-a-vis these other firms.

To determine a reasonable rate of return on equity, a long-run average of industry earnings is preferable. The use of a time series analysis smooths our variations in earnings which may fluctuate widely from year to year, avoids the possibility of allowing a carrier an inadequate return if current earnings are abnormally low, or conversely, permitting a carrier unjustifiably high profits if a temporary surge in earnings has occurred. In addition, a time series provides a better idea of the trend in earnings. Therefore, the initial determination of a fair rate of return for a carrier experiencing average risk should be based on the average rate of return on equity earned during the past ten years by non-financial U.S. corporations. Hearing Counsel's witness, Mr. Stilling, FMC Staff Economist, presented numerous schedules to that effect. For purposes of this proceeding, Mr. Stilling's initial determination of a fair rate of return for a regulated firm experiencing average risk was based on rates of return on stockholder's equity earned during the past ten years by non-financial U.S. corporations as reported by Citibank.[6]

For the ten-year period 1969 to 1978, non-financial corporations averaged 12.8 percent return on equity, and in 1978 the companies averaged 14.8 percent, indicating that returns are currently higher than over the past decade. Although during the past ten years there has been a trend of increasing returns on equity, between 1974 and 1975 average returns on equity dropped from 13.9 percent to 11.7 percent. On a moving average basis, the five-year median return on equity for U.S. industries has increased from 11.6 percent during the period 1970–1974 to 13.9 percent in the 1974–1978 period. Such higher nominal earnings reflect both a real component and an inflation component. As inflation rises, earnings and rates of return rise in large measure due to higher prices. It is, therefore, more reasonable to look at a ten-year period of time to determine trends in returns. On this basis, an appropriate starting point from which a determination can be made as to a reasonable rate of return on equity for TMT is the ten year, 12.8 percent average rate of return on equity of the composite, non-financial U.S. corporations.

TMT's witness Mr. Roush calculated the fair rate of return on equity for the projected year based on the 1978 *Fortune 500* average with a 2.6 percent adjustment which Dr. Robert Ellsworth, FMC Staff Economist used in a previous case. Although Mr. Roush selected the 1978 *Fortune 500* average as the basis for his calculation, he stated that such an average could not be used as an indicator of business conditions in 1979 or 1980, and he did not review the alternate sources of business data. Nor did Mr. Roush explain why Dr. Ellsworth's 2.6 percent adjustment should be applied to the 1978 *Fortune 500* average.

Adjustment to the ten-year average rate of return on equity, to account for current trends in returns on equity, cost of money, financial and business risk should be reflected in the return that any regulated firm would be permitted to earn if it was in a similar risk category as an average firm.

The objective measure of financial risk is determined by looking at the capital structure of the firm and hypothesizing that the more debt and the more expensive the debt the company has, the more volatile will be its return on equity. The equity investor is, therefore, subject to more risk in a highly leveraged firm.

To determine whether TMT had more financial risk (leverage) than the average U.S. corporation, schedules were prepared by staff witness Mr. Stilling which show the debt/equity ratios for those industries surveyed by *Forbes* for the latest twelve months. This data was then compared by Mr. Stilling to the debt/equity ratio of TMT to determine whether it is more or less leveraged than the average firm.

Mr. Stilling's data show that the median debt/equity ratio for all the industries surveyed by *Forbes* for the last twelve months was 0.4, the surface

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[6] Non-financial corporations include all industries surveyed by Citibank, among them transportation, except financial institutions (commercial banks, investment funds, sales finance) which returns may not be accurately reflected.

transportation industry had a debt/equity ratio of 0.6, the air transportation industry 0.9, and the public utility industry a ratio of 1.0. From data provided by the carrier as of December 31, 1978, Mr. Stilling calculated the CMC debt/equity ratio to be 1.1.

On the basis of a comparison of the above debt/equity ratios, Mr. Stilling concludes that CMC has substantially more long-term debt to equity than the average firm and, therefore, CMC is more leveraged than the average firm. Because of CMC's more leverage position than other companies based on the median debt/equity ratios, Mr. Stilling judged that TMT should be given a financial risk premium of 0.5 percent.

The measure of business risk is a test of stability of earnings of a firm and is measured in terms of fluctuations in rates of return. Higher variations are viewed as symptomatic of higher levels of risk.

In order to determine business risk, Mr. Stilling applied a variations in earnings test. Using the variations in earnings test, based on TMT's five years of earnings, including the period December 1, 1977–November 30, 1978, and January 1, 1978–December 31, 1978, Mr. Stilling concluded that TMT appeared to have a high business risk. Mr. Stilling compared the financial data for TMT to the variations in rates of return for thirty industries surveyed by *Forbes* for the five-year period 1974–1978. The data, according to Mr. Stilling, indicates that TMT is in a high-risk position as compared to the industries surveyed.

However, in determining levels of risk, consideration must also be given to the subjective measures of risk. A less precise alternative to the variations in earnings test to estimate business risk is to analyze market shares. The larger the market share of the firm, the more dominant its position. A dominant firm with large market shares will normally be subjected to less risk because its position permits the firm to experience various economies of scale and thereby withstand the rigors of competition.

Based on an analysis of TMT's market share in the Puerto Rican Trade for the years 1975–1978, Mr. Stilling found that TMT cannot be considered dominant in the overall Puerto Rican Trade with a meaningful market share somewhat higher than 17 percent. However, TMT's profits have always been positive and its market penetration during the last four years has increased, a trend which Mr. Stilling believes is likely to continue.

The above factors indicate that TMT is subjected to more than average business risk, although TMT's profits have always been positive and the company has had little trouble in attracting new investment. On this basis, as the purpose of assessing a carrier a risk premium is to allow a return capable of attracting needed capital, Mr. Stilling allowed CMC a business risk premium of 1.0 percent. Therefore, based on Mr. Stilling's analysis, Hearing Counsel take the position that the total appropriate adjustment to the ten-year average rate of return on equity for non-financial corporations for business and financial risk should be 1.5 percent for TMT.

Another factor to be considered when determining the appropriateness of the ten-year average return on equity as an indicator of a fair return is the trend in money costs during the period. Information on the current and historical cost of money indicates whether the ten-year average return on equity is too conservative for the average firm which must compete in the money market for equity funds. Adjustments to the ten-year average return on equity to account for current trends and cost of money should, therefore, be reflected in the return that any regulated firm such as TMT would be permitted to earn if it was in a similar risk category as an average firm.

Mr. Stilling's analysis of current trends and the cost of money showed that a time series analysis underestimates the cost of capital and, therefore, an upwards adjustment to the average rate of return is necessary. Mr. Stilling found that currently money costs are significantly higher than they have been during the most recent ten-year period. Mr. Stilling's conclusions are based on the fact that current returns on equity are 2 percent higher than the ten-year average, average 1978 corporate bond yields were 0.76 percent above the ten-year average, and the average 1978 discount rate was 1.5 percent above the ten-year average.

To the extent that the use of average earnings data for historical periods is underestimated, and based on the above analysis of the high cost of attracting capital, Mr. Stilling concluded that a 1.5 percent adjustment should be attached to the ten-year average rate of return on equity to bring TMT's return up to a reasonable level which will account for current financial trends.

Given all of the above average risk conditions, Mr. Stilling concluded that TMT (or CMC) should be entitled to a rate of return on equity which is 3.0 percent higher than the ten-year average for non-financial U.S. corporations of 12.8 percent. On that basis, the reasonable return on equity that TMT should be allowed to earn for the projected year March 1979–April 1980 is 15.8 percent. A 15.8 percent return on equity will give TMT the opportunity to earn a rate of return which is higher than that actually earned by nearly 70 percent of those U.S. industries analyzed by *Standard & Poors* for 1977.

TMT's projected rate of return on equity for the forecast year is 16.15 percent. Considering the degree of judgment necessarily involved in both attempting to predict future business results and in determining what is within the zone of reasonableness, it believes it cannot fairly be concluded that a rate of return is excessive which is barely three-tenths of a percentage point higher than one expert's judgment of what is fair.

While TMT believes a higher rate of return would indeed be reasonable, it does not believe it would be productive here to continue that theoretical controversy, particularly since the forecast results are themselves based upon the similarly inexact "science" of predicting the future. Accordingly, TMT concedes to the staff's conclusion that 15.8 percent would be a reasonably allowable rate of return on equity for TMT.

In consideration of the foregoing, it is concluded that the record herein establishes that a return on equity to TMT in the zone of 15.8–16.15 percent would not be excessive in comparison to other industries facing similar business and financial risk.

It is further concluded that the record herein establishes that if TMT's net revenue projections are accepted, the return on equity to TMT would not exceed the zone of reasonableness and would not be excessive.

It is further concluded that it cannot be determined on this record whether or not the return on equity to TMT would exceed the zone of reasonableness because TMT has not met its burden of proof on this issue and no reliable projection of TMT's net revenues can be made.[7]

II.

We now proceed to a consideration of the allocation of line haul expenses and division of assets between TMT and Gulf Caribbean Marine Lines (GCML), both subsidiaries of Crowley Maritime Corporation (CMC), for tandem barge towing services between U.S. Gulf Coast ports and Puerto Rico.

In the U.S. Gulf Coast/Puerto Rican trade between Lake Charles, Louisiana, and San Juan, Puerto Rico, tugs are used by TMT to tandem tow a TMT barge and a GCML barge, an affiliate of TMT and both subsidiaries of CMC. The TMT barge sails only from Lake Charles to San Juan, whereas the GCML barge calls at other ports on the Gulf Coast and Puerto Rico and includes some foreign destinations. However, GCML employs its own tugs while loading and discharging cargo to move its barges among the various other ports it serves.

For the projected year's (March 1979–April 1980) allocation of expense and division of assets for the tugs used in the tandem towing service between Lake Charles and San Juan, TMT employed an allocation based on a time formula for a round-trip voyage. TMT's method allocated 50 percent of the actual steaming time in a round-trip voyage to each respective carrier and 100 percent of the remaining time not under tandem tow to TMT. On this basis, TMT asserts that this results in a 60/40 allocation ratio to be applied on an annual basis to TMT and GCML, respectively.[8] It is TMT's position that this time formula is based on benefits received and is a reasonable method of allocation for expenses and assets in the tandem tow service.

Hearing Counsel disagree with the use of a time formula allocation for the tandem tow expenses and assets. They contend that a volume method of allocation should be employed and that such method is required by G.O. 11.

The principles set out in G.O. 11 prescribe allocation of expense and division of assets on a volume basis. Under the requirements of G.O. 11, direct vessel expenses are accumulated for all voyages in the Service, and where allocation is necessary, allocated to the Trade on a revenue-ton mile relationship, which reflects volume. 46 C.F.R. §512.7(c)(2). The volume principle of allocation is carried through G.O. 11, and in particular to the Vessel Operating Expense (VOE) summary which provides operating results and allocations to the Trade based on a revenue-ton mile relationship where there is simultaneous carriage of other cargo. 46 C.F.R. §512.7(c)(3). A vessel day allocation is prescribed by G.O. 11 only in those cases of cargo vessels employed in the Service for less

[7] See discussion *infra* for full development of issue of revenue projections.

[8] TMT based its time formula on a twenty-one day round-trip voyage between Lake Charles and San Juan during which sixteen days (eight days each direction) are actual steaming time. During the remaining five days the tug stays with only the TMT barge. Thirteen of the twenty-one days are allocated to TMT and eight days are allocated to GCML, thus producing TMT's 60/40 ratio.

than the entire reporting period, and this provision, argues Hearing Counsel, is inapplicable to the tandem barge towing service.

Mr. Coleman, FMC staff Financial Analyst, using the volume formula principle of G.O. 11, employed a cargo cube allocation for line haul expenses and division of assets for the tandem tow portion of a round-trip voyage between Lake Charles and San Juan. Mr. Coleman's cargo cube allocation is based on the tonnage of cargo carried on TMT's and GCML's respective barges during the tandem tow portion of a round-trip voyage. During the period when the barges were not in tandem tow, and only a TMT barge is towed or during lay-up time, expenses and assets are allocated on a revenue-ton mile relationship. Calculation of this allocation by Mr. Coleman produced a ratio of 63.7 percent for TMT and 36.3 percent for GCML.

The Commission has upheld the use of a volume allocation over a daily-time allocation for vessel expenses. In *Alcoa Steamship Co., Inc.—General Increase in Rates in the Atlantic Gulf Puerto Rico Trade,* 9 F.M.C. 220 (1966), a principal issue was a determination of a reasonable allocation of vessel expenses to the Puerto Rican common carrier service of Alcoa Steamship Co., Inc. (Alcoa). In general, Alcoa allocated vessel expenses between its southbound common carrier service and its northbound contract service on the basis of days operated in each service. The Commission found that the ton-mile method more closely approximated the assignable costs of Alcoa to its regulated service and should be employed as the proper method of computing vessel expenses. The Commission stated, in pertinent part that:

> The vessel-day basis, although superficially appealing, suffers from many built in faults.
>
> The benefit derived from a transportation service is that cargo (tonnage) is transported over distance (miles) to its receiver. As stated in a recent and definitive study, "The product which the transportation industry sells is the ton-mile in freight service . . . ." This has often been recognized by this Commission and its predecessors. As we noted in *Atlantic & Gulf Puerto Rico General Increase,* 7 F.M.C. 87, 98 (1962), "The basic factors contributing to vessel operating expenses [are] the tonnage and distance carried."
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> * * * * *
>
> The ton-mile method is proper . . . because we believe it fairly allocates expenses which . . . should be borne by users in proportion to amount of their tonnage carried.
> 9 F.M.C. at 231-233.

The Commission further held that in those instances of unemployed legs of a voyage where no cargo is carried, the same volume method of allocation should be used. The Commission stated:

> Ballast leg and positioning leg days also should be allocated on the ton-mile basis. An attempt to allocate such days on a vessel-day basis shows another basic flaw in that method, the great possibility for arbitrariness an [sic] inconsistent positions.
> 9 F.M.C. at 232.

TMT argues that the concept of "benefits-received" should not be restricted to cargo carried. It believes that a carrier receives a benefit when its barge is towed from point-to-point irrespective of the amount of cargo carried. It contends that the GCML barge, which rarely carries any cargo northbound, would, under Hearing Counsel's method, receive the benefit of towage back to Lake Charles and bear none of the expenses of that towage. TMT says its method, which is directly related to the time the barges are under tandem tow, does not permit such an inequitable result and finds direct support in section 512.7(b)(1)(i)(b) of G.O. 11. TMT claims that from the standpoint of the real world, it is highly unlikely that a prudent carrier would enter into a business arrangement with a second independent carrier to share the expenses of a joint tow based upon respective cargo volume, for the poorer the fortunes of the second carrier the greater would be the first carrier's expenses, which he would thus be powerless to control. The result should be no different where the carriers happen to be affiliated.

Section 512.3(g) of G.O. 11 permits other methods of allocation of expenses in the G.O. 11 statement in those instances where a volume method would produce unreasonable results. In this case, however, the cargo cube allocation method fairly reflects the expenses and assets of the tandem barge towing service and will not, therefore, create unreasonable results. Following what Hearing Counsel characterized as a "benefits-received" principle in the case of the tandem barge towing service, it is more reasonable to conclude that the company which carries the greater amount of cargo receives the greater benefit. This benefit is reflected in Mr. Coleman's cargo cube allocation, as it is based on volume. Absent the volume principle underlying G.O. 11, TMT's time formula allocation could be regarded as based on "benefits-received." But as between what must be regarded as a cornerstone principle of G.O. 11 and another principle of allocation, the volume-oriented allocation underlying G.O. 11 must be utilized in preference to a time-oriented allocation.

For the foregoing reasons, it is concluded and found that the volume formula set forth by witness Coleman should be adopted for purposes of determining the allocation of expenses and division of assets between TMT and GCML for the tandem barge towing service.

III.

Why is there a projected increase in revenue for the trade despite a decreasing volume of cargo carried for TMT's projected period of April 1, 1979, to March 31, 1980, as compared to TMT's actual period of December 1, 1977, to November 30, 1978?

The ultimate issue which must be determined by the Commission is whether the rate increase is just and reasonable. One cannot predict with exactitude the amount of revenue that a particular set of rates will produce. However, based on known facts and reasoned projections, it is possible to set rates which can be expected to produce sufficient revenues to equal the cost of service.[9]

After ascertaining what rate of return is reasonable (Commission Issue No. 1), it is necessary to determine whether the rates to be charged will achieve that return. That determination, in turn, can only be reached by ascertaining what revenues can be anticipated. And revenue anticipation, in its turn, re-

[9] The cost of service is defined to equal the sum of operating expenses, depreciation expense, taxes, and a reasonable return on the net valuation of property. Garfield and W. Lovejoy, *Public Utility Economics* (1964) at 44.

quires a knowledge of rates to be charged times the volume[10] of cargo to be carried (Commission Issue No. 3).

The record establishes that a return of 15.8–16.1 percent on equity is a resonable return to TMT. The question then remaining is will the rate increase result in such return?

TMT's original revenue and revenue ton projections for the test year are found on Schedule V, Exhibit 2. The Schedule was originally prepared by Donald C. O'Malley, Jr., Director of Tariff and Regulation Affairs for the Caribbean Division of Crowley Maritime Corporation sometime after management decided to seek a general rate increase.

There is no evidence as to how CMC originally determined a forecast of revenue of $48,792,000 for TMT which, in turn, it contends, results from the imposition of a 5 percent general rate increase. No witness appearing on behalf of TMT could testify as to the basis or rationale by which the $48,792,000 was first arrived at.

The record establishes that Mr. O'Malley was given a projected total revenue figure of $48,792,000 from the forecasted budget which he understood would be the "bottom line" revenue figure on Schedule V. However, neither Mr. O'Malley nor Mr. Roush, TMT's other witness, took any part in the preparation of the forecast budget for TMT. Thus, no witness could explain how the management of TMT arrived at the revenue figure of $48,792,000, which it is claimed will result from TMT's general rate increase of 5 percent.

After obtaining the total revenue figure, Mr. O'Malley went to work to establish the rest of the figures shown on Schedule V, Exhibit 2. From a computer run, he obtained the historic revenue for the fifteen leading commodities. He then adjusted the revenue figures to account for shifts in cargo, increased competition and the rate increase. Mr. O'Malley could not remember how he determined or arrived at the actual amount of the adjustments he made and thus the reasonableness of those adjustments are unknown. After arriving at a total revenue figure for the fifteen leading commodities, Mr. O'Malley then simply subtracted this figure from the $48,792,000 total in order to obtain a revenue figure for "Other" cargo.

After setting forth the adjusted revenue figures, Mr. O'Malley then calculated the revenue tons of each of the fifteen commodity breakdowns. Again, as with his revenue adjustments, Mr. O'Malley could not remember how he did it. Arithmetic calculations seem to suggest that he divided historic average revenue per ton for each of the fifteen leading commodities (adjusted for the increase) into the total projected revenue for each commodity.[11]

Although the method by which TMT actually calculated the revenue tons shown on Schedule V, Exhibit 2, is unclear, the record establishes that the

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[10] In rate design, cargo mix is an integral aspect of volume.

[11] A formula which conforms to the O'Malley results is as follows:

$T = R$ divided by $(1.05 \times R'/T')$

where T is the projected revenue tonnage figure,
R is the projected revenue amount figure,
T' is the historical revenue tonnage figure, and
R' is the historical revenue amount figure.
The 1.05 factor represents the 5% rate increase.

management of TMT does not make forecasts of future volumes of cargo in terms of tonnage. Rather, it forecasts in terms of revenue. Whether or not last year's average rate per ton for a given commodity will approximate this year's depends in part on whether shippers tender the same size shipments. To complicate matters, carriers regularly change the minimum quantity requirements for a given trade. Rate adjustments may also affect the size of shipments tendered. Thus, the historic average revenue per ton for a given commodity during a past year may not be necessarily related to the average revenue per ton for a future year. The problems in using historic average revenue per ton increase in the case of the calculation for "Other" cargo. There, many commodities make up the average and the mix of commodities may change from year to year based on shifts in cargo, competition and rate increases. In short, the commodity mix for "Other" cargo is affected by all of the factors which Mr. O'Malley considered in adjusting the revenue figures for the fifteen leading commodities and compounded by the larger number of commodities involved. Hence, TMT's "correction" to the revenue tons attributable to "Other" cargo, based on historic average revenue ton, cannot be relied on.

The consequences of TMT's method of calculating projected revenue tons is of crucial importance in this proceeding because allocations in the Exhibits which form so great a part of the record are based on TMT's projection of revenue tons.[12]

Due to the weakness inherent in TMT's method of calculating revenue tons, Hearing Counsel and GVI contend that these Exhibits are not reliable indicators of TMT's projected financial condition and cannot form the basis of a Commission decision. Because of the inherent flaws in these Exhibits, they say, the Commission does not have a record before it from which it can conclude that the rates of TMT are just and reasonable.

TMT disputes that its revenue forecasts or information in support thereof is deficient or that it in any way has failed to furnish information timely.

TMT asserts that the commodity forecast set forth in Schedule V is not prepared by TMT for any business purpose other than to comply with the requirements of G.O. 11. In connection with the preparation of the original forecast,[13] those who prepared it were given a marketing department budget of $48,792,000 revenue for the twelve months ended March 31, 1980.[14] They then proceeded to determine, because TMT says it was required by G.O. 11, their best estimate of how much of that $48,792,000 would be derived from each of the fifteen leading commodities carried and how many revenue tons of each would be carried. Starting with historical data showing the actual revenue and tonnage for each of the fifteen, those data were adjusted to reflect their view, after further consultation with marketing personnel, of the future prospects as

[12] (1) Exhibit 2, Forecast April 1, 1979, through March 31, 1980.
(2) Exhibit 5, Analysis of Schedule V, TMT Projected Year April 1, 1979, through March 31, 1980.
(3) Exhibit 7, Forecast April 1, 1979, through March 31, 1980.
(4) Exhibit 8, Revised Computation of Return on Equity.
(5) Exhibit 10, Schedule 1, Testimony of Thomas J. Stilling, Revised Computation of Return on Equity.
(6) Exhibit 11 (Offer of Proof).

[13] Ex. 2.

[14] TMT Brief at 9-10. This revenue forecast made prior to any tonnage analysis is the basis for Hearing Counsel and GVI contention of unreliability.

to each commodity. Exhibit 5 shows, in general, what factors entered into the adjustments resulting in the differences between the actual dollar and tonnage figures on Schedule V of Exhibit 1 and the forecast dollar and tonnage figures on Schedule V of Exhibit 2 for each of the fifteen leading commodities.

TMT proceeded as follows to determine the remaining "other" dollar and tonnage figures. The revenue adjustments for the fifteen leading commodities resulted in an aggregate of $27,580,588 projected revenue for those commodities, which, when subtracted from the total marketing department budget of $48,792,000, left a remainder of $21,211,412 revenue, which by definition would come from all "other" commodities carried. Having allocated $21,211,412 to "other commodities," TMT then computed the corresponding tonnage figure necessary to realize the dollars. The method employed is set forth on page 2 of Exhibit 5. Marketing personnel predicted an increase of 41,607 tons and corresponding revenue of $3,371,270 from increased carryings of liquid and refrigerated cargo. They also predicted a general shift (decrease) of about 20 percent of the 1978 "other" revenue to TMT's through tariff and other tariffs. Since the total "other" forecast revenue had been computed at $21,211,412, of which $1,010,067 would result from the 5 percent rate increase and $3,371,270 by reason of increased revenue from liquid and reefer cargo, there remained $16,830,075 to account for. This sum was $4,016,997 less than (and about 20 percent of) the 1978 actual "other" revenue. It was then accounted for by assuming that the shift to other tariffs would reduce the prior year's "other" revenue by $4,016,997. Since the actual 1978 average revenue per ton for "other" cargo was $20.53, on the assumption that the cargo mix and other factors would not change, this figure was divided into the $4,016,997 in order to arrive at the corresponding volume reduction of 195,655 revenue tons. Subtraction of 195,655 from the 1978 actual "other" tonnage and addition of the expected increase of 41,607 tons of reefer and liquid cargo left a net tonnage figure of 861,213.[15]

Hearing Counsel and GVI dispute TMT's rationale and contend that TMT was required to adduce additional evidence as to the details underlying TMT's marketing department's budget and predictions. TMT argues that the Commission never ordered an investigation into the reasonableness of TMT's projections. If it had done so, TMT claims it would have been prepared to present more detailed evidence relating to the marketing department's basis for its budget and predictions. It never considered doing so, however, in view of the order of investigation.

One thing is clear from the record: Schedule V was not used to calculate the potential revenue figure because the schedule was not even in existence at the time the potential revenue [budget] was determined.[16] The evidence in this proceeding establishes that TMT built its rate design and cargo estimates to fit and justify a predetermined revenue figure.[17]

[15] The change to this 861,213 figure (Schedule V to Exhibit 7) from 689,363 (Schedule V to Exhibit 2) is the only correction which TMT has made to its operating revenue forecast.

[16] Tr. 95-97.

[17] Neither Mr. O'Malley nor TMT's other witness, Mr. Roush, were involved in preparing the budget; thus, the record fails to show how the budgeted figure was determined.

The testimony of record reveals that once the total projected revenue figure was "given" to Mr. O'Malley by the accounting department, he went back to historical revenue dollar and tonnage figures for each of the fifteen leading commodities as shown on TMT's computer. From the historical revenue dollar figures he proceeded to derive, on a commodity-by-commodity basis, the projected revenue dollar figures. While Mr. O'Malley did not remember and did not testify how these individual projections were calculated, TMT argues that it probably was an evaluation of competitive factors, a shift to through tariffs, and the 5 percent rate increase which accounted for many of the adjustments between historical and projected years.

The revenue amount figure for the "other cargo" category was then "backed into"; i.e., it is a residual figure calculated by subtracting from the total budgeted figure ($48,792,000) the subtotal of the revenue amounts for the top fifteen individual commodities ($27,580,588) to arrive at $21,211,412 for "other cargo."

Having projected revenues, Mr. O'Malley then calculated the projected tonnage figures for the fifteen leading commodities.[18] While he did not remember how this calculation was performed, it appears from analysis of the figures that he used a mathematical formula based on the revenue per ton for each commodity.[19] Mr. Roush used a similar revenue-per-ton calculation to derive "other" revenue tons.[20]

TMT contends, at least with regard to the fifteen individual commodities, that revenue amount projections were predicated on historical figures adjusted for purported shifts to thru-tariffs and competitive factors. The record establishes that, in any event, the projection of "other cargo" and thus the total revenue ton figure have no basis in analysis. Mr. O'Malley admitted it was necessary to forecast for each commodity (not just the top fifteen) the effect that shifts to thru-tariffs and competition will have on projected cargo, because these factors affect each commodity differently, but he did not make individual forecasts;[21] rather a flat percentage was applied to the "other cargo" category, and even the details of this calculation are not revealed in the record. Thus, at least with regard to the "other" category and the total revenue tons, the cargo projections can be traced directly back to the predetermined budgeted total revenue amount figure which itself had no basis on volume but was forecast before volumes were ever considered. Hence, it is concluded that from the residual nature of the "other" revenue amount figure, and the subsequent calculation of the "other" revenue ton figure, that marketing information and known facts were not the basis for establishing the cargo projection.

To support its revenue dollar projection and ultimate rate of return, TMT should have analyzed each commodity individually in terms of cargo shifts and the competitive situation. This analysis should have been used to arrive at projected tons.

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[18] See Schedule V of Exhibits 2 and 7.

[19] Fn. 11, *supra.*

[20] See Exhibits 5 and 7, Schedule V.

[21] Refrigerated cargo and tank trailers were apparently the only exception. (Exhibit 5, at 2, note (2); Tr. 49-50, 83, 138).

If this had been done, tariff rates could then have been applied to the tonnage figure for the respective commodities to determine projected revenue for every commodity. Then, the sum of the individual revenue figures would have produced a reasoned, supportable total figure for revenue. Rather, TMT proceeded as outlined above, and then produced Exhibit 5 as an after-the-fact justification of the result.

Assuming that with the rate increase total revenues would not exceed $48,792,000 because of lower cargo volume and thus that the return to TMT would not be greater than the 15.8–16.15 percent deemed proper, TMT has the burden of establishing by competent evidence those factors which it claimed would cause tonnage decreases.

A prime factor that TMT cites[22] as the basis for decreased tonnage projections is a shift to the so-called thru-tariffs and other tariffs. However, Mr. O'Malley, who prepared the forecast, never was aware of the percentage of cargo in the subject trade which moved on the thru-tariffs, nor did he utilize any historical data (or any kind of data whatsoever) to forecast the purported "shifts" of cargo to these tariffs. The following quotation from the record is illustrative:

Q—Mr. O'Malley, how did you determine the percentage shift to the through tariff and the other tariffs if you were unaware of the amount of traffic going to those tariffs?

A—This is a forecast, and I was theoretically forecasting how much I thought would be shifting in the forecast year. I have no idea what additional cargo will be added to those new tariffs in that year . . .

Q—Was there any data upon which you based that forecast?

A—No.[23]

It is concluded that TMT's assertion that part of the alleged decrease in volume was due to a shift to thru-tariffs and other tariffs is not based on historical data nor does it have any other factual support in the record. It should also be noted that the other major factor asserted by TMT as contributing to decreased tonnage, namely competition, also is not supported on the record by any specific figures or calculations. To the contrary, although TMT contends that its cargo volume will decrease in the projected year,[24] the record indicates that its volume (and thus its revenue) may well increase. TMT's market share in the Mainland-Puerto Rico trade has increased every year since it entered the trade, from 10.4 percent in 1975 to 17.7 percent in 1978,[25] and Mr. Roush expects that its market share will be increased.[26] Unless there is a decrease in overall traffic volume by all carriers to Puerto Rico, TMT's total cargo will probably increase, rather than decrease. There is no evidence that the Puerto Rican trade will decrease in volume.[27]

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[22] Tr. 101, 119. Exhibit 5.

[23] Tr. 124–125.

[24] Primarily by reason of cargo shifting to thru-tariffs. See discussion, *supra*.

[25] Exhibit 10 at 11.

[26] Tr. 175.

[27] Mr. Roush testified as to TMT's belief in the potential of that service and implied total volume would, if not increase, not decrease. Tr. 175.

In addition to the unreliability of the projected revenue as determined by TMT's methodology, another matter must be mentioned as further compounding the difficulty and dilemma of the Commission[28] in attempting to determine whether the rate increase is just and reasonable.

Although TMT submitted a number of eleventh hour "corrections," Hearing Counsel claim two stand out as being particularly unfair to the other parties. These are the revenue tonnage recalculation for "Other" cargo appearing on page 2 of Exhibit 7 and the figure for line haul expense appearing in Exhibit 11.

By a telephone conversation of June 5, 1979, between Mr. Roush and Mr. Coleman and letter dated June 6, 1979, correcting TMT's direct case, Mr. Roush supplied a new total line haul expense figure of $4,942,610 and an allocation of $2,965,607 to TMT and $1,977,003 to GCML which produced a 60/40 percent time allocation. Mr. Coleman used the total of $4,942,610 in his testimony which he identified as "line haul expense." Although Mr. Coleman's testimony was served on June 12, 1979, TMT waited until the hearing before announcing that the $4,942,610 figure was not the "line haul expense" but included other expenses as well. If there was a misunderstanding over the $4,942,610 it should have been resolved as soon as TMT received Mr. Coleman's testimony. TMT hardly needed to cross-examine Mr. Coleman on the $4,942,610—it was supplied by TMT in the first place.

The projected revenue tons for "Other" cargo provides another example of an eleventh hour "correction" which could and should have been made weeks before the hearing.

Mr. Coleman, as part of his regular function in connection with the 5 percent general rate increase, performed a complete analysis of the data in TMT's G.O. 11 statements, both actual and forecasted. In the process of this analysis, he calculated the average revenue per ton for all commodity line items including "Other" cargo on Schedule V of TMT's projected G.O. 11 statement. Mr. Coleman calculated that the total revenue per ton increased from TMT's actual year (Exhibit 1) to the projected year (Exhibit 2) by 23 percent and that in the "Other" cargo category alone, revenue per ton increased approximately 49 percent.

On three separate occasions, Mr. Coleman requested Mr. Craig Wallace of CMC to explain why revenue per ton on individual line items on TMT's projected Schedule V (Exhibit 2) increased from TMT's actual Schedule V (Exhibit 1) on the average of about 5 percent, whereas the "Other" cargo category produced a 49 percent increase, resulting in an overall increase of 23 percent.

In response to a telephone inquiry of February 9, 1979, by Mr. Coleman as to why revenue tons increased 23 percent, Mr. Wallace responded that TMT would be carrying higher rated liquid tank cargo which is a low tonnage cargo. In response to a telephone inquiry of March 2, 1979, by Mr. Coleman as to whether TMT included the general rate increase in its projections, Mr. Wallace responded yes, and further that the 5.94 percent increase in revenue is the result of the compounding effect of applying the 5 percent general increase, a

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[28] Viewed in the light of the time constraints imposed by P.L. 95-475.

23 percent increase in revenue per ton, offset by a 13.88 decrease in revenue tons carried. The increase in revenue per ton is principally affected by "Other" cargo which consists of liquid or tank cargo which is low in tonnage and carried at a higher rate.

In response to Mr. Newton Frank, Supervisory Accountant, Federal Maritime Commission, on May 22, 1979, regarding TMT's decrease in projected revenue tons and increase in revenue, Mr. Wallace responded that tonnage was down due to the fact that more cargo was being carried under ICC tariffs. Mr. Wallace further responded that the revenue in "Other" cargo increased 48 percent, 38 percent of which was due to more reefer and special cargo which is high rated and low in tons and the remaining 10 percent due to the projected mix in quantities.

On May 22, 1979, Mr. Coleman called Mr. Wallace regarding the conflicting information given Mr. Frank as compared to previous conversations regarding the increase in revenue per ton and decrease in revenue tons. Mr. Wallace stated that the 48 percent increase in revenue referred to was the revenue per ton increase of the total of "Other" cargo and that, in addition to the increase in tank cargo, there is a projected increase in reefer cargo which he may have forgotten to mention earlier.

The record amply demonstrates that staff inquiries regarding the increased revenue, despite decreasing tonnage, specifically focused on "Other" cargo. Mr. Wallace understood staff interest by explaining that the apparent anomaly was due to the increase in reefer and liquid or tank cargo, which comports with the reason which appears in connection with "Other" cargo on TMT's Exhibit 5. There is no evidence that Mr. Wallace was not talking about "Other" cargo when he made the observation. Indeed, the only commodity in the fifteen leading commodities which showed a drop in tonnage coupled with an increase in revenue was automobiles. It is concluded that the staff repeatedly questioned the projected revenue tonnage for "Other" cargo and that TMT was aware of staff's concern.

Despite repeated questions, TMT did not recalculate the figure until three or four days before the hearing. Apart from the merits of the recalculation, timing of the "correction" is critical to the Commission's ability to consider the lawfulness of the rate increase.

The Commission in supporting enactment of Public Law 95-475 was extremely concerned about the time elements inherent in the development of a rate case. The testimony of Vice Chairman Moakley to the Senate Subcommittee on Merchant Marine and Tourism focused on this issue. In outlining the changes to the Commission's procedure that would be required in order to comply with the legislation, he made the following statement:

> First, the financial data which the carrier is required to file simultaneously with the filing of its general rate change will have to be essentially the evidence it will rely upon throughout the expedited proceeding. This means, at the very least, there can be no change in the test year used by the carrier in support of the rate increase. *Otherwise, the parties will not have a proper opportunity to test the carrier's evidence.*[29] (Emphasis added.)

[29] *To Amend the Intercoastal Shipping Act, 1933, and For Other Purposes: Hearings on H.R. 6503 Before the Subcomm. on Merchant Marine and Tourism of the Senate Committee on Commerce, Science and Transportation*, 95th Cong. 2d Sess. 17 (1978).

This apparently provoked the following exchange:

SENATOR INOUYE. What makes you believe that you can cut a 6-year hearing period down to 180 days, as H.R. 6503 would require?

Mr. MOAKLEY. I think—I might take a quick look at what took place on the longest one, which was the *Matson* case, on which test years were changed, the financial information was changed, the whole basis of the case was constantly changed.

Now, we have clearly defined that at the time you apply for the rate increase you must submit the financial information which will be used to determine whether the rate is reasonable or unreasonable. That will not change. *Therefore, the opponent to it will have their financial information in the beginning and be able to analyze.*[30] (Emphasis added.)

Vice Chairman Moakley was not alone in this view. Chairman Daschbach addressed a letter dated October 3, 1978, to Senator Inouye in which he stated, *inter alia:*

Fourth, carriers have often made major changes to their evidence after a rate case has begun, including the changing of test years. The legislative history of H.R. 6503 makes it clear that the carrier must henceforth use the evidence submitted with its rate increase filling [sic] to justify its increase and cannot make major changes or additions to that evidence which would require further analyses, cross-examination and, possibly, rebuttal.[31]

The Committee Report, S.Rep. No. 1240, 95th Cong., 2d Sess. 9 (1978), lends support to the views expressed by the Chairman and Vice Chairman.

This is one of the very first rate proceedings to be conducted within the time constraints of P.L. 95-475 and despite ample time in which to furnish the information which would enable the Commission to properly consider the reasonableness of the increase, we find the carrier shifting and changing data at the last moment, making it virtually impossible for staff and protestants to evaluate the new information or prepare for cross-examination, let alone draw rational conclusions relating thereto. The statute places a high degree of responsibility on the carrier seeking a rate increase to supply the information necessary to permit expeditious consideration.

Review and consideration of the record in this proceeding leads to the conclusion that the volume factor is not reasonably accurately ascertainable on this record. Not knowing the volume, it is impossible to know what the revenues will be and hence whether such revenues will yield a return which will be a reasonable 15.8-16.1 percent or whether it will be something else.

CONCLUSIONS

Section 3(b) of the Intercoastal Shipping Act, 1933, 46 U.S.C. §845(b), as amended, states that at any hearing "the burden of proof to show that the rate . . . is just and reasonable shall be upon the carrier. . . ."

The evidence in this proceeding fails of proof that the rate increase will not result in an excessive return on equity to TMT in comparison to other industries facing similar risks.

[30] *Id.* at 18-19.

[31] *Id.* at 26.

The evidence in this proceeding establishes that the cargo cube allocation of expenses and division of assets between TMT and GCML for the tandem barge towing service is appropriate and in accordance with G.O. 11.

The evidence in this proceeding fails to establish any reasonably accurate basis for determining volumes or revenues which may be anticipated by reason of the rate increase.

Inasmuch as the record does not reasonably establish volumes and revenues which may be anticipated by the rate increase, it cannot be determined why there is a projected increase in revenue for the trade despite a projected decreasing volume of cargo to be carried for TMT's projected period of April 1, 1979, to March 31, 1980, as compared to TMT's actual period of December 1, 1977, to November 30, 1978.

Because the evidence does not reasonably reflect anticipated volumes or revenues or rate of return, respondent TMT has failed its burden of proof of showing that the rates in Supplement No. 1 to tariff FMC-F No. 5 are just and reasonable and otherwise lawful.

Because respondent TMT has failed to establish that the rates in Supplement No. 1 to tariff FMC-F No. 5 are just and reasonable, they are found to be not lawful.

(S) STANLEY M. LEVY
Administrative Law Judge

WASHINGTON, D.C.
August 20, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-81

MARINE EXPRESS LINE, S.A.

v.

SEATRAIN INTERNATIONAL S.A.

NOTICE

October 31, 1979

Notice is given that no exceptions have been filed to the September 26, 1979, dismissal in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, that dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-81

MARINE EXPRESS LINE, S.A.

v.

SEATRAIN INTERNATIONAL S.A.

DISMISSAL OF COMPLAINT

Finalized October 31, 1979

By a "Notice of Dismissal" complainant Marine Express Lines has withdrawn its complaint in this proceeding. Accordingly, the proceeding is hereby dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

September 26, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-24

PACIFIC FREIGHT AUDIT, INC.

v.

SEA-LAND SERVICE, INC.

DOCKET NO. 78-25

PACIFIC FREIGHT AUDIT, INC.

v.

AMERICAN PRESIDENT LINES, LTD.

ORDER PARTIALLY ADOPTING INITIAL DECISION

October 31, 1979

These proceedings were initiated by separate complaints filed by Pacific Freight Audit, Inc. (PFA) against Sea-Land Service, Inc. and American President Lines, Ltd. (APL) alleging violations of sections 14, 16 and 18(b) (3) of the Shipping Act, 1916 (46 U.S.C. §§812, 815, 817(b) (3)). The proceedings were subsequently consolidated due to the similarity of the issues presented. The Trans-Pacific Freight Conference of Japan/Korea and the Commission's Bureau of Hearing Counsel intervened.

The gravamen of the complaints is that Sea-Land and APL, improperly refused to honor claims for refunds of ocean freight charges on shipments which were allegedly delivered to OCP destinations. Respondents interposed the defenses that the claims were to a large extent duplicative and fraudulent and in any event were not tendered with proper documentation or other proof of OCP movements.

Full evidentiary hearings were held and Administrative Law Judge William Beasley Harris issued an Initial Decision finding that: (1) Complainant had not sustained its burden of proof as to its allegations of violations of the Shipping Act; and (2) Respondents were justified in refusing to pay the OCP claims.

However, the Presiding Officer granted Complainant 60 additional days within which to submit sufficient proof of these OCP movements to the Respondents. Exceptions to the Presiding Officer's decision were filed by Respondents and Hearing Counsel. There were no replies to Exceptions.

DISCUSSION

Sea-Land argues that the Presiding Officer's decision is deficient in its findings of fact necessary to support the conclusion that the Complainant has failed to sustain its burden of proof and asks the Commission to find certain specific facts.[1] It also opposes allowing Complainant an additional 60 days to substantiate its claims on the grounds that the claims have already been adjudicated insufficient and this finding should in all fairness now be made final.

In addition to citing certain alleged drafting errors in the Initial Decision[2], APL objects to the 60-day extension afforded Complainant on the grounds that the Administrative Procedure Act requires decisions to make final determinations of the issues presented and that the ruling of the Presiding Officer would require the Respondents to violate the terms of their tariffs.[3]

Hearing Counsel agrees with the Presiding Officer and Respondents, that Complainant has failed to sustain the validity of its claims but objects to the 60-day extension afforded Complainant on the ground that the Commission should not, as a matter of policy, allow this proceeding to continue without a final determination.

After reviewing the full record in these proceedings, the Commission agrees with the ultimate conclusion of the Presiding Officer that Complainant failed to sustain its burden of proof as to the validity of the subject OCP claims and finds that the Initial Decision is sufficient to support that conclusion. Much if not all of the factual findings sought by Sea-Land are expressly incorporated in the Presiding Officer's decision and those not so incorporated are necessarily included in the Initial Decision's more general findings.[4]

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[1] Specifically, Sea-Land urges that the Commission find that: (a) the shipments in question moved under the proper port-to-port tariff rates; (b) such movements can be subsequently re-rated under an OCP rate upon fulfilling the necessary tariff requrements; (c) Sea-Land's tariff allows proof of an OCP movement by means of any one of six types of documents but in any event must include proof of the name of the vessel, the port of origin, the ocean carrier's bill of lading number, the vessel voyage number, the final OCP and the date of the actual OCP movement; (d) PFA's claims consisted solely of ocean carrier bills of lading with attached inland carrier bills but no inland bill contains any of the relevent and necessary information; (e) certain documents used by PFA to support its claims were duplicative; (f) commercially accepted inventory control systems different than that used by PFA's consignees would facilitate compliance with the stated tariff requirements; and (g) the subject tariff requrements were not complied with in that no direct correlation between a particular ocean carrier movement and a subsequent inland movement was established and that in fact nearly one in four claims included documents used in more than one claim.

[2] APL notes that: (a) Mr. James Mitchell, President of PFA, is characterized at one point in the Initial Decision as a complainant when in fact he is not a party to the proceeding; (b) two claims, 792 and 1097, were omitted in the list of claims against APL in which duplications were found; (c) the word "contact" in the quote of section 14 Fourth of the Shipping Act should read "contract;" (d) the reference to section 16, first Initial Paragraph should be to the second Initial Paragraph and section 16 First. These exceptions point out valid, albeit minor, errors in the Initial Decision and will be adopted.

[3] APL states that its tariffs require that OCP refund claims "must be submitted within 90 days from the date the final lot of the bill of lading is forwarded."

[4] See footnote 2: Sea-Land's proposed finding "(a)" is contained in lines 13-15 of page 11 of the Initial Decision, "(b)" is contained in paragraph numbered 11 on page 7, "(c)" is contained in paragraph numbered 22 on page 10, "(d)" is contained in paragraph numbered 17 on pages 8 and 9, "(e)" is contained in paragraphs numbered 13 and 14 on pages 7 and 8, "(f)" is contained by implication in the third complete paragraph on page 19, and "(g)" is contained in the last paragraph on page 14 and in the last paragraph on page 18.

However, the Commission agrees with Respondent that the Presiding Officer erred in according Complainant an additional 60-day period within which to submit to the Respondents further proof in support of its claims. Complainant has had every opportunity to prove the validity of its assertions and has simply failed to do so. There is no reason, equitable or otherwise, to allow Complainant any further opportunity to prove its case. Respondents have already been subjected to lengthy proceedings and fairness dictates that these proceedings now become final. Accordingly, that part of the Initial Decision granting Complainant an additional 60 days to submit proof in support of the subject OCP claims will be reversed.

One final matter needs be addressed. In his Initial Decision, the Presiding Officer advised that the Complainant in these cases bore "heavy burden of proof." While this statement is not necessarily inaccurate, it does require some clarification, particularly in light of the Commission's recent decision in *Pan American Health Organization v. Moore McCormack Lines, Inc.*, Informal Docket No. 387(I), Report on Remand, served September 12, 1979, 19 SRR 762. There the Commission explained that references in earlier decisions to an overcharge claimant's "heavy burden" related "to the difficulty in obtaining the necessary evidence rather than to the weight to be given such evidence." The applicable standard here is that the validity of the claims be established by a "preponderance of the evidence." From the Commission's review of the record it does not appear that the Presiding Officer imposed upon the Complainant in these proceedings any burden other than to prove its allegations by such a preponderance.

THEREFORE, IT IS ORDERED, That the Exceptions of Sea-Land Service, Inc., American President Lines, Ltd. and the Commission's Bureau of Hearing Counsel are granted to the extent indicated in this Order and are, in all other respects denied; and

IT IS FURTHER ORDERED, That the Initial Decision issued in these proceedings 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. 78-24

PACIFIC FREIGHT AUDIT, INC.

v.

SEA-LAND SERVICES, INC.

No. 78-25

PACIFIC FREIGHT AUDIT, INC.

v.

AMERICAN PRESIDENT LINES, LTD.

Partially Adopted October 31, 1979

Although the complainant has failed to meet the heavy burden of proof necessary to sustain its case and relief is denied, the complainant is given 60 days from the date hereof within which to offer to respondents back-up documents and affidavits that will warrant payment of OCP refunds.

This consolidated proceeding and each docket No. 78-24 and 78-25 be and hereby are respectively discontinued.

William H. Carter of Carter & Monkman and *Thomas W. McLaughlin* for complainant Pacific Freight Audit, Inc.

J. Donald Kenny of Kenny & Finan for respondent American President Lines, Ltd.

John M. Ridlon, General Attorney, *Stephan T. Lanctot*, Associate Counsel, *F. A. Fleischer*, Registered Practitioner, and *Gary Ferrulli*, Director, Traffic and Regulatory Services, for respondent Sea-Land Service, Inc.

Charna Swedarsky, *John Robert Ewers* and *Paul J. Kaller*, Director and Deputy Director, respectively, of the Commission's Bureau of Hearing Counsel, for intervenor Hearing Counsel.

Charles F. Warren and *George A. Quadrino* of Warren & Associates, P.C., for intervenor Trans-Pacific Freight Conference of Japan/Korea and its Member Lines.

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

Complaint against respondent Sea-Land Service, Inc. (Sea-Land) in FMC Docket No. 78–24 was served June 19, 1978. Complaint against respondent American President Lines, Ltd. (APL) in FMC Docket No. 78–25 was served June 20, 1978. In each proceeding, complaint is made of respondents' alleged violations of section 18(b)(3) as well as sections 14 and 16 of the Shipping Act, 1916. Because they involve substantially the same issues, an order consolidating the two dockets was served June 22, 1978, pursuant to Rule 148 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.148.

On July 5, 1978, an Order was served granting enlargement of time requested by respondent Sea-Land to July 24, 1978, for parties to reply to the complaints herein. Respondent APL served its Answer to the complaint July 10, 1978, and a First Amended Answer on July 11, 1978. Respondent Sea-Land served its reply to the complaint July 21, 1978.

Intervention herein was granted to (1) The Trans-Pacific Freight Conference of Japan/Korea (TPFCJ/K) and (2) Hearing Counsel.

By order served August 15, 1978, pursuant to Rule 94 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.94, a prehearing conference was set for Tuesday, August 29, 1978. At the request of the complainant for a postponement, an order was served August 24, 1978, granting postponement of the prehearing conference to September 26, 1978. At the September 26, 1978, prehearing conference (the official stenographic transcript of which comprised 52 pages), hearings were set to commence December 12, 1978, in Los Angeles, California. The commencement of hearing was rescheduled December 1, 1978, to commence Wednesday, January 10, 1979. Hearings began in Los Angeles, California, on the latter date, continued on January 11 and 12, 1979, concluding on January 12, 1979.

At the hearings, the following briefing schedule was developed:

1. Opening brief by complainants to be mailed on or before Tuesday, February 20, 1979 (Tr. 464, 467, 471).
2. Reply briefs by respondents to be mailed on or before Tuesday, March 20, 1979 (*Id.*).
3. Closing brief by the complainant to be mailed on or before Friday, April 20, 1979 (Tr. 464, 468, 471).

Complainant's opening brief, served February 20, 1979, was received February 27, 1979. Respondent APL's reply brief, served March 27, 1979, was received March 28, 1979. Respondent Sea-Land's reply brief, served March 27, 1979, was received March 29, 1979. Intervenor Hearing Counsel's reply brief was served and received March 27, 1979. Intervenor TPFCJ/K and its member lines' reply brief served and received March 27, 1979. Complainant's closing brief, served April 26, 1979, was received April 30, 1979.

[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).

The complainant proposed seven findings of fact and four conclusions of law (opening brief). Respondent APL proposed twenty findings of fact. Intervenor Hearing Counsel proposed ninety-four findings of fact and four conclusions of law. Respondent Sea-Land proposed fifty findings of fact and six conclusions of law, and Intervenor TPFCJ/K proposed twenty-four findings of fact. These total 195 proposed findings of fact and fourteen conclusions of law. All proposals and requests have been considered carefully and granted, granted in substance, or denied as evidenced herein by the facts found and decisions made.

The official stenographic transcript of the hearing consists of three volumes, totaling 475 pages. Thus, the transcript of the prehearing conference and hearing total 527 pages. Forty-four (44) exhibits were identified, of which two were withdrawn (Exhibits for identification, Nos. 10 and 42); one was not offered (No. 36). All the rest were received in evidence. It is from the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding that the Presiding Administrative Law Judge finds the facts hereinafter and constitutes the exclusive record for this decision.

Facts

1. During November of 1976, while in the employment of respondent Sea-Land as a sales representative, complainant James Mitchell began filing claims against Sea-Land for others for OCP refunds (Tr. 42). The said James Mitchell had come in contact with OCP claims on several occasions where Sea-Land customers he was calling on for Sea-Land were filing or were attempting to file with Sea-Land claims for OCP recovery and he assisted them in doing that (Tr. 83, 84). Sea-Land, upon discovering that James Mitchell represented or was PFA, terminated his services with Sea-Land about November 1, 1977 (Tr. 43) and stopped payments to PFA (Tr. 327).

2. Witness James Mitchell testified that PFA is a California corporation that was incorporated December 15, 1977; also that PFA was operating prior to incorporation under that trade name (Tr. 23); that it is a family business (Tr. 18) of which he is the president, his father Eli T. Mitchell is the vice-president, his mother Marion Mitchell is the treasurer, and his brother Perry Mitchell is secretary of the corporation. PFA, he stated, is engaged in the business of performing freight audits for customers anf filing claims with carriers for recovery of freight charges for customers (Tr. 17, 18). PFA, aside from family members, in 1977 and 1978 employed about five other persons (Tr. 33).

3. In early November 1976, the first claims of PFA were made to APL (Tr. 43). APL stopped paying OCP claims about the same time as Sea-Land.

4. The tariffs involved in this proceeding are:

(A) Trans-Pacific Freight Conference of Japan/Korea, Tariff No. 35, FMC No. 6 (Exh. No. 26), Agreement No. 150. APL and Sea-Land both are members. (TPFCJ/K publishes a port-to-port tariff in the Eastbound Japan/ Korea-U.S. Pacific Coast Trades, including both local and overland common point (OCP) rates.)

(B) Sea-Land Service, Inc., Tariff No. 245-A, FMC No. 138 (Exh. No. 27), from Ports in Hong Kong and Taiwan to United States Pacific Coast Ports named in Item 320 and Overland Common Points.

(C) American President Lines, Ltd., Hong Kong-Taiwan Freight Tariff No. 5, FMC No. 67 (Exh. No. 28), from Hong Kong and Taiwan to Honolulu, Hawaii and Pacific Coast Ports of the U.S.A.

(D) Philippines/North America American Conference Tariff FMC No. 11, Agreement No. 5600. APL and Sea-Land both are members. (Each carrier herein has on file an independent tariff under the aegis of Agreement No. 10107, covering the Eastbound Hong Kong/Taiwan U.S. Pacific Coast Trade.)

5. Clients represented by PFA in this proceeding and the date of contract or agreement between them are:

(a) Kennington—contract dated 2/2/77 (Exh. No. 1).

(b) Silton Brothers—contract dated 11/76 (Exh. No. 7), 5/31/78 and 7/10/78 (Exh. No. 6).

(c) Sportsclothes Ltd., Inc.—contract dated 6/1/78 and 7/14/78 (Exh. No. 4).

(d) American Pants (World Trading Co.)—contract dated 9/1/78 (Exh. No. 5).

(e) K. W. International—contract dated 3/3/77 by PFA and 3/16/77 by K.W. (Exh. No. 9); contract dated 5/31/78 (Exh. No. 8).

(f) International Set—contract dated 11/11/76. Does not now represent them. Tr. 19.

(g) California Prime, Inc.—contract dated 3/3/77 (Exh. No. 3). (Ceased to operate on or about end of 1978 (Tr. 241).)

6. Exhibit No. 25 is stipulated to contain the copies and are the claims made by PFA to APL which are listed in the complaint (Tr. 73, 74).

7. Sea-Land in its answer to the complaint admitted its address is 2150 Valdez, Suite 1901, Oakland, California 94666; that it is a corporation and common carrier by water engaged in the transportation of cargoes for hire from various ports in the Far East, including Manila, Hong Kong, Busan, Keelung and Kaohsuing to Long Beach, California, and as such is subject to the provisions of the Shipping Act, 1916, as amended, and the applicable tariff. Sea-Land describes itself as a U.S.-flag common carrier by water in the foreign commerce of the United States having its principal offices at Edison, New Jersey.

8. Sea-Land also admitted in its answer to the complaint that it has promptly processed and paid claims submitted by other freight audit companies for adjustment of ocean freight charges from local to OCP within 30 to 60 days of their submission and alleges that it also has processed and paid promptly proper claims submitted by complainant within the same time frame stated.

9. APL in its answer to the complaint admits its address is 1950 Franklin Street, Oakland, California 94612; that APL is a corporation organized and existing under the laws of the State of Delaware. APL is a common carrier by

water, subject to the Shipping Act, 1916, as amended, providing ocean transportation services between various ports in the Far East and ports in the United States.

10. APL in its answer admits that during the period set forth in the complaint, it received claims from the complainant requesting adjustment of freight charges from local freight rates to Overland Common Point ("OCP") freight rates pursuant to applicable tariffs. APL in its answer further admits that it has refused to refund freight charges to the complainant where insufficeint or false documentation has been presented to APL by claimant as support for an adjustment in freight charges.

11. Generally, cargo which is destined to OCP territories in conformity with the rules published in each conference or carrier tariff is entitled to the lesser OCP rates. OCP territory is defined in applicable tariff as all points in North Dakota, South Dakota, Nebraska, Colorado, New Mexico and states east thereof (Exh. 25, p. 20). Official notice is taken that the Commission has said "[O]CP territory which territory may be described, roughly as that part of the United States east of the Rocky Mountains." *Investigation of Overland and OCP Rates and Absorptions*, Docket No. 65-31, 12 F.M.C. 184, 187 (1969).

12. PFA's compensation from clients for recovery of OCP funds is based solely on the amount of the refunds PFA is able to collect from ocean carriers on behalf of its customers. PFA retains 50 percent of all such refunds and remits the remainder to the shipper or consignee. If the claim is denied, or if PFA decides not to submit a particular claim after review, PFA receives no compensation from any source regardless of the time or expense incurred (Tr. 220).

13. It was stipulated between complainant and APL that the following list of paid claim files were in fact paid by APL: PFA Claim Nos. 375, 368, 948, 376, 370, 401, 786, 400, 382, 402, 399, 974, 405, 403, 379, 378, 381, 958, 380, 369, 951, 950, 949, 947, 862 and 952—a total of 26 files (Tr. 350, 351, 360, 361, 363; Exh. 37).

14. There are 31 (34, 3 more added Tr. 213) PFA claim numbers contained in the documents in Exhibit 25 (duplication between submission to APL is noted by a green tab (Tr. 194)), which complainant and APL stipulated contain duplications of supporting documents (Tr. 196). The PFA claim numbers in which one or more duplications have been found are: 1021, 1109, 1110, 1111, 1128, 1130, 1020, 1019, 789, 790, 791, 793, 1002, 1003, 1004, 1005, 1006, 1043, 1044, 1048, 1049, 1066, 1079, 1098, 1099, 1100, 1359, 1047, 1033, 1017, 1508, 1507 (Tr. 194, 195).

15. The claims for OCP refunds filed by PFA with Sea-Land on behalf of six consignees were allocated among the consignees in the following amounts:

American Pants Co.	27 claims	$ 3,531.52
International Set, Inc.	42 "	8,792.62
Kennington Ltd.	295 "	53,089.90
K. W. International	43 "	5,972.92
Silton Bros., Inc.	32 "	7,294.03
Sportclothes Ltd., Inc.	11 "	2,553.35
		$81,234.34

The total number of claims submitted by PFA to Sea-Land, master file listing 1,123 claims, of which 450 are the subject of this action (Tr. 418).

16. The claims for OCP refunds filed by PFA with APL on behalf of six consignees are allocated in the following amounts:

American Pants Co.	1 claim	$ 47.62
California Prime, Inc.	1 "	103.41
Kennington Ltd.	16 claims	3,089.20
K.W. International	79 "	15,663.79
Silton Bros., Inc.	9 "	2,299.03
Sportclothes, Ltd.	2 "	396.62
		$21,599.67

17. The documents submitted by PFA to the ocean carriers in support of the claims, the subject of this proceeding, are a copy of the ocean bill of lading, copies of allegedly relevant domestic bills of lading of freight bills, together with the information which had to be affixed to each of the domestic bills of lading and PFA's cover sheets (Tr. 39). PFA does not keep copies of the claims submitted with the exception of PFA's cover sheet (Tr. 40) which has vessel, voyage number, ocean bill of lading number and the pounds. PFA has a stamp which places information as to the vessel, the voyage number, the ocean bill of lading number and the port of origin on the domestic bills of lading, which PFA says the tariff requires (Tr. 122).

18. PFA claims for OCP refunds were for refunds of 100%, 95% or 90% of the ocean lading quantity (Tr. 380). For example, 16 claims were filed against APL as to Kennington, Ltd; 12 of the 16 claims were for 100 percent moves to OCP; of the remaining 4, none were below 90% (Tr. 352). Too, in every claim as to Kennington, Ltd., all of the inland bills of lading for each claim would have been time-barred but for one inland bill of lading which was within the time frame permitted under the tariff (Tr. 353).

19. A representative of a claim submitted to Sea-Land by PFA is Exhibit No. 11. The same documents would be submitted to APL (Tr. 58). The documents comprise the claim and would ordinarily consist of cover sheet (prepared by PFA), ocean bill of lading, domestic bills of lading referenced to the ocean bill of lading (Tr. 56).

20. As in the case of American Pants (Tr. 59), OCP rates can apply either initially or after the fact. This importer brings goods in at the OCP rate and is in the position of having to provide proof of OCP movement to the carrier to retain that rate. The same proof is required in either instance (Tr. 59, 60).

21. Custom and practice of PFA as to OCP refunds:

1. meet with and work with people represented to obtain the necessary documents and information, specifically ocean bills of lading or copies of same, and domestic bills of lading or freight bills for cargo which they subsequently ship to OCP destinations.
2. segregate the bills of lading into date order and destination, whether OCP or non-OCP destination.
3. matching commodities, pounds of cargo moved, cartons, etc.

On that basis, PFA submits claims to the carrier within the confines of the tariff rule of the amount of time that can elapse that cargo can be warehoused before movement to OCP destination.

A claim PFA sends the carriers would consist of an ocean bill of lading and two or three domestic bills of lading to maybe a hundred or more in some cases, evidencing the OCP movement of imported cargo.

On the domestic bills of lading, PFA has to place information about the vessel that imported the goods, the bill of lading number, the voyage number of the vessel, and the port of origin of the cargo.

Claims are basically filed by weight. Tr. 33, 34.

22. Sea-Land would require that the vessel and voyage number be identical on the inland bill as well as the ocean bill; if they were *not*, the claim would be rejected. APL also would require customer's proof, invoices or inland bills, stating the necessary facts, such as vessel, voyage, weights and where it came from, etc., or the claim would be denied. Tr. 319, 332.

23. Witness Mitchell stated that with each claim for an OCP refund, he or PFA submitted a PFA cover sheet, the ocean bill of lading and domestic bills of lading. This information, where it appears in the inland carrier's bill of lading, is a result of its being stamped on these bills by a stamp fabricated by PFA which stamp attaches to these bills a vessel name, voyage number, port of origin and ocean bill of lading number.

DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

Hearing Counsel sees the big issue in this proceeding as whether the complainant, on behalf of certain consignees, has established pursuant to the applicable tariff rules, "proof of movement" to OCP territory of cargoes imported in an ocean common carrier, so as to qualify for refund of monies for ready adjustment of local freight rates to OCP rate. It is Hearing Counsel's position that PFA has failed to introduce any evidence to sustain its burden of proof as required by law, and to establish with reasonable certainty the validity of its claim for OCP refunds.

Intervenor TPFCJ/K argues that the history and development of OCP rates, from their origin more than a hundred years ago, has been thoroughly documented by the Commission in *Investigation of Overland/OCP Rates and Absorptions*, Docket No. 65-31, 12 F.M.C. 184 (1969). TPFCJ/K says that none of the claims in this proceeding involved cargo transferred directly to an inland carrier; in all claims, PFA is seeking a refund of the difference between the local rates originally paid by its customers and lower OCP rates. Before an OCP refund can be paid, the consignees or his agent must demonstrate that the goods in question actually moved to a destination within the OCP territory in accordance with all applicable tariff rules.

TPFCJ/K contends (Brief at 17) that the documentation submitted by complainant, allegedly to demonstrate OCP entitlement, proves one and only one fact: Cargo described as wearing apparel was carried from warehouses in California to destinations in the OCP territories. Complainant's documentation, according to TPCFJ/K, does not establish that the cargo moving to OCP areas had originally been carried (1) by any particular ocean carrier, (2) under any particular ocean bill of lading, (3) in any particular vessel, (4) at any particular time, or (5) from any particular origin. Yet, all of this information is essential if OCP rates are properly to be applied.

Respondent Sea-Land (Brief at 16) also contends that the complainant has failed to adduce any evidence appropriate to proving complainant's case.

Respondent APL contends (Brief at 16) the complainant not only has failed to sustain the "heavy burden of proof" placed upon it, but also has failed to sustain the burden of proof under any measure whatsoever.

APL argues that the PFA case can be summarized as a group of ocean bills of lading and domestic bills of lading which do nothing to support the complainant's case and the testimony of Mr. Mitchell which indicates a total lack of effort on the part of PFA to properly support its claims.

The complainant (Closing Brief at 9) submits that it has established the validity of each and every claim for OCP refunds initially submitted to respondents under applicable tariffs and has satisfied the "heavy burden of proof" test set forth in *Western Publishing Co. v. Hapag Lloyd*, Docket No. 283(I), 13 SRR 16, 17 (May 4, 1972) and *Johnson & Johnson v. Prudential Grace Lines*, Informal Docket Nos. 303(F) and 304(F), 18 FMC 244 (1975).

The Presiding Administrative Law Judge, in dealing with this issue of burden of proof, first looked to the complaint in each docket. The allegations in the complaint in Docket No. 78-24 as to respondent Sea-Land and those in Docket No. 78-25 as to APL, save for amounts, are similar. It is alleged that the respondents' (Sea-Land in Docket No. 78-24 and APL in Docket No. 78-25) conduct in refusing to pay complainant the difference between local and OCP rates on the claims submitted to respondents is unlawful and constitutes a violation of the Shipping Act, 1916, as amended, section 18(b)(3), and the applicable tariff rules, with regard to adjustment of freight rates from local to OCP; that complainant's assignors have been subjected to the payment of rates for transportation of cargoes from ports in the Far East to Long Beach, which rates are unjustly discriminatory, prejudicial and unreasonable, all in violation of section 18(b)(3) of the Shipping Act, 1916, as amended, and the applicable tariff. Complainant alleges he is entitled to recover of Sea-Land $81,352.88 and of APL $21,599.67 in freight charges presently due complainant under the applicable tariff. Further, it is alleged complainant's business has, and will continue to suffer loss of goodwill and has been damaged as to Sea-Land in the amount of $50,000, as to APL $25,000, by reason of respondents' dilatory conduct and unjustified and unreasonable refusal to refund freight adjustment from local and OCP rates as mandated by applicable tariffs.

Also, complainant alleges that respondents have established over the year last past a pattern of unjustified, unreasonable and unwarranted discrimination against complainant in violation of the Shipping Act, 1916, as amended, sections 14 and 16, for which complainant claims entitlement to receive from respondent damages to complainant's business and loss of goodwill as to Sea-Land in the amount of $50,000 and as to APL in the amount of $25,000.

The complainant seeks an order directing respondents to cease and desist from the alleged violations of said act and tariffs and also pay to said complainant by way of freight adjustment from local to OCP rates the amounts set out above.

The complainant in support of its case called the following witnesses:

(1) James Mitchell, the president PFA and an employee of Sea-Land until it was discovered that while in Sea-Land's employ, he represented others in claims against Sea-Land for OCP refunds. This began in November 1976; Sea-Land terminated his service there in November 1977. PFA kept no copies of claims submitted (Tr. 39), but asserts a copy of the ocean bill of lading, copies of relevant domestic bills of lading or freight bills, together with information which had to be affixed to each domestic bill of lading, along with a PFA cover sheet, was submitted. He testified as to linkage necessary in OCP refund claims (Tr. 173); if it is not possible to reestablish the link between the OCP—the importation of the OCP movement—PFA would have no alternative but to decline an attempt to collect on either the original or the duplicate.

(2) Arthur Ting, employed as a manager by Daddy's Fashions, Inc. (Tr. 251).

(3) Perry Spanos, employed as import-export manager by Wallace Berry, Inc., a dealer in toys and novelties (Tr. 262).

(4) Earl Wayne Cox, employed as an import clerk by Sanyo Electric, Inc. (Tr. 269).

(5) Phillip C. Levin, comptroller and secretary-treasurer of Bardon, Inc., an importer of men's clothing (Tr. 277).

(6) Donald G. Hermansen, West Coast Pricing Manager, Pacific Division of Sea-Land (Tr. 312).

(7) Robert Bertagna, corporate credit manager of APL (Tr. 329).

The complainant then rested its case (Tr. 369).

APL in presenting its defense called the following witnesses:

(1) Kenneth E. Sivilich, corporate controller of Kennington Ltd., Inc.

(2) Walter Weitzmann, vice-president of Silton Brothers (Tr. 399).

(3) Richard J. Cohen (Tr. 411), vice president of operations for K. W. International (Tr. 412), who distributes a basically full line of junior and misses ladies' sportswear.

Sea-Land called the following witnesses:

(1) Donald G. Hermansen, Sea-Land's West Coast Purchasing Manager, Pacific Division (Tr. 379).

APL and Sea-Land then rested as to each (Tr. 451).

None of the above gave any testimony whatsoever as to PFA's claim for loss of goodwill and damages therefrom. None of the witnesses, including Mr. Mitchell, reestablished the link between the importation and the OCP movement. And, as Mr. Mitchell testified, if it is not possible to do this, PFA would have no alternative but to decline an attempt to collect. Could less be expected from the trier of fact? The Presiding Administrative Law Judge, as the trier of fact herein, *finds* and *concludes* that the complainant had a "heavy burden of proof" in this proceeding, especially in view of the fact the goods had left the carrier, but has failed to meet that burden of proof. The complainant kept no copies of the proofs submitted for claims made for OCP refunds. Further, the president of PFA, for example, testifying as to Silton Claim 1013, was asked to show (Tr. 148) the method whereby PFA would take the ocean bill of lading and identify inland bills of lading as referring to the same cargo that came in on the vessel *SS President Madison* from Hong Kong. This was a shipment of 100 percent moving OCP and the entire shipment stayed in Silton's warehouse for approximately eleven months before any of it was sent out.

Mr. Mitchell replied (Tr. 148, 149):

The best answer I could give you, lacking a recollection of this claim having been put together, is that this national motor freight classification number that you see that they used to describe their cargo is the motor freight classification for wearing apparel, which agrees in description with the ocean bill of lading commodity description of men's nylon parkas.

* * * * *

Clothing in and clothing out tells—it does not amount to a conflict in my mind and if there was a question at the time that claim was prepared, we would have verified the fact that it is in fact the same stuff.

The Presiding Administrative Law Judge asked (Tr. 150):

Actually your answer is, as to this particular claim, which is Silton's claim 1013, you are unable now, looking at it, to answer how a claim could be made that it had come in a particular vessel. Is that correct?

The witness (Tr. 150):

I am unable to recall that claim out of a couple of thousand that we have prepared, as to—

JUDGE HARRIS: Well, I will put my question again. From looking at this particular document that is before you dealing with Silton claim 1013, you are unable, simply by looking at this document, to tell how it was ascertained that the goods came in on the particular vessel. Is that correct?

THE WITNESS: I can tell you that the method employed would have put us in touch with the importer who could have given us the answer.

JUDGE HARRIS: Yes, but looking at these documents, really your answer is that you don't know at this point, by looking at these documents, how it was determined that a particular vessel brought these goods in and that then they went to an OCP point. You can't tell us now by looking at those documents?

THE WITNESS: I can't tell you, no, sir.

JUDGE HARRIS: But what you can tell is that the method that your company uses, that you will ask someone in Silton and they will tell you something about it and you put it together and you say we can make an OCP claim on this basis.

THE WITNESS: Yes, sir.

JUDGE HARRIS: That makes it clear to me. I just wanted clear in the record how this is arrived at. Mr. Kenny, I hope I didn't interfere too much with your cross.

MR. KENNY: No, I appreciate the clarification.

Every claim PFA would submit would have the cover sheet, the ocean bill of lading and domestic or inland bill of lading (Tr. 57). Exh. No. 11 is a typical claim folder. And, PFA stated (Tr. 176), PFA's system of identifying inland bills of lading to shipments is not error free.

As has been indicated above, this record is void of any proof as to loss of goodwill by the complainant, as well as to any proof of damages therefor. Any recovery by PFA against any respondent herein therefore is denied.

The complainant alleges violation of the Act for failure to make adjustment and settlement of claims. Under section 14, Fourth (c) of the Shipping Act, 1916, it is provided:

Sec. 14. That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

* * * * *

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due reqard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

The adjustment and settlement of claims was envisioned early on in these proceedings. The respondents at the prehearing conference promised, upon receipt of back-up documents on the claims herein and their satisfactory review of those claims, payment of the claims would start immediately (Prehearing Transcript at 24). This unfortunately did not happen. Under the circumstances of this case, the Presiding Administrative Law Judge *finds* and *concludes* the respondents were justified in withholding payment of OCP refund requests in view of the discovery of an employee of Sea-Land processing OCP refund claims against Sea-Land and the matter of compliance with the tariff as to eligibility for the OCP refund, and the aforesaid lack of back-up material showing compliance with the tariff for OCP refund.

The complainant in its closing brief contends (p. 7) that to have Mr. Mitchell prepared with back-up documents and testimony on each and every claim and bill of lading would have been an impossible task, straining the resources of PFA to financial ruin and aggravating to the fullest extent possible all PFA clients, especially where all claims and supporting bills of lading are so clearly within the spirit as well as precise wording of each tariff involved. In the next breath, PFA contends it has established the validity of each and every claim for OCP refund initially submitted to respondents under applicable tariff. The Presiding Administrative Law Judge is not persuaded that the complainant has done so or that it has met the heavy burden of proof necessary in such circumstances.

The Presiding Administrative Law Judge cannot find and conclude under the facts and circumstances of this proceeding that the complainant has established the bona fides of the claims nor that the matter of duplication is not an impeaching factor. The complainant in its closing brief (p. 2) submits the comparably minor amount of duplication in terms of number of documents and actual dollar amount represented by duplicate documents should not and does not impeach the validity of all of PFA's claims. To rule otherwise, argues PFA, would be to allow PFA's errors to deny innocent consignees from receiving substantial amounts of OCP refunds on bona fide claims.

The bona fides of the claims, a matter at issue in this proceeding, is and was important, yet the complainant did not present the consignees nor satisfactory documentation to prove such bona fides.

The Shipping Act, 1916, provides in:

Sec. 16. That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

Under the circumstances of this proceeding, the complainant has failed to prove that the respondents have violated this section of the Act, or the following section of the Act:

Sec. 18(b)(3). No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportaion of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

The complainant argues that only 24.04% of the total claims submitted to respondent Sea-Land ($21,352.88) have some duplicates, which dollar amount of these claims containing some duplicates equals $19,557.23. And, of the $19,557.23, only 14.96% would be actual duplicate proof, which amount equals $6,837.21. The complainant argues that using a percentage approach, $74,515.69 of the claims submitted to the respondent Sea-Land do not suffer from duplication; that if one assumes that the duplicates were only submitted twice, as is the case in the majority of the claims (see Exhs. 41 and 44), one-half of the amount of duplication would be valid, leaving only one-half of $6,837.21, to wit $3,418.61 as invalid.

As has been indicated above, the Presiding Administrative Law Judge is unpersuaded by this argument.

Unfortunately, early on efforts failed to have the complainant present satisfactory and adequate proof that would require payment of OCP refunds. Similarly, efforts to shorten the proceedings by the rise of representative samplings of claims made for OCP refund only served to prove that proof is needed to be presented as to every claim made herein, especially in the absence of agreement between the parties that such representative samples as were presented and the proofs thereof provided as answer that warrants payment of OCP refunds.

This case has been in process over a year, and in that time resolution between the parties has not been achieved totally. The matters brought to light as shown in this decision have eliminated some considerations and better focused others. Further, the complainant's argument, referred to above, that to have Mr. Mitchell (PFA) prepared with back-up documents and testimony on each and every claim and bill of lading would have been an impossible task, straining the resources of PFA to financial ruin and aggravating to the fullest extent possible all PFA clients, is lacking any proof in this record. Litigation herein undoubtedly has been costly to all despite the efforts herein to try to resolve this matter in the least time possible and at the least cost possible.

This is all leading up to granting the complainant 60 days to do that which they have not been able to do, that is within 60 days to present to the respondents any and all claims in this proceeding with back-up documents and affidavits, that the respondents, upon review and checking, are satisfied to pay forthwith. The Commission is to be kept fully informed of any and all progress and payments. At the end of this 60-day period, this proceeding will stand discontinued.

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 complainant has failed to meet the heavy burden of proof necessary to sustain its case.

(2) Relief should be denied and the complaints should be dismissed, but the complainant, as noted above, is given 60 days from the date of this decision to submit back-up documents and affidavits to prove any and all claims it can.

(3) This proceeding should be discontinued at the end of the 60-day period.

Wherefore, it is ordered that:

(A) Relief is denied, except within the 60-day period, back-up documents as to any claims may be submitted to respondents for payment and, if satisfactory, be paid by respondents.

(B) The complaints in Docket No. 78-24 and Docket No. 78-25 be and hereby, within 60 days of the date hereof, are dismissed.

(C) This consolidated proceeding and each Docket, No. 78-24 and No. 78-25, be and hereby, within 60 days of the date hereof, are respectively discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON, D.C.
July 9, 1979

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 607 (I)

IDEAL TOY CORPORATION

v.

ATLANTIC CONTAINER LINE

ORDER REMANDING PROCEEDING

October 3, 1979

Ideal Toy Corporation filed this complaint alleging that Atlantic Container Line charged it rates in excess of the applicable tariff on file with the Commission.* On July 16, 1979, Settlement Officer James F. Carey, issued a decision dismissing Ideal Toy Corporation's complaint on the ground that the complainant had failed to meet its burden of proof. The Commission determined to review the Settlement Officer's decision.

The record in this proceeding does not disclose the commodity description of the tariff item applied nor does it reveal the description of the commodities actually shipped. In order to assure a correct disposition of the complaint, this proceeding is being remanded to the Settlement Officer for further evidence. Specifically, the Settlement Officer is directed to receive evidence showing the commodity description of the tariff item applied to the shipments at issue and the description of commodities actually shipped.

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the Settlement Officer for the taking of additional evidence and the issuance of a supplemental decision thereon; and

IT IS FURTHER ORDERED, That such supplemental decision be rendered within 60 days of the date of this Order.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

* By consent of the parties the proceeding was conducted under the Commission's informal docket procedures [46 C.F.R. 502.301 *et seq.*].

224226

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 668

APPLICATION OF MAERSK LINE AGENCY FOR
THE BENEFIT OF MITSUI AND COMPANY

ORDER ON REMAND

November 1, 1979

This proceeding was instituted upon the application of Maersk Line Agency for permission to refund a portion of certain freight charges to Mitsui and Company pursuant to section 18(b)(3) of the Shipping Act, 1916.

The Administrative Law Judge rendered his Initial Decision on August 27, 1979, conditioning ultimate approval of the application upon the submission of evidence to the Commission establishing the date of the shipments in question.

Although no exceptions were filed, the Commission, on its own motion, determined to review the Initial Decision.

Among that which must be submitted to support a request for refund or waiver under section 18(b)(3) of the Shipping Act, 1916, is evidence establishing the dates of the shipments for which such authority is requested. Without the dates of the subject shipments, it cannot be determined whether the applicant has satisfied the 180 day statute of limitation imposed under section 18(b)(3) of the Act.

It is the Presiding Officer's duty to marshall the evidence necessary to make a decision whether to grant or deny an application. Should an applicant fail to provide satisfactory evidence to sustain its burden of proof then the Presiding Officer can require the submission of additional evidence *before* rendering an Initial Decision. If it is inappropriate to receive additional evidence and the applicant has not met its burden of proof then the Presiding Officer should render an initial decision denying the application. It is inappropriate for the Presiding Officer to render an Initial Decision conditioning approval of an application upon the submission of evidence to the Commission.

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the Presiding Officer for the receipt of evidence establishing the date of the shipments upon which the application is based and the issuance of a supplemental Initial Decision.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 660

APPLICATION OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF BDP INTERNATIONAL, INC. AS AGENT FOR CHAMPION INTERNATIONAL EXPORT CORPORATION

ORDER ADOPTING INITIAL DECISION

November 2, 1979

This proceeding was instituted upon the application of Sea-Land Service, Inc. to refund a portion of certain freight charges collected from BDP International, Inc., and independent ocean freight forwarder, as agent for Champion International Export Corporation.

Administrative Law Judge William Beasley Harris served his Initial Decision on August 10, 1979, granting Sea-Land's application. No exceptions were filed, but the Commission, on its own motion, determined to review the Initial Decision.

The findings and conclusions of the Initial Decision are well founded and correct and are herein adopted. However, when, as here, authority is granted to a carrier to refund freight charges to a freight forwarder acting as the agent for a shipper, the Commission must receive adequate assurances that the refund is paid over to the shipper.[1] The Commission is therefore requiring the submission of an affidavit from the agent certifying that it has remitted the refund to the shipper, or, if the remittance cannot or has not been made, an affidavit setting forth the reason or reasons therefor.

The Commission will also require the freight forwarder to adjust the amount of brokerage compensation it has received from the applicant. Therefore, contemporaneous with its affidavit certifying that the refund has been paid to the shipper, BDP International, Inc. shall certify that it has refunded to the applicant the excess brokerage compensation it has received by virtue of the adjusted freight charges.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding is adopted and made a part hereof; and

[1] *See* Special Docket Nos. 537, 538, 539, *Salentine & Co., Inc., et al. v. Europe Canada Laker Line,* 20 F.M.C. 542 (1978); Special Docket No. 519, *Buckley & Forstall, Inc. v. Gulf European Freight Association for Combi Line,* 20 F.M.C. 343 (1977).

IT IS FURTHER ORDERED, That BDP International, Inc. certify to the Commission by filing an affidavit within 45 days of this Order either that it has forwarded to Champion International Export Corporation the sum of $2,065.40 or explaining why such remittance has not been made.

IT IS FURTHER ORDERED, That BDP International, Inc. certify to the Commission, in detail, that it has refunded a proportionate percentage of brokerage compensation it has received for these shipments which was based on a percentage of the total freight charges; and

IT IS FURTHER ORDERED, That Applicant promptly publish in its appropriate tariff the following notice:

Notice is given as required by the decision of the Federal Maritime Commission in Special Docket No. 660 that effective December 14, 1978 and continuing through April 1, 1979, inclusive, the rate on waxed paper to Guatemala and Honduras under Item 1090, Tariff No. 283, F.M.C. No. 161, trailerload rate, is $82.00 per ton of 2,000 lbs., minimum of 37,000 lbs.

By the commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 660

APPLICATION OF SEA-LAND SERVICE, INC.
FOR THE BENEFIT OF BDP INTERNATIONAL, INC.
AS AGENT FOR CHAMPION INTERNATIONAL EXPORT CORP.

Adopted November 2, 1979

Permission granted to refund \$2,065.40 portion of aggregate freight charges of \$6,666.60 collected.

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

This is a special docket application by Sea-Land Service, Inc. (Sea-Land), a common carrier by water in foreign commerce which publishes its own tariff, No. 283, FMC No. 161, on rates for transportation of freight from U.S. North Atlantic Ports to Ports in Central America. BDP International, Inc., a freight forwarder (FMC 1127), paid aggregate freight charges of \$6,666.60 to Sea-Land for transportation to two shipments of Paper, Viz: Waxed for shipper Chemical International Export Corp., from Baltimore to Puerto Cortes (destination en route changed to Tegucigalpa) and from Baltimore to Honduras. The commodity was described in one Bill of Lading as Wrapping Paper and in the other as Wax Paper.

In this application it is certified by applicant Sea-Land that this application was mailed to the Secretary of this Commission on July 5, 1979. Thus, that is the date of filing of this application. (Rule 92(a)(3), Rules of Practice and Procedure, 46 C.F.R. § 502.92(a)(3)). The involved shipments dates of sailing, according to applicant, respectively are January 10, 1979 (as to B/L No. 956744391) and March 10, 1979 (as to B/L No. 956747400). A special docket application must be filed within 180 days of the sailing date of the involved shipment. The instant application was and thus is filed timely.

The commodity is Paper on the two (2) shipments involved herein.

Shipment No. 1: In Sea-Land's Bill of Lading (bearing no date) No. 956744391 (Exh. No. 5, Page 3 of 22 attached to application) the goods are described as "35′ Container STC: 28 skids of 28 Rolls: Wrapping Paper."

[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).

Shipment No. 2: In Sea-Land's Bill of Lading (bearing no date) No. 956747400 (Exh. No. 5, Page 16 of 22 attached to application) the goods are described as 25 "Pallets STC 71 Rolls: Wax Paper."

The applicant states that the goods were properly described as wax paper in Shipment No. 2.

Upon receipt of the bill of lading as to Shipment No. 1, the shipper Champion International Export Corp. filed with Sea-Land an overcharge claim on the basis the commodity was actually Waxed Paper and not Wrapping Paper (Exh. No. 5, page 12 of 22 attached to application). On the basis of the sample submitted by the Shipper, a refund was authorized by Sea-Land's Rate Audit Department in the amount of $230.80 (*Id.,* at 15 of 22). This amount reflected the applicable Class 7 rate of $100.00 on Wrapping Paper and the $92.00 LTL rate published on Waxed Paper in Item 1090.

Thus, it is agreed that the commodity transported in each shipment is Waxed Paper.

Shipment No. 1, B/L No. 956744391 (bears no date), was loaded at Baltimore on Sea-Land's vessel *Tampa* (no voyage number given on B/L) for Puerto Cortes. No freight charges are shown on the B/L. Weight is shown as 41,880 lbs. Sea-Land's Home Office Accounting Copy Microfilm #6081558 shows the cubic measure 1154, weight 41880 rated as 2885 Rate $100. TM charge of $2,885; Port Dues rated as 2094 TN. MI. $26.18—Total charge of $2,911.18. The application states the voyage number for Shipment No. 1 is 267S and that shipment was made January 10, 1979, and the sailing date for it is January 10, 1979. Exhibit No. 4 at 1 of 2 attached to application, shows vessel *Tampa* voyage 267 sailed Baltimore, Md., on January 10, 1979, at 1512 hours.

While Shipment No. 1 was en route, the forwarder notified Sea-Land that the destination was to be changed from Puerto Cortes to Tegucigalpa which is an inland point. Supplemental freight bill No. 956-743392 (Exh. No. 5 at 9 of 22) in the amount of $489.96 was issued to reflect the additional charges. Both the original and supplemental freight bills were paid in full.

Shipment No. 2, B/L No. 956747400, sailed March 10, 1979, on the vessel *Tampa,* voyage No. 271S. The second shipment, which was properly described as Wax Paper was: billed at the $92.00 LTL rate; assessed the applicable inland charges to Tegucigalpa; and paid in full by the forwarder. Attached as Exhibit No. 5 is "Calculation of Freight Charges" which shows the: charges originally billed, including the supplemental; charges after refund authorized; charges based on the proposed rate; charges paid and the amount of refund if the application is granted. The bills of lading, freight bills, overcharge letter from the shipper and the tariff authority for the accessorial charges are made part of that exhibit.

The above information was derived from the instant application. Further information supplied by the applicant in support of the application is as follows:

Sea-Land publishes various commodity rates on Paper in Item 1090 to its Tariff No. 283, FMC No. 161, which apply from U. S. North Atlantic ports to Central America. Prior to December 14, 1978, a trailerload rate of $82.00 per ton of 2,000 lbs., minimum of 37,000 lbs. for Waxed Paper was published to Guatemala and Honduras, Central America, 12th Revised Page 154, effective November 27, 1978. Exhibit No. 1. Effective December 14, 1978, Item 1090 was amended to add a new rate on Wrapping, Kraft to apply to Guatemala and in the process of revising the tariff page, the $82.00 trailerload rate on Waxed Paper to Honduras was inadvertently deleted—see Exhibit No. 2. Attached is Affidavit of John Brennan, certifying that due to a clerical error the rate was omitted from the tariff. The error was discovered after the involved shipments moved and the omission was corrected by publication of 15th Revised Page 154 effective April 2, 1979—see Exhibit No. 3.

It was Sea-Land's intention to amend Item 1090 in its Tariff No. 283 to add a new commodity rate and to bring forward the Waxed Paper rates without change. However, due to a clerical error, a trailerload rate on Waxed Paper was deleted.

It is Sea-Land's position that the clerical error in inadvertently deleting the trailerload rate in Item 1090 is of the type within the scope of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

DISCUSSION

Upon consideration of the above, the Presiding Administrative Law Judge *finds* and *concludes* that he agrees with the applicant that a proper case has been made out by the applicant in accordance with section 18(b)(3) of the Shipping Act, 1916, and Rule 92 of the Rules of Practice and Procedure, 46 C.F.R. § 502.92. Therefore the application for permission to refund a portion of the freight charges should be granted.

For the reasons given in the application and upon consideration of all of the above, 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 a clerical or administrative nature which resulted in the necessity for refund.

(4) The refund permission 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) Sea-Land Service, Inc., is granted permission to refund a $2,065.40 portion of aggregate freight charge of $6,666.60 collected, to BDP International, freight forwarder (FMC 1127), as agent for Champion International Export Corp.

(C) Appropriate notice shall be published in the applicable tariffs.

(D) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON, D.C.

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–28

INTERNATIONAL TRADE & DEVELOPMENT, INC.
AND ROBERT H. WALL, INC.

v.

SENTINEL LINE AND ANCHOR SHIPPING CORPORATION

ORDER ADOPTING INITIAL DECISION

November 2, 1979

On September 26, 1979, the Commission determined to review the Initial Decision issued August 21, 1979 in the above-captioned complaint proceeding. In that decision, the Presiding Officer denied a complaint alleging violations of sections 16 First, 17 and 18(b) of the Shipping Act, 1916 (46 U.S.C. §815 First, 816 and 817(b)) arising out of a common carrier's failure to honor a cargo booking contract.

Upon examination of the record, the Commission shares the Presiding Officer's conclusion that the complainants failed to prove their case. Further comment is offered only to avoid any wrong impression which might result from the discussion of section 16 First at page 6 of the Initial Decision.

Page 6 contains citations from portions of the Commission's *North American Freight Conference* decision* which refer to the need for a *competitive relationship* between a prejudiced and a preferred shipper in order to establish a violation of section 16 First. Although correct as far as it goes, reliance solely upon the *North American* decision fails to reflect other rulings which have held that section 16 First can be violated without the presence of a competitive, commercial relationship between shippers. *E.g., Volkswagenwerk A.G. v. Federal Maritime Commission,* 390 U.S. 261, 278–280 (1968); *New York Foreign Freight Forwarders & Brokers Ass'n v. Federal Martime Commission,* 337 F.2d 289, 299 (2d Cir. 1964), *cert. den.,* 380 U.S. 910 (1965); *Freight Forwarder Bids on Government Shipments,* 19 F.M.C. 619 (1977); *Proposed ILA Rules on Containers,* 18 S.R.R. 553 (1978); *General Mills, Inc. v. State of Hawaii,* 17 F.M.C. 1 (1973); *Valley Evaporating Co. v. Grace Line, Inc.,*

* 11 F.M.C. 202, 209 (1967).

14 F.M.C. 16 (1970); *Free Time Practices—Port of San Diego,* 9 F.M.C. 525 (1966).

These cases establish that a competitive relationship is not required when the facts reveal a clear comparative disadvantage or other type of "special injury" to the complaining shipper (or locality) which (1) goes beyond the simple payment of a higher rate; and (2) cannot reasonably be justified on the basis of traditional transportation factors. Because the complainants did not even establish that a particular shipper or shippers were unduly preferred, the Commission need not reach the question of whether a carrier's duty to honor cargo bookings is the type of conduct which would violate section 16 First in the absence of a competitive relationship.

THEREFORE, IT IS ORDERED, That, except as supplemented by the above discussion of section 16 First of the Shipping Act, 1916, the August 21, 1979 Initial Decision in Docket No. 78-28 is 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. 78-28

INTERNATIONAL TRADE & DEVELOPMENT, INC.
AND ROBERT H. WALL, INC.

v.

SENTINEL LINE AND ANCHOR SHIPPING CORPORATION

Adopted November 2, 1979

Complainants have failed to establish a violation of any provision of the Shipping Act upon which reparation can be granted.

Robert S. Hope for complainants.

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

By a complaint filed under section 22 of the Shipping Act, 1916, International Trade & Development, Inc. and Robert H. Wall, Inc. seek reparation of "at least $22,976.09" for Sentinel Line's "non-performance of its obligation as a common carrier."

Anchor Shipping Corporation, originally named as co-respondent in the complaint, moved for dismissal as to it on the ground that since Anchor was neither a "common carrier by water" nor an "other person" as defined in the Shipping Act, the Commission was without jurisdiction over it.[2] Anchor was a general agent and broker and as such was not a common carrier or other person against whom a complaint would lie.

Judge Reilly granted the motion and dismissed the complaint as to Anchor.[3] (See Order of October 30, 1978). On the same day as the dismissal of Anchor, Judge Reilly issued an "Order to Show Cause Why Proceeding Should Not be

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

[2] Section 22 permits persons to file complaints only against common carriers and other persons.

[3] Section 1 of the Shipping Act defines other person as someone other than a common carrier "carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." Clearly Anchor was not an "other person."

Decided Without Oral Hearing." In that order Judge Reilly noted that Sentinel had not answered the complaint nor had it responded to any of the various motions, but nevertheless sought to give Sentinel one more opportunity to defend itself in the case. Sentinel was given 15 days to respond to the order to show cause. On November 17, 1978, Judge Reilly in noting that Sentinel had not responded to the order to show cause dispensed with oral hearing and ordered complainant to submit "such documentary evidence as it had in its possession which [would] support its claim of reparation against Anchor Line." Complainant filed its exhibits on December 20, 1978. In a covering letter, complainant stated:

> Although the complaint as to respondent Shipping Corporation was dismissed upon the representation of its counsel that it was acting only as General Agent for Sentinel it is the information and belief of complainants that Sentinel and Anchor are one and the same entity, owned and controlled by the same persons and should both be held responsible for payment of the reparations as set forth in the attached Affidavit, plus reasonable attorney's fees and costs of at least $6,000.00.[4]

On the next day December 21, 1978, the Commission in a notice announced that the time within which the Commission could determine to review the dismissal of Anchor had expired and that no review would be undertaken. On January 18, 1978, Judge Reilly wrote counsel for complainant posing certain questions and directing counsel to file a memoradum of law. The memorandum was filed on July 26, 1979.[5]

FACTS

International Trade & Development, Inc., is engaged in the export of various commodities in the foreign commerce of the United States. Robert H. Wall is an agent and broker of shipments in U. S. foreign commerce. Sentinel Line is or was a common carrier by water subject to the Shipping Act, 1916.

On February 7, 1977, International completed negotiations for the sale of 2,000 short tons of bagged rice to the Government of Haiti at a price of $13.45 a bag, CIF Port-Au-Prince, Haiti. On the same day, Food Corporation International, Ltd. of Houston confirmed to Robert H. Wall the sale of 40,000 one hundred pound bags of rice to International at a price of $11.40 a bag. The Government of Haiti on February 8, 1977, opened a letter of credit at Riggs National Bank in Washington, D.C. The letter was for $538,000 and was in favor of International. On the same day that the letter of credit was opened, Transchartering, Inc. of New York made a firm booking by telephone for the Sentinel vessel *M/V Omiris*. The cargo was booked at $37.65, full berth terms, the *Omiris* to be available for loading February 17–28, 1977. The telephone booking was confirmed by a booking contract dated February 8, 1977.

Wall is a subscriber to the "Transportation News Ticker" and on February 15, 1977, International learned from that service that the *Omiris* had been booked to carry 1834 metric tons of blended food to Kingston, Jamaica,

[4] Complainants have not, at least as far as this record shows, ever formally attempted to have Anchor restored as a respondent.

[5] The delay in filing the memorandum was due to illness of counsel. In the interim Judge Reilly left the Commission and thus became unavailable to render a decision in this case.

March 1–10, berth terms at a rate of $46.76 per short ton. The physical limitations of the *Omiris* and the scheduling made it impossible for the *Omiris* to satisfy both bookings.

Upon finding out about the Jamaica booking Wall contacted Transchartering and was assured that a substitute vessel would be furnished to meet International's loading dates. On February 14, Wall learned the *Omiris* had been arrested in the Dominican Republic. Transchartering, however, told Wall that the lien on the *Omiris* was to be lifted and the vessel would be at a U. S. Gulf port on February 28, 1978. As a precaution, International had the letter of credit extended to change the cancelling date of March 5, 1977. Several days later, Transchartering told Wall that the loading date for the *Omiris* would be March 8, 1977. The Government of Haiti agreed to a final extension of the letter of credit with the condition that the on board bills of lading be dated no later than March 10, 1977. Finally on March 7, 1977, after repeated requests for assurances that the *Omiris* would meet the March 8th loading date, Transchartering advised that the ship would not be able to perform the booking.

International, despite repeated efforts, could not find a vessel in a position to meet the loading date and the Government of Haiti cancelled the purchase contract and the letter of credit expired by its terms.

It is asserted that because of Sentinel's failure to perform its booking contract International suffered out-of-pocket expenses of $22,976.09 composed of:

(1) Loss of profit from sale of rice	$13,665.25
(2) Charges and interest levied	8,000.00
(3) Charges by Riggs National Bank	1,310.84

Complainant's request for reparation is grounded on the allegation that:

> Sentinel has not only breached its obligation as a common carrier but has violated Section 16 of the Act by giving undue or unreasonable preference or advantage to other shippers, particularly the shipper of blended food in packages to Jamaica which acts resulted in undue or unreasonable prejudice or disadvantage to Wall and I.T. & D (International). Likewise upon information and belief, Sentinel and Anchor probably violated other provisions of the Act including Sections 17 and 18 thereof.
> Complaint for International Trade & Development at 6.

DISCUSSION AND CONCLUSION

Complainants' entire argument on the merits of the case is:

1. "Common Carriers" cannot convert themselves to "Contract Carriers" by entering into preferential and exclusive contracts for one banana shipper for a forward period, while carrying common carriage cargoes on the balance of a particular ship or ships. Hence, the result was a violation of Sections 14 Fourth and 16 First of the Shipping Act, 1916.
2. Here, despite the firm booking to Complainants of the *M/V Omiris* on Full Berth Terms or by a substitute vessel, the respondent did not perform. This booking was confirmed both orally and in writing as to the *Omiris* then as to a substitute vessel. Respondents failed to perform with any vessel and did

not advise Complainants until it was too late to carry the bagged rice to Haiti.

3. The same cases mentioned above established that the Commission as the Agency with the expertise has the responsibility of determining the amount of reparations. Both the Court of Appeals and the Supreme Court found the Commission used the proper standards of measuring the damages, that is, as Chief Judge Bazelon stated:

> The Shipper's lost profits are the normal measure of damages in cases involving a refusal to carry, and the Supreme Court affirmed this principle in its rejection of our prior conclusion regarding equity of giving Consolo his lost profits in the circumstances of this case. . . .

Whatever the measure of reparation may be none can be awarded unless a violation of a specific provision of the statute is found. In its complaint, Sentinel mentions sections 16, 17 and 18 of the Shipping Act. In mentioning these sections the only specific allegation made is that Sentinel violated section 16 by "giving undue or unreasonable preference or advantage to other shippers, particularly the shipper of blended food in packages to Jamaica. . . " The difficulty with this allegation is that no where in the record is there any evidence that the *Omiris* was released from the custody of the Government of Santo Domingo in time to carry the Jamaican shipment or that the shipment was ever carried by Sentinel.

As if this were not enough the Commission has on any number of occasions spelled out the criteria for establishing a violation of section 16:

> This prohibition against under or unreasonable preference or prejudice is designed to deal with two or more competing shippers or localities receiving different treatment which is not justified by differences in competitive or transportation conditions. The classic case would be where the shippers at A & B are competitive in a common market at C . . . and the same competitive influences apply. . . .
>
> North American Freight Conference, 11 F.M.C. 202 at 209 (1967) and cases cited therein.

Complainants as shippers of rice were not competitive with the shipper of packaged blended foods and thus the two shippers were not similarly situated. Nor were the cargoes destined for a common market. The rice was destined for Haiti and the blended food was destined for Jamaica. Under the facts of this case no violation of section 16 can be found. Nor will the record sustain a violation of section 17:[6]

> [D]iscrimination arises when two shippers of like traffic, shipping [on the same line] between the same points under substantially similar circumstances and conditions, are charged different rates. 11 F.M.C. at 212.

For obvious reasons the facts of this case do not establish a violation of section 17.[7]

All of this is not to say that complainants have no forum. Sentinel appears to have breached the contract of carriage and the remedy for that lies in the courts not the Commission.

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[6] In mentioning section 17, it is presumed that complainants are concerned with discrimination since the "receiving, handling, storing or delivering of property" is not involved here.

[7] For equally obvious reasons, no violation of section 18(b) of the Act has been established. Since there was no actual carriage none of the provisions of 18(b) can be brought to bear.

Since complainants have failed to establish a violation upon which reparation can be granted, the case is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

WASHINGTON, D. C.
August 10, 1979

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

SUBCHAPTER A—GENERAL PROVISIONS

[GENERAL ORDERS NOS. 25 AND 30, REVISED; DOCKET NO. 79-66]

PART 504—COLLECTION, COMPROMISE AND TERMINATION OF ENFORMCEMENT CLAIMS

PART 505-COMPROMISE, ASSESSEMENT, SETTLEMENT AND COLLECTION OF CIVIL PENALTIES UNDER THE SHIPPING ACT, 1916, AND THE INTERCOASTAL SHIPPING ACT, 1933 (AMENDED)

November 19, 1979

ACTION: Final Rule

SUMMARY: This repeals obsolete regulations (Part 504) and amends and finalizes interim regulations (Part 505) which are enacted to implement recent amendments to the Shipping Act, 1916 which authorize the Federal Maritime Commission to assess or compromise all civil penalties provided in the act.

EFFECTIVE DATE: November 27, 1979

SUPPLEMENTAL INFORMATION

This proceeding was instituted by publication of Interim Regulations made immediately effective on July 5, 1979 (44 Fed. Reg. 39176), to amend 46 C.F.R. Part 505 (General Order 30) which, as amended, implements the assessment of civil penalty authorization provisions of Pub. L. 96-25.

Comments to the Interim Regulations were invited and were received from eleven parties in four submissions. Commentators consist of one attorney, one steamship company and nine conferences/agreements.

J. Alton Boyer, Esquire (Boyer) suggests clarification that both the finding of violations and assessment of penalties therefor be encompassed in a single proceeding, and clarification of the role of Hearing Counsel, the difference between compromise and settlement, if any exists, who makes the determination that a violation may have occurred, and the opportunity for judicial review. Boyer further raises questions concerning due process, the desirability of maximizing opportunity for settlement, the necessity for approval of settlement at three levels, too much formality in the compromise procedure, the desirability of using confess-judgment notes, and the public availability of internal settlement guidelines. Finally, Boyer suggests that the rules make clear that they are not intended to impose a harsher outcome than the previous rules.

Lykes Brothers Steamship Co., Inc., supports the interim regulations *in toto* and urges expedited approval.

Agreements 10107 and 10108, Japan/Korea-Atlantic and Gulf Freight Conference, Philippines North America Conference, Straits New York Conference,Thailand/Pacific Freight Conference, Thailand/U.S. Atlantic and Gulf Conference and Trans-Pacific Freight Conference of Japan/Korea (Conferences) suggest clarification of the presiding officer's authority to modify a settlement in an assessment proceeding, insist that compromise procedures be available to all on an equal basis, and agree that obsolete 46 C.F.R. Part 504 (General Order 25) need not be retained.

Inter-American Freight Conference (IAFC) suggests changes to clarify the role of Hearing Counsel and two other minor sections.

Each of the Specific proposals advanced by the comments will now be discussed:

1. *Repeal of General Order 25 as Obsolete.*

In the preamble of the Interim Regulations, the Commission indicated that it ". . . perceives no probable regulatory need for the retention of General Order 25 (46 C.F.R. Part 504) Collection, Compromise and Termination of Enforcement Claims which implemented the Federal Claims Collection Act of 1966. The need to retain such General Order will be considered by the Commission in connection with comments invited to these interim regulations." The only comment received on this point was from the Conferences, which agree that General Order 25 need not be retained. Accordingly, 46 C.F.R. Part 504 will be revoked.

2. *Finding of Violations and Assessment of Penalties in the Same Proceeding.*

As raised by Boyer, it 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. Such a specific provision, however, is not necessary in view of the Commission's need for flexibility in structuring proceedings under section 22 of the Shipping Act and the Administrative Procedure Act.

3. *The Role of Hearing Counsel.*

IAFC suggests there is no need to define the role of Hearing Counsel because the duties of this Bureau are already defined in 46 C.F.R. § 502. Boyer, on the other hand, refers to the "newly assigned role of prosecutor" and the seeming inconsistency with the duty of Hearing Counsel "to act as he deems is required by the public interest . . . under 46 C.F.R. § 502.42."

The pertinent part of 46 C.F.R. § 502.42 reads "Hearing Counsel shall actively participate . . . to the extent required in the public interest. . . ." Whatever this may mean in other types of proceedings, Hearing Counsel have always been the staff attorney in Commission instituted cases to establish violations. The "prosecutorial" role was always there; the only "newly assigned" role under P.L. 96–25 is the ability to request assessment of civil penalties in such a proceeding.

In an assessment proceeding, as in violations cases before the enactment of P.L. 96–25, Hearing Counsel are subject to the direction of the Commission only as set forth in the order(s) instituting the case and are otherwise fully subject to the separation of functions as in all other adjudicatory proceedings. Also, as in previous violations cases, it is clear that Hearing Counsel have the burden of proof to establish such violations.

To clarify this provision somewhat, we will delete the phrase: "shall participate as attorney for the Commission" and related language in section 505.3. The remaining language will be retained to specifically provide that all negotiations for settlement will be with Hearing Counsel in assessment proceedings, and not with General Counsel as in compromise cases where no formal proceeding has been instituted.

4. *Settlement Procedures in Formal Proceedings.*

The difference between "compromise" and "settlement" was questioned by Boyer. Of course, in addition to the traditional legal connotation, a "compromise" proceeding as defined in section 505.2(c) is the informal process, while the "assessment" proceeding is a formal docket. (See section 505.2(a).) Settlements can be reached in either process with General Counsel or Hearing Counsel, as the case may be.

Boyer suggests that it is desirable to maximize opportunity for settlement ("compromise") in a formal proceeding but the rules "seem to tend in the opposite direction." He questions the necessity of having such settlements "approved" by three levels of officials, i.e., Hearing Counsel, the Administrative Law Judge (where referred) and the Commission itself.

The Commission intends no extraordinary impediment to settlements, keeping in mind that most formal proceedings will be the result of unsuccessful compromise efforts with the General Counsel. Hearing Counsel, as a party to the stipulation or settlement, will not be approving agreements but rather will be joining with respondents in submitting agreements for approval. The inclusion of the settlement agreement in the Initial Decision and final decision replaces findings of violations and assessment of penalties, and the Commission deems such limited formality necessary to its regulatory responsibilities.

The Conferences submit that the 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. Accordingly, no other changes to section 505.3 are necessary.

5. *Compromise Procedures—Institution and Notice.*

Section 505.4 provides for institution of compromise procedures in certain instances "whenever the Commission has reason to believe that there has occurred a violation. . . ." Boyer questions the participation by the Commission in this determination as compromising its integrity as a quasi-judicial body. It is well settled, however, that an administrative agency's participation in the institution of a proceeding does not disqualify it from making an informed decision on the record as to whether violations are established.

On the other hand, the Conferences would urge the absolute right of any respondent to first utilize the compromise procedures before (or instead of) going to a formal proceeding, with the only possible exception being the case where the statute of limitations period is about to run. While such a procedure is intended to be used in the normal case, we do not interpret P.L. 96–25 or its legislative history as establishing it as a right and no such amendment will be added. (See section 505.5.)

IAFC suggests that the first demand letter inform respondents of the identity of the attorney in General Counsel who will negotiate the compromise. This is neither practical nor necessary.

Boyer suggests that the language "making a final determination" with respect to that stage when the compromise procedure is terminated may be too formalistic. The language is not intended to imply a determination similar to a final order of the Commission, but rather to specifically set a reasonable cut-off date beyond which the compromise procedures cannot continue. Since we can think of no more palliative language with the necessary import, no change will be made.

6. *Mutual Exclusiveness of Proceedings.*

IAFC suggests clarification of section 505.6(b) to remove ambiguity. Accordingly, we will insert the words "under section 505.4" to accomplish this clarification.

7. *Confession of Judgment Note Provisions.*

Boyer questions the desirability of requiring a confession of judgment provision in a promissory note in section 505.7(b) and in Appendix B. Where circumstances allow a promissory note instead of immediate payment of the penalty in the first place, such a provision is necessary to protect the government from delays in collection of debts and is common practice. It was provided for in both the original General Order 30 and General Order 25 which is being repealed.

8. *Opportunity for Judicial Review.*

Boyer suggests the rules should provide for judicial review and for protection during that review from "assessment proceedings or collection efforts." Where a final Commission order has been issued, however, the Hobbs Act (28 U.S.C. §2341 *et seq.*) provides for judicial review and the Courts of Appeals have the power to stay further agency action with respect to such orders. Since assessment proceedings will ordinarily result in a final order on both the existence of violations and the amount of penalties, and since compromise procedures are voluntary, we cannot understand the basis for Boyer's suggestion and do not see the need for any amendment.

9. *Guidelines for Compromise and Settlement.*

Boyer suggests that guidelines for compromise and settlement be published. Such an endeavor, however, if feasible after further experience, belongs in a policy statement rather than in the procedural regulations involved here.

10. *Protection Against a Harsher Outcome.*

Boyer urges that the "Commission should make it clear that nothing in these rules or in the Commission's administration of Public Law No. 96-25 is intended to or will be permitted to impose a harsher outcome with respect to penalties for violations or alleged violations occurring prior to the adoption of P.L. No. 96-25 and these rules than would have been the case without their adoption." Again, we have difficulty in understanding this suggestion, especially since the new statute substantially increased the penalties in sections 16 and 18 and provides for new penalties for operating under a suspended tariff. Thus, without some further definition of "harsher outcome" (if such is possible), no such amendment to these procedural rules appears feasible.

Therefore, pursuant to the provisions of Pub. L. 96-25 (93 Stat. 71), section 4 of the Administrative Procedure Act (5 U.S.C. §553) and sections 32 and 43 of the Shipping Act, 1916 (46 U.S.C. §§831 and 841a), Title 46 CFR Part 504 is hereby revoked and the interim revision of 46 CFR Part 505, published at 44 Fed. Reg. 39176, is amended by the revision of sections 505.3 and 505.6, is adopted as final, and shall read as follows:

PART 505—COMPROMISE, ASSESSMENT, SETTLEMENT AND COLLECTION OF CIVIL PENALTIES UNDER THE SHIPPING ACT, 1916, AND THE INTERCOASTAL SHIPPING ACT, 1933

Sec.
505.1 Purpose and Scope
505.2 Definitions

AUTHORITY: Sec. 3, 86 Stat. 653, Sec. 10(e), 93 Stat. 71, and Secs. 32 and 43 of the Shipping Act, 1916 (46 U.S.C. §§831 and 841a).

§505.1 *Purpose and Scope*

The purpose of this part is to implement the statutory provisions of section 3 of Public Law 92-416 (86 Stat. 653) and section 10(e) of Public Law 96-25 (93 Stat. 71) by establishing rules and regulations governing the compromise, assessment, settlement and collection of civil penalties arising under certain designated provisions of the Shipping Act, 1916, the Intercoastal Shipping Act, 1933, and/or any order, rule or regulation (except for procedural rules and regulations contained in part 502 of this chapter) issued or made by the Commission in the exercise of its powers, duties and functions under those statutes. Also, for the purpose of this part, the 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.

§505.2 *Definitions*

For the purposes of this part:

(a) "Assessment" means the imposition of a civil penalty by Order of the Commission.

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

(c) "Compromise" means the process whereby a civil penalty for a violation is agreed upon by the respondent and the Commission's General Counsel.

(d) "Person" includes individuals, corporations, partnerships, associations, and other legal entities.

(e) "Violation" includes any violation of sections 14b through 21 (except 16 first and third) and section 44 of the Shipping Act, 1916; section 2 of the Intercoastal Shipping Act, 1933; and/or any order, rule or regulation (except for procedural rules and regulations contained in part 502 of this chapter) issued or made by the Commission in the exercise of its powers, duties, and functions under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933.

(f) "Respondent" includes any person charged with a violation.

§505.3 *Assessment*

Assessment of civil penalties may be made only in a formal proceeding instituted by the Commission under section 22 of the Shipping Act, 1916 for the purpose of such assessment. Such proceeding shall be governed by the Commission's Rules of Practice and Procedure, 46 CFR 502. In such a proceeding, the Commission's Bureau of Hearing Counsel shall have full authority to enter into stipulations and settlements. Any such proposed settlement of penalties for violations which are the subject of a pending proceeding under this section must be negotiated with Hearing Counsel, shall be submitted to the presiding officer for approval, and the full text of every such settlement must be included in the final Order of the Commission in the proceeding.

§ 505.4 *Compromise Procedures*

(a) *Institution and Notice*

Except in pending assessment proceedings as provided for in section 505.3 above, whenever the Commission has reason to believe that there has occurred a violation for which a civil penalty is authorized and it is appropriate to invoke the procedures looking toward compromise of the statutory penalties, the General Counsel's Office will send a registered letter to the respondent informing him of the nature of the violation, the statutory and factual basis of the penalty, the amount of the penalty and the availability of Commission personnel for discussion of the penalty claim should the respondent so desire. Two written demands, at 30-day intervals, will normally be made unless a response to the first demand indicates that further demand would be futile or unless contrary action is indicated by the circumstances.

(b) *Request for Compromise*

(1) Whenever a person is advised in writing that the Commission has reason to believe that he has committed a violation, such person may submit any oral or written answer to the notification letter explaining, mitigating, showing extenuating circumstances, or, where there has been no formal proceeding on the merits, denying the violation. Material or information so presented will be considered in making a final determination as to whether to terminate the compromise procedure or whether to compromise the penalty, and if so, the amount for which it will be compromised.

(2) All correspondence, petitions, forms, or other instruments regarding the collection, compromise, or termination of any penalty under this section should be addressed to the General Counsel, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573.

(c) *Disposition of Claims in Compromise Procedures*

(1) When the penalty is compromised, such compromise will be made conditional upon the full payment of the compromise within 30 days or such longer period, and upon such terms and conditions as may be allowed by the General Counsel.

(2) When a statutory penalty is compromised and the respondent agrees to settle for that amount, a compromise agreement shall be executed. (One type of settlement agreement is set forth in Appendix A.) This agreement, after reciting the nature of the claim, will include a statement evidencing the respondent's agreement to the settlement of the Commission's penalty claim for the amount set forth in the agreement and will also embody an approval and

acceptance provision which is to be signed by the General Counsel. Upon settlement of the penalty in the agreed amount, a copy of the executed agreement shall be furnished to the respondent.

(3) Any offer of compromise submitted by the respondent pursuant to § 505.4(b) shall be deemed to have been furnished by the respondent without prejudice and shall not be used against the respondent in any proceeding.

(d) *Delegation of Compromise Authority*

The compromise authority set forth above is delegated to the General Counsel.

§ 505.5 *Assessment Procedures*

In addition to its discretion to institute an assessment proceeding or civil penalty action without need to resort to the compromise procedures, the Commission may, after initiation of compromise procedures, institute an assessment proceeding or civil penalty action when:

(a) The respondent, within the prescribed time, does not explain the violation, petition for compromise, or otherwise respond to letters or inquiries; or
(b) The respondent, having responded to such letters or inquiries, fails or refuses to pay the statutory or the compromised penalty.

§ 505.6 *Mutual Exclusiveness of Procedures*

(a) No assessment of penalties for violations shall be made by Order of the Commission, nor shall any assessment proceeding be instituted after a settlement agreement for the same violations under the compromise procedures has become effective.

(b) No compromise procedure for penalties under section 505.4 for violations shall be initiated after institution of a Commission assessment proceeding for the purpose of assessing penalties for the same violations.

§ 505.7 *Method of Payment of Penalty*

Payment of penalties by the respondent shall be made by:

(a) A bank cashier's check or other instrument acceptable to the Commission.
(b) Regular installments by check after the execution of a promissory note containing a confess-judgment agreement (Appendix B).
(c) A combination of the above alternatives.

All checks or other instruments submitted in payment of claims shall be made payable to the Federal Maritime Commission.

Effective date—The provisions of this part 505 will become effective upon publication in the *Federal Register*.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

APPENDIX A

One Example of Compromise Agreement Used by ______________________, And The Federal Maritime Commission

This Agreement is entered into between: (1) the Federal Maritime Commission and, (2) __________, hereinafter referred to as respondent.

WHEREAS, the Commission is considering the institution of an assessment proceeding against respondent for the recovery of civil penalties provided under the Act for violations of Section __________;

WHEREAS, this course of action is the result of practices believed by the Commission to have been engaged in by respondent to wit;

____

____

____

____

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

WHEREAS, Public Laws 92-416 and 96-25 authorize the Commission to collect and compromise certain designated civil penalties arising under the Shipping Act, 1916, including the civil penalties which arise from the violations set forth and described above.

WHEREAS, the respondent has terminated the practices which are the basis of the violations set forth herein, and has instituted and indicated its willingness to maintain measures designed to eliminate, discourage, and prevent these practices by respondent or its officers, employees and agents.

NOW, THEREFORE, in consideration of the premises herein, and in compromise of all civil penalties under the Act arising from violations set forth and described herein, that may have occurred between ______________ and ________________, the undersigned respondent herewith tenders to the Federal Maritime Commission the sum of ____________________ ($_____) [Payment will be made in one, or a combination of the following methods: (a) A banks cashier's check or other instrument acceptable to the Commission; (b) Regular installments by check after the execution of a promisoory note, a copy of which will be attached to this agreement and incorporated herein.] Upon the following stipulations and terms of settlement:

1. Upon acceptance of this agreement of settlement in writing by the General Counsel of the Federal Maritime Commission, this instrument shall forever bar the commencement or institution of any assessment proceeding or other

claims for recovery of civil penalties from respondent arising from the alleged violations set forth and described herein, that have been disclosed by respondent to the Commission and that occurred between ____________________ and ____________________

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 undersigned respondent to the alleged violations set forth above.

NAME OF COMPANY

By____

Date_______________________________________

APPROVAL AND ACCEPTANCE

The Above Terms and Conditions and Amount of Consideration are hereby Approved and Accepted:

By the Federal Maritime Commission:

____

General Counsel

Date_______________________________________

APPENDIX B

Promissory Note Containing Agreement for Judgment

For value received, ______________________________, promises to pay to the Federal Maritime Commission (the Commission) the principal sum of ____ Dollars ($________) to be paid at the offices of the Commission in Washington, D.C., by bank cashier's or certified check in the following installments:

____

____

____

____

____

____

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 ______ percent (______%) 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 this 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, ______ 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 ______ in any suit on this Promissory Note; to waive any venue requirement in such suit, to release all errors which may intervene in entering up such judgment or in issuing any execution hereon; and to consent to immediate execution on said judgment. ________ 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 ______ 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.

NAME OF COMPANY

By ______________________________

Date______________________________

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 649

APPLICATION OF MAERSK LINE AGENCY
FOR THE BENEFIT OF NOMURA (AMERICA) CORPORATION

SPECIAL DOCKET NO. 652

APPLICATION OF MAERSK LINE AGENCY
FOR THE BENEFIT OF WESPAC CORPORATION

REPORT AND ORDER ADOPTING INITIAL DECISIONS[1]

November 20, 1979

These proceedings involve applications filed on June 11, 1979, by the Pacific Westbound Conference (PWC) and one of its members, Maersk Line, represented by the Maersk Line Agency, seeking permission to refund portions of freight charged on various shipments which moved under PWC tariffs. By Initial Decisions served August 21 and 22, 1979, Administrative Law Judge Norman D. Kline denied both applications. Exceptions to the Initial Decisions were filed by PWC.

In Special Docket No. 649, PWC prior to January 1, 1979 had published a rate on "Butyl Motor Tube Scrap" in the amount of $64 per weight ton of 1000 kilograms. PWC revised and republished this tariff effective January 1, 1979.[2] In the process the rate on "Butyl Motor Tube Scrap" was unintentionally deleted.[3] As a result any shipment of this commodity became subject to the commodity classification "Synthetic rubber . . . including the following: Butyl . . . ,"[4] which carried a rate of $96 per weight ton. Some time thereafter, PWC restored a rate on "Butyl Motor Tube Scrap", effective March 28, 1979. The rate which was published, however, was not the previous rate of $64, but rather a rate of $70 per weight ton.[5] On February 5, 1979, during the time in

[1] Because of the similarity of parties and issues, these proceedings have been consolidated for decision.

[2] Local and Overland Freight Tariff No. 11—F.M.C. 19.

[3] Affidavit of Donald P. Griffith, Executive Assistant to the PWC, June 11, 1979.

[4] Local and Overland Freight Tariff No. 11—F.M.C.-19.

[5] PWC Tariff No. 11—F.M.C.-19, 3rd rev. page 742, effective March 28, 1979.

which the unintended rate of $96 per weight ton was in effect, the Nomura (America) Corporation shipped used butyl motor tubes. Because at the time the shipment was made Nomura expected to be charged the $64 rate, it requested that this rate be reinstated and applied.[6]

In Special Docket No. 652, PWC, in republishing its tariff to become effective January 1, 1979, inadvertently deleted the $104 W/M commodity rate for "Mineral Insulating Material, N.O.S." Consequently, any shipment of this material became subject to a rate of $201 W/M, under the commodity description "Non Metallic Minerals and Products, Except Ceramic Products and Glass and Glass Products, N.0.S."[7] PWC filed a corrective rate on April 25, 1979 of $114 W/M, rather than $104 W/M. This higher rate included a general rate increase which raised the rate from $104 to $114 as of April 1, 1979. During the time the $201 rate was in effect, and before the general rate increase was to be instituted, Wespac Corporation sent insulated materials to the carrier's terminal to be shipped. This shipment left port on April 6, 1979. The shipper was not aware of the 10% rate increase and requests that the $104 rather than $114 rate be applied.

The Presiding Officer denied both applications on the ground that PWC and Maersk had, prior to filing the applications, failed to file tariffs upon which a refund could be based. He found that in each case PWC had filed rates different from those the shipper had either been quoted or expected to be charged prior to the time of shipment.[8]

The Presiding Officer cites five recent cases to support his decision, including *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 S.R.R. 1191, 1193 (1977), where the Commission held:

> Section 18(b)(3) requires that prior to applying for a refund or a waiver the carrier file a new tariff upon which "such refund or waiver will be based." When read in conjunction with the statements in the House and Senate reports, it is clear that "the new tariff" is expected to reflect a prior intended rate, not a rate agreed upon after the shipment.

In its Exceptions, PWC explains that, with respect to the rates at issue in Special Docket No. 649, it considered it more prudent to incorporate the general rate increase of 10% on March 28, 1979 than have a $64 wt. rate in effect for only four days which would have increased to $70 wt. on April 1, 1979.

The situation which gave rise to the application in Special Docket No. 652 is allegedly somewhat different. As to that application, PWC explains that when the oversight was discovered in April, 1979, the general rate increase had already been instituted. Therefore, the Conference allegedly reinstated the omitted commodity at the pre-April 1 general rate level and then incorporated the 10% increase that was in effect as of April 1, 1979.

In the alternative, if both of the above explanations are found not to justify granting the applications as submitted, PWC requests permission to publish in

[6] Letter of H. Kimoshita, Assistant Secretary, Nomura Corporation, addressed to PWC Chairman Donovan D. Day, February 28, 1979.

[7] PWC Tariff No. 11—F.M.C. 19, 3rd rev. page 489, effective January 1, 1979.

[8] As late as June 25, 1979, the Presiding Officer advised PWC of the possible jurisdictional deficiency and suggested that it publish an appropriate corrective tariff and file a new application. *See* letter of Administrative Law Judge Norman Kline addressed to PWC Executive Assistant Donald Griffith, June 15, 1979.

its tariff notice that effective January 1 through March 31, 1979, for purposes of refunds or waiver of freight charges, the rates of $64 for "Butyl Motor Tube Scrap" and $104 for "Mineral Insulating Material, N.O.S." (subject to all rules, regulations, terms and conditions of these tariffs), would be applicable. PWC cites *Application of Pacific Westbound Conference for the Benefit of M-C International,* 19 S.R.R. 333 (1979), in which it claims that an application was granted under similar circumstances.

DISCUSSION AND CONCLUSION

A special docket application seeking a refund or a waiver must meet certain requirements 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 a type contemplated by the statute, that applicant, prior to submitting the application, have filed a corrective tariff setting forth the rate on which the refund would be based, that the application be filed within 180 days of shipment, and that no discrimination among shippers result from the granting of the application.

We are concerned here with the condition that is set forth in the second proviso of section 18(b)(3), to wit:

> Provided, further, That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which *sets forth the rate on which such refund or waiver would be based.* . . . [Emphasis added].

The rates negotiated between PWC and the shippers involved in these proceedings, and the corrective rates filed by PWC pursuant to its applications are clearly at variance. Consequently, PWC has failed to comply with the requirement of section 18(b)(3) as cited above. This finding is consistent with the Commission's holding in *Munoz, supra,* where it was explained that:

> Prior to applying for a refund or waiver the carrier must file a new tariff to reflect a prior intended rate. The Commission does not have authority to approve a rate which was never agreed-upon or intended to be filed.
> 17 S.R.R. at 1192.

PWC does not dispute the holding in *Munoz* but contends that an application was granted under the same circumstances existing here. In the case relied upon, *Application of Pacific Westbound Conference for the Benefit of M-C International, supra,* the Presiding Officer's decision became administratively final upon the passage of time allowed for exceptions or Commission review. Under the circumstances, the result in the *Pacific Westbound Conference* case is of questionable precedential value. In any event, however, to the extent that decision is inconsistent with the holding reached here, it is expressly overruled.

THEREFORE, IT IS ORDERED, That the Exceptions to the Initial Decisions of PWC are denied; and

IT IS FURTHER ORDERED, That the Initial Decisions served August 21, 1979 and August 22, 1979 are adopted and made a part hereof; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.
By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 649

APPLICATION OF MAERSK LINE AGENCY FOR THE BENEFIT OF NOMURA (AMERICA) CORPORATION

Adopted November 20, 1979

Application for permission to refund portion of freight charges denied.

Conference and carrier applicants unintentionally deleted a specific commodity rate on a commodity known as "Butyl Motor Tube Scrap" in the amount of $64 per weight ton when republishing their tariff with the result that a shipper of this commodity was required to pay additional freight costs. However, prior to filing this application, the conference filed a new, corrective tariff which published a rate of $70 for the commodity involved rather than the rate which had been deleted. Because this new tariff does not conform to the earlier rate, the application is jurisdictionally defective for failure to satisfy the second proviso of section 18(b)(3) of the Shipping Act, 1916.

If a new application preceded by a correct, conforming tariff is filed by these applicants within the 180-day time period prescribed by law, the application can be given favorable consideration.

Donald P. Griffith, for applicant Pacific Westbound Conference.
Bryce J. Herbst, for applicant Maersk Line.

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

This is a special-docket application filed on June 11, 1979, by the Pacific Westbound Conference (PWC) and one of its members, Maersk Line, represented by the Maersk Line Agency, seeking permission to refund a portion of freight charged on a shipment of motor tube scrap which had moved under a PWC tariff which had undergone revision and republication. It is one of a series of five special-docket applications which were all filed on the same date. Three of these applications (Special Docket Nos. 648, 650, 651, *Application of Maersk Line Agency for the Benefit of CPC International Trading Corp., Firestone Tire & Rubber Co., and Kimberly-Clark Corporation,* 19 SRR 541 (1979)) were found to have fully qualified for relief under the applicable provisions of section 18(b)(3) of the Shipping Act, 1916 (the Act), as amended

[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).

by P.L. 90-298. See Initial Decision, July 10, 1979. Another application (Special Docket No. 652, *Application of Maersk Line Agency for the Benefit of Wespac Corporation*) is not yet ripe for decision because of the lack of certain critical information which I am seeking to obtain from PWC. Decision in the present case has been delayed pending receipt of further information, as more fully described below. Now that this information has been received, however, I find that the application cannot be granted because of the failure of the applicants to satisfy one of the essential conditions set forth in that portion of section 18(b)(3) which governs this type of proceeding, namely, the condition that a carrier or conference applicant must publish and file a new, corrective tariff rate prior to the time of filing its application, which new rate must conform to the earlier rate which had been unintentionally deleted or had not been filed through inadvertence. As more fully discussed below, whenever the failure to meet this particular condition of law has been found applications have consistently been denied at least since the decision of the Commission in *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 SRR 1191 (1977).

Because of the apparent failure of the applicants to satisfy this requirement, I advised Mr. Donald P. Griffith, Executive Assistant of the PWC, who had filed the application, that I did not believe that I could grant the application because of the decision in *Munoz y Cabrero, supra,* and other decisions which have consistently followed and have confirmed the principle involved. I advised Mr. Griffith that applicants could continue to seek favorable action of their application before the Commission notwithstanding *Munoz y Cabrero* but that I would have to issue an initial decision denying the application. Alternatively, I advised that the PWC could cure the defect in the application by filing the correct, conforming tariff. See my letter to Mr. Griffith dated June 25, 1979. PWC has responded by letter dated July 9, 1979, and chooses to seek favorable action on the application on the basis of additional assertions and contentions. See letter addressed to me from Mr. Griffith, dated as mentioned. Having considered these additional assertions and contentions, however, I find that the application cannot be granted because PWC has still failed to satisfy the essential condition set forth in law and confirmed by *Munoz y Cabrero* and at least four other decisions which continue to confirm the validity of that decision. However, I repeat what I indicated in my letter to Mr. Griffith, namely, that if applicants would be willing to correct the jurisdictional defect regarding the failure to file a correct, conforming tariff, this application, if refiled timely, could be granted.

FACTUAL BACKGROUND

The error which gave rise to this application related to the fact that the PWC completely revised and overhauled one of its tariffs and in so doing unintentionally deleted a special rate on a commodity known as "Butyl Motor Tube Scrap." Prior to January 1, 1979, the pertinent PWC tariff (Local and Overland Freight Tariff No. 5—F.M.C.-13) had published a special rate on "Butyl Motor Tube Scrap" in the amount of $64 per weight ton of 1,000 kilograms. See tariff cited, 16th rev. page 267, effective September 20, 1978. PWC revised and republished this tariff, effective January 1, 1979, by publishing a new tariff (Local and Overland Freight Tariff No. 11—F.M.C.-19). This tariff was a substantial overhaul of the previous tariff in which both commodity descriptions and item numbers underwent revision. In the process the special rate on "Butyl Motor Tube Scrap" was unintentionally deleted. See Affidavit of Donald P. Griffith, Executive Assistant to the PWC, June 11, 1979. The result of this action was that any shipment of this commodity would be assessed under a new commodity item described as "Synthetic rubber . . . including the following: Butyl . . . " The special rate for this item was $96 per weight ton, a substantial increase (50%) over the previous rate of $64. This error was called to the PWC's attention by the shipper Nomura (America) Corporation by letter dated February 28, 1979. Some time thereafter PWC restored a special rate on Butyl Motor Tube Scrap, effective March 28, 1979. The special rate which was published, however, was not the previous rate of $64 but rather $70 per weight ton. See PWC Tariff No. 11—F.M.C.-19, 3rd rev. page 742, effective March 28, 1979. During the time in which the unintended rate of $96 per weight ton was in effect, the Nomura (America) Corporation shipped two containers laden with used butyl motor tubes which weighed 43,572 kilograms. The shipment sailed on February 25, 1979, from Long Beach, California, destined for Osaka, Japan. The shipper paid $5,344.54 in freight rated under the $96 rate including terminal receiving and currency adjustment charges.

PWC and Maersk now seek to refund $1,370.77 in freight on the shipment in question. If their application is granted, this would mean that Maersk would retain only that amount of freight (including the incidental charges) based upon a rate of $70 per weight ton, not upon the $64 rate which had been published before PWC changed its tariff on January 1, 1979. This $64 rate, furthermore, was the rate which the shipper, Nomura (America) Corporation, specifically requested to be applied retroactively to January 1, 1979, to eradicate the tariff error. See letter to H. Kinoshita, Assistant Secretary, Nomura (America) Corporation, addressed to Mr. D. D. Day, Jr., Chairman, PWC, February 28, 1979, attached to the application.

Discussion and Conclusions

This special-docket application is filed under the remedial provisions of section 18(b)(3) of the Act and the pertinent Commission regulation, Rule 92(a), 46 C.F.R. §502.92(a). It is true that since this law is equitable and remedial in nature and is designed to relieve shippers of financial burden which would fall on them because of carrier error in tariff publishing and filing, the law has been construed liberally in order to carry out its purposes. See, e.g., *D. F. Young, Inc. v. Cie. Nationale Algerienne de Navigation,* 18 SRR 1645 (1979); *Ghiselli Bros. v. Micronesia Interocean Lines, Inc.,* 13 F.M.C. 179, 182 (1970); *Westinghouse Trading Co. v. American Export Lines, Inc.,* 18 SRR 570, 572–574 (1978). However, it is also true that this law is an exception to the equally strong principle that tariffs have the force and effect of law and that any application seeking relief must show that it complies with the various conditions set forth in the law, i.e., that the error was bona fide and of a type contemplated by the statute, that applicant has filed a timely corrective tariff, has met the 180-day period of limitation, and that there will be no discrimination among shippers should the application be granted. See, e.g., *Farr Co. v. Seatrain Lines,* 17 SRR 1463, 1467–1469 (I.D. 1977), 18 SRR 369 (F.M.C. 1978), and the legislative history to P.L. 90–298, cited in 17 SRR at 1467 n. 6; Hearings on H.R. 9473 Before the Subcommittee on Merchant Marine and Fisheries, 90th Cong., 1st Sess., Sen. No. 90–11 (1967) at 88 (need to ensure that applicant establishes that a bona fide mistake has occurred); *A. E. Staley Mfg. Co. v. Mamenic Line,* 18 SRR 433 (1978) (need to show that the jurisdictional condition regarding actual filing of a new tariff prior to application has been satisfied); *Level Export Sales Corp. v. Sea-Land Service, Inc.,* 18 SRR 1084 (1978) (need to file application within 180 days after date of shipment).

It is important to bear in mind the fact that although denial of special-docket applications does indeed result in an additional financial burden for a shipper caused not by the fault of the shipper but by the fault of the carrier, denials did occur in the cases cited above. Furthermore, it is important to keep in mind the fact that when the Congress gave the Commission authority to depart from the prevailing tariff law in the exeptional circumstances occurring in these types of cases, Congress did so on the understanding that the Commission would exercise that authority with care, i.e., that each application would not be merely rubberstamped but would be carefully scrutinized by qualified judicial officers. For example, in response to a concern expressed by Congressman Edwards that the new legislation authorizing waivers and refunds from otherwise applicable tariffs would lead to rebating or other abuses and that such applications might merely mean "a shipowner writing out a check to the shipper," the then Chairman of the Commission reassured the congressman that in addition to other conditions and controls to be written into the bill, "the case would appear before the hearing examiner [now administrative law judge] but under a very shortened procedure which we call 'special docket procedure,' in which there would have to be establishment of the fact that this is a bona fide mistake." Hearings, cited above at 88.

One of the conditions which must be satisfied under the law in question is that set forth as the second proviso in the remedial portion of section 18(b)(3), as amended by P.L. 90–298. This condition is stated as follows:

> *Provided, further,* That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based. . . .

It is this condition which is critical to the application because of the fact that the Conference in filing the "new tariff . . . which sets forth the rate on which such refund or waiver would be based" has filed a rate different from that which the shipper involved in this application had either been quoted or expected to be charged prior to the time of the shipment and which the shipper had specifically requested to be applied to the shipment by way of retroactive relief. There are now at least five decisions of the Commission or its administrative law judges which have become administratively final in which the principle has been clearly established that the new tariff filed to correct the error in the tariff applicable at the time of shipment must conform to the rate which had been quoted to the shipper or which the carrier or conference had deleted by mistake when publishing its tariff. At least one of these cases furthermore involved the PWC itself.

The first of these cases is *Munoz y Cabrero v. Sea-Land Service, Inc.,* 17 SRR 1191 (1977). In that case the carrier had negotiated a rate of $44 W/M for a shipment of glassware but inadvertently failed to file that rate prior to the time of shipment. When aware of the error, Sea-Land filed a corrective tariff and a special docket application but instead of filing the $44 rate, it filed a rate of $40. The Commission, after considering the legislative history of P.L. 90–298 and in full realization that denial of the application would mean that the carrier's errors caused the shipper to incur greater cost, nevertheless denied the application, stating:

> Section 18(b)(3) requires that prior to applying for a refund or a waiver the carrier file a new tariff upon which "such refund or waiver will be based." When read in conjunction with the statements in the House and Senate reports, it is clear that "the new tariff" is expected to reflect a prior intended rate, not a rate agreed upon after the shipment.
> 17 SSR at 1193.

In every case since *Munoz y Cabrero* in which the fact that the carrier had filed a rate other than the prior intended rate was noted, the application has been denied. Thus, in *Henry I. Daty, Inc. v. Pacific Westbound Conference,* 17 SRR 1439 (1978), the PWC inadvertently increased a rate on ground clay when republishing a portion of its tariff, raising the rate from $56 W to $98 W, thereby causing the shipper to bear a greater cost. To correct this error the PWC filed a special docket application but, prior thereto, filed the new tariff in which the rate was not shown as $56 W but as $56 W subject to a minimum weight for 20-foot containers of 40,000 pounds. The shipment involved could not meet this minimum weight with the result that the new, corrective tariff not only did not correspond to the earlier flat $56 W rate but the freight also differed. The application was therefore denied for failure to meet the second condition set forth in the statute.

In *Owens Illinois Co. v. Trans Freight Lines, Inc.,* 19 SRR 170 (Initial Decision), F.M.C. Notice of finality, May 9, 1979, the carrier had agreed to file a lump sum rate of $1,800 per container for expansion tanks but failed to do so in time for the shipment. But before filing its application the carrier filed a new, corrective tariff in the amount of $36 WM, minimum 2200 ft. per container instead of the quoted $1,800 rate. The application was denied.

In *Application of Neptune Orient Line for the Benefit of Stauffer Chemical Co.,* 19 SRR 451 (Initial Decision, F.M.C. Notice of finality, July 23, 1979) the carrier filed a new tariff rate of $62 W on lactose instead of a rate of $58 per 1000 kilos which had been quoted to the shipper. This was one of the reasons for the denial of the application.[2]

[2] The other reason for denial related to the fact that the carrier was a "controlled" carrier under the Ocean Shipping Act of 1978 and the facts showed that because the carrier realized certain restrictions on its ability to file reduced rates, it could not show that there was an inadvertent failure to file an intended rate.

Most recently, in *Application of Sea-Land Service, Inc. for the Benefit of Nepera Chemical, Inc.,* 19 SRR 235 (Initial Decision, April 20, 1979) which decision has been "adopted" by the Commission according to a Commission press release dated June 27, 1979,[3] the carrier failed to conform its new tariff filed prior to the special application to the earlier rate which it had quoted and had intended to file prior to the shipment in question. The earlier rate had been $6.85 per hundredweight, minimum 40,000 lbs. However, the new, corrective tariff published a rate of $162.25 per weight ton of 2240 lbs., minimum 17 WT. On exceptions to the Commission Sea-Land explained that this new rate was really only slightly different from the previous rate considering Sea-Land's stowage factors and that relief should not be denied because of such a slight variance. Nevertheless, the Commission announced that it has "adopted" the initial decision. By this action Sea-Land will be required to recover over $42,000 in additional freight from the shipper. In that case, furthermore, Sea-Land had waited until the very last day of the 180 day period to file its application so that there was no time for it to file a proper corrective tariff and another application.

In view of these cases which consistently deny applications when the carriers failed to conform their corrective tariffs with the previously quoted or intended rates, it is clear that these two applications must also be denied. The fact remains that PWC did not file a $64 rate on butyl motor tube scrap which had been intended but which PWC had inadvertently deleted but filed a $70 rate instead. As mentioned above, I called this problem to PWC's attention by letter of June 25, 1979, to afford PWC an opportunity to pursue the application and seek to overturn the doctrine followed in the cases cited or in the alternative, to file a proper corrective tariff and a new application. PWC has chosen to seek approval of the application notwithstanding the case law and has called several matters to my attention.

PWC points out that it had given approximately six-months' notice to shippers that a rate increase would occur on April 1, 1979. This means that the shipper in this application was put on actual or constructive notice that the rate would increase from $64 to $70 on that date. PWC argues that had it not committed an error in republishing its tariff on January 1, 1979, the quoted rate would have been published as $64 subject to the April 1, 1979, general rate increase which brought the rate up to $70. All that PWC did was to advance the increase on the $64 rate to $70 effective March 28, 1979. PWC explains that the reason why it advanced the rate increase on the $64 rate from April 1, 1979, to March 28, 1979, was that "the Conference considered it more prudent to incorporate the general rate increase on March 28 for Item 771.1440.20 rather than have a $64 Wt. rate in effect subject to Supplement No. 2 which would have increased this rate to $70.00 Wt. on April 1." See letter of D. P. Griffith, PWC Executive Assistant, July 9, 1979.

Alternatively PWC suggests that the applications should be granted by allowing the $64 rate to apply from January 1 through March 27, 1979.

[3] See NR 79-68, Actions Taken at June 27, 1979, Commission Meeting, agenda item No. 8 at 2. The Commission's Report has been served on August 8, 1979.

Finally, PWC cites another special docket (Special Docket No. 631) in which it claims that the application was granted under similar circumstances.

Regrettably, I do not believe that this application can be granted on any of the grounds advanced by PWC and adhere to my earlier belief that the only proper way in which PWC could obtain favorable action would be to file a correct new tariff showing the $64 rate quoted to the shipper, prior to the filing of a new application. Even now there is time to do this since the 180-day period does not expire until August 24, 1979 (180 days after date of sailing which was February 25, 1979).

It is impossible to grant relief based upon the $64 rate on a retroactive basis, as PWC suggests in one alternative, because of the fact that the $64 rate is not on file with the Commission. Section 18(b)(3) requires in pertinent portion that prior to filing the application, the applicant must file "a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based." Failure to meet this requirement is a jurisdictional defect which cannot be waived. See *A. E. Staley Mfg. Co. v. Mamenic Lines,* 17 SRR 1522 (1978); *Louis Furth Inc. v. Sea-Land Service, Inc.,* 17 SRR 1171 (1977). In both of the cited cases applications had to be denied because there was no filing of the actual rate on which relief was requested prior to the time of filing the application.

PWC's reference to Special Docket No. 631 is not sufficient to justify granting its application. In Special Docket No. 631, *Application of Pacific Westbound Conference for the Benefit of M-C International,* 19 SRR 333 (Initial Decision, May 14, 1979) (F.MC. Notice of no review and administrative finality, June 28, 1979), the PWC inadvertently deleted a specific commoidity rate on playing cards when republishing its tariff on January 1, 1979. Upon receiving a letter from the shipper complaining of this mistake, the PWC reinstated the specific commodity rate on playing cards but, as in SD No. 649, filed the new corrective tariff effective March 28, 1979, and advanced the general rate increase which was scheduled to become effective on April 1, 1979, for playing cards, as compared to the previous rate which had been deleted. The facts seem to be the same as those in SD No. 649. However, neither the initial decision nor the Commission's notice, which merely announced that no review had been undertaken by the Commission, made any reference to the *Munoz y Cabrero* problem. Had there been any reference to this problem there might have been a different result or a decision that the *Munoz y Cabrero* doctrine should no longer be followed. With no reference to the problem by either the Commission or the presiding judge, however, I cannot conclude that this case means that the *Munoz y Cabrero* doctrine is no longer to be followed in the face of the fact that in at least five cases, cited above, where the problem has been specifically identified, *Munoz y Cabrero* has been expressly followed and where in the last of these cases, *Application of Sea-Land Service, Inc. for the Benefit of Nepera Chemical, Inc.,* 19 SRR 235, *supra,* the Commission's final decision, which will undoubtedly be issued in the near future, will come later than the notice of administrative finality issued on June 28, 1979, in Docket No. 631.

PWC's argument that all it did in this case was advance the general rate increase to $70 by a few days may seem appealing. Also the fact that the shipper would be happy to accept a $70 rate rather than the higher $96 rate in effect at the time of the shipment is no doubt a truism. However, these arguments still miss the point, namely, that all that PWC had to do to obtain favorable action was to refile a correct tariff rate with a new application so as to eliminate the *Munoz y Cabrero* problem. The excuse that the Conference considered it "more prudent" not to publish the $64 rate but to accelerate the increase to $70 is obviously not prudent, at least in terms of seeking special docket relief, if it means a hopeless collision course with the *Munoz y Cabrero* doctrine. PWC's standing to argue an exception to the *Munoz y Cabrero* doctrine is weakened moreover by several considerations. First, in the other three special docket applications to which I referred above (SD Nos. 648, 650, and 651) all involving mistaken deletions or typographical errors in PWC's republished tariffs, PWC showed itself perfectly capable of filing the new corrective tariffs to conform exactly to the rates previously deleted or intended. Secondly, in one of these cases (SD No. 648, for the benefit of CPC International Trading Corp.) PWC correctly published a new conforming tariff in the very same tariff involved in the two applications under consideration, namely, Tariff No. 11—F.M.C.-19, effective January 17, 1979. Apparently the reason why PWC did not include the April 1 general rate increase in the new tariff rate filed in SD No. 648 was that January 17 is not nearly so close to April 1 as is March 28, the effective date of the new tariff rate in SD No. 649, in which PWC did include the general rate increase in the new tariff. Thirdly, PWC is fully aware of the *Munoz y Cabrero* doctrine, having been denied relief in the case of *Henry I. Daty, Inc. v. Pacific Westbound Conference, supra,* 17 SRR 1439, only last year, in which case PWC made the same error of changing the new, corrective tariff so that it did not conform to the earlier rate which had been inadvertently deleted from the PWC tariff.

Nevertheless, PWC, despite the fact that it is aware of the *Munoz y Cabrero* doctrine and has been specifically advised in this application by my letter of June 25, 1979, that its application fails to satisfy the principle enunciated in *Munoz y Cabrero* and additional cases following that principle, chooses not to refile a correct new tariff with a new application. Perhaps the reason for this reluctance is the fact that if the new tariff were to be filed correctly with a rate of $64 as the shipper expected and requested, this rate would have to remain unchanged for 90 days in the tariff because of the 90-day notice requirement of section 14b(2) of the Act governing dual-rate contracts, since the rates concerned are contract rates. PWC has already manifested a desire to increase its rates generally in its Tariff No. 11 effective on April 1, 1979, and apparently is not inclined to favor the commodity involved in this application by granting it a rate reduction from $70 to $64 which would remain unchanged until some time in the autumn when the 90-day notice period would expire. That is a decision which PWC is entitled to make and, indeed, the entire special-docket statute does not require a carrier or conference to seek relief for shippers at all, which action, at least, PWC has initiated. However, if PWC believes it to be unwise to make the correction suggested so as to conform to prevailing law, there is nothing I can do to authorize permission to make a refund. Accordingly, notwithstanding the fact that PWC's tariff errors will result in the shipper's having to bear an additional $1,370.77 in freight, this application, under the present circumstances, cannot be granted.[4]

ULTIMATE CONCLUSIONS

This special docket application cannot be granted under the present circumstances. Although there did occur an error in the PWC tariff of a clerical or administrative nature because of unintentional deletion of a specific commodity rate and the shipper concerned was unable to enjoy the rate which it had believed would be applicable when booking the shipment, PWC and Maersk have failed to comply with an essential condition set forth in section 18(b)(3) of the Act, namely, the requirement that the new, corrective tariff filed prior to filing of the application set forth the identical rate which conforms to the earlier intention of the conference and carrier. Instead, PWC filed a new tariff which publishes a rate different from the unintentionally deleted rate which PWC had earlier intended to remain at $64 during the period January 1, 1979 through March 31, 1979, not $70, which was supposed to become effective on April 1, 1979, not earlier. Consequently, the subsequent idea to apply the increased rate retroactive to this earlier period of time does not conform to the earlier intent.

The application must therefore be denied, but it is still not too late for it to receive favorable consideration if PWC and Maersk would promptly file a correct, conforming tariff and a new application so that the essential jurisdictional condition regarding the conformance of the new tariff rate to the prior intended rate would be satisfied. If PWC also meets the 180-day time period (ending on August 24, 1979) and is willing to retain the correct conforming rate in its tariff increasing it to the $70 level on 90-days' notice, it would appear that the jurisdictional defect in its present application would be cured.

(S) NORMAN D. KLINE
Administrative Law Judge

WASHINGTON, D.C.
August 8, 1979

[4] In every case in which a special docket application has to be denied, of course, the result is that the shipper has to bear additional freight costs although not at fault. This has been recognized in the cases cited but cannot be helped. See, e.g., *Munoz y Cabrero v. Sea-Land Service, Inc., supra,* 17 SRR 1191 at p. 1193. In *Application of Sea-Land Service, Inc. for the Benefit of Nepera Chemical Co., supra,* 19 SRR 235, note that the denial meant that Sea-Land must seek an additional $42,000 in freight from the shipper. At least in the present application the amount of additional freight is relatively small by comparison (something over $1,000) and the shippers have already paid this amount so that there will be no need for applicants to bill them for additional sums.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 652

APPLICATION OF MAERSK LINE AGENCY FOR THE BENEFIT OF WESPAC CORPORATION

Adopted November 20, 1979

Application for permission to refund portion of freight charges denied.

Conference and carrier applicants unintentionally deleted specific commodity rate of $104 for insulating materials when republishing their tariff with the result that the shipper concerned was required to bear additional freight cost. However, prior to filing this special docket application, the conference filed a new, corrective tariff which published a rate of $114 rather than the rate which had been deleted, in order to incorporate a general rate increase into the new rate. Because this new tariff does not conform to the earlier rate which had been quoted to the shipper but deleted in republishing, the application is jurisdictionally defective for failure to satisfy the second proviso of section 18(b)(3) of the Shipping Act, 1916.

If a new application is filed preceded by a correct, conforming tariff filing which reinstates the $104 rate, and the application is filed within the 180-day time period prescribed by law, which still has considerable time to run, the application can be given favorable consideration.

Donald P. Griffith, for applicant Pacific Westbound Conference.
Bryce J. Herbst, for applicant Maersk Line.

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

This is the last of a series of five special-docket applications all filed on June 11, 1979, by the Pacific Westbound Conference (PWC) and one of its members, Maersk Line, represented by the Maersk Line Agency, seeking permission to refund portions of freight charged on various shipments which moved under PWC tariffs which had undergone revision and republication. In all five of these cases the PWC had made errors of a clerical or administrative nature by deleting commodity rates or descriptions or by otherwise publishing erroneous matters in the tariffs with the result that various shippers were

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

adversely affected. Three of these applications were found to have qualified fully for relief under the applicable provisions of section 18(b)(3) of the Shipping Act, 1916 (the Act), as amended by P.L. 90-298. See Special Docket Nos. 648, 650, 651, *Application of Maersk Line Agency for the Benefit of CPC International Trading Corp., Firestone Tire & Rubber Co., and Kimberly-Clark Corporation*, Initial Decision, served July 10, 1979, 19 SRR 541. Another application was found not to have qualified because of a jurisdictional defect relating to the fact that the PWC failed to file a correct, conforming tariff rate prior to the filing of the application, in contravention of the requirements of the second proviso of section 18(b)(3) and the doctrine enuciated by the Commission in *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 SRR 1191 (1977), and at least four cases which follow the *Munoz* doctrine. See Special Docket No. 649, *Application of Maersk Agency for the Benefit of Nomura (America) Corporation*, Initial decision, served August 21, 1979, 19 SRR 689.

In both Special Docket No. 649 and the instant case, I advised the PWC of the jurisdictional defect and gave PWC the option to continue to seek favorable consideration of the applications notwithstanding the *Munoz y Cabrero* doctrine or to file a new application preceded by a correct, conforming tariff which would reinstate the earlier deleted rates exactly as they had been quoted and published in the earlier tariffs. See letter which I addressed to Mr. Donald P. Griffith, PWC Executive Assistant, dated June 25, 1979. PWC responded and chose to continue to seek favorable consideration of both applications on the basis of certain statements and arguments. See letter dated July 9, 1979, from Mr. Griffith to myself. I have considered the matters discussed by Mr. Griffith in his letter and remain of the opinion that this application, as well as that in Special Docket No. 649. cannot be granted because the jurisdictional defect has not been corrected. However, as in No. 649, I reiterate that favorable consideration to the instant application could be given if PWC were to eliminate the defect by filing a correct, conforming tariff and a new application.

FACTUAL BACKGROUND

The facts in this case are relatively simple. It appears that PWC had published a tariff in 1978 for the carriage of cargo between Pacific Coast ports and ports in various Far East countries. This was PWC Local and Overland Freight Tariff No. 5—F.M.C.-13. Effective January 1, 1979, PWC overhauled and republished this tariff, changing commodity descriptions and item numbers. In the present case, PWC had published a special rate for "Mineral Insulating Material, N.O.S." in its previous tariff in the amount of $104 W/M, for local movements to Bangkok, Thailand. See tariff No. 5, cited, 11th revised page 392, effective September 1, 1978. In republishing the tariff, however, PWC inadvertently deleted this special commodity rate. Consequently, any shipment of the type of mineral insulating material in question became subject to a rate of $201 W/M moving to Bangkok, Thailand, under an N.O.S. commodity description published as "Non Metallic Minerals and Products, Except Ceramic Products and Glass and Glass Products, N.O.S." See PWC Tariff No. 11-F.M.C.-19, 3rd rev. page 489, effective January 1, 1979. PWC was notified of this tariff error by a shipper, Wespac Corporation, who had shipped this commodity while the $201 W/M rate was applicable. Wespac, by letter dated April 10, 1979, requested that the PWC file a special docket application to restore the $104 rate which the shipper had been quoted by Maersk in November 1978 and requested that the $104 rate be made retroactive to March 1979. See letter addressed to the PWC by Mr. John A. Carambat, dated April 10, 1978. The PWC responded to the request by publishing and filing a new special rate on the commodity in question, effective April 25, 1979, and after receiving a second letter from the shipper, by filing this special-docket application. However, as noted, the new special rate which PWC filed was not the $104 rate which the shipper requested but rather a rate of $114. The reason why the PWC published this latter rate rather than the lower rate requested was the fact that on April 1, 1979, there occurred a general rate increase which raised $104 to $114.

During the time in which the $201 rate was in effect, the shipper shipped 13.726 cubic meters of insulating material on a Maersk vessel which sailed from Oakland, California, on April 6, 1979. The shipment was destined for Bangkok, Thailand. The shipment, as rated under the $201 rate, was assessed $2,758.93 in freight exclusive of incidental charges. The PWC and Maersk wish to refund the amount of $1,194.17, which would result in Maersk's retaining freight charges calculated on the basis of the $114 rate, not the $104 rate which the shipper had been quoted and which the shipper had requested to be made applicable to the shipment.

DISCUSSION AND CONCLUSIONS

The principles of law which govern this case are precisely the same as those discussed in my initial decision in Special Docket No. 649, *Application of Maersk Line Agency for the Benefit of Nomura (America) Corporation*, *supra*. Very briefly, this application, like the other, cannot be granted because of the failure of the PWC to satisfy the second proviso of section 18(b)(3) of the Act and the principles of law enunciated in the five cases cited in that decision, beginning with *Munoz y Cabrero v. Sea-Land Service, Inc.* The proviso has to do with the requirement that applicants must file a new, conforming tariff prior to the time of filing their applications, which new tariff publishes the same rate which had been unintentionally deleted. This principle and the relevant cases are discussed in more detail in the other decision and need not be repeated here. The only distinction between the two cases lies in the fact that in this case the PWC filed the new tariff after the effective date of the general rate increase which as I mentioned, was April 1, 1979, whereas in the other case the PWC filed the new tariff a few days prior to the effective date of the increase. In both cases the PWC urges that I not follow the *Munoz y Cabrero* doctrine and argues that the shippers had notice of the April 1 increase approximately six months before that date so that retroactive application of the increased rates rather than the originally quoted rates should be permitted. I have discussed these arguments in my initial decision in Special Docket No. 649, to which the reader is referred, and see no need to repeat them here, In short, none of the PWC's assertions corrects the fact that the PWC has simply not filed the proper, conforming new rate and chooses not to refile its application with a corrected new rate. Under the circumstances, there is no way in which I can find that the application can be granted, notwithstanding the fact that the shipper will not be entitled to receive a refund for additional freight charges which were caused by carrier, not shipper error. So long as the PWC has filed only the $114 rate, rather than originally quoted $104, the only rate on which a refund could be based would be $114, since the statute requires the carrier or conference to file a new tariff "which sets forth the rate on which such refund or waiver would be based." The only conceivable way in which it could be argued that the shipper would be entitled to a refund on the basis of the $114 rather than the $104 rate would be the fact that the shipper was aware of the rate increase which was to take effect on April 1, 1979, and shipped on or after that date when the $114 rate would apply. However, these facts cannot be established. On the contrary, the shipper, in two letters, requests that the $104 rate be applied and that it be made retroactive to March, 1979. Furthermore, evidence which the PWC has furnished at my request quite honestly reveals that the shipper sent the shipment to the terminal prior to April 1, 1979.[2] Under the PWC tariff's effective date of rate change rule, a shipment received at the carrier's terminal prior to April 1 to be loaded on a vessel sailing within 10 days of that date, would be rated under the previous, unincreased rate. See Rule 3.1.2, PWC Tariff No. 11, 3rd rev. page 53. Therefore, the shipment would have qualified for the $104 rate had it been published in the PWC tariff. Had the shipment been received on or after April 1, 1979, it could be argued that the proper rate was $114 and that since this rate has been filed with the Commission by the PWC, the refund can be granted on the basis of the higher rate. I can understand that the PWC, when filing the new tariff of April 25, 1979, filed the rate subject to the April 1 increase, therefore inserting a rate of $114 into the tariff rather than $104. However, this business decision, while conforming to the longstanding intention of the PWC to increase its rates on April 1, 1979, does not conform to its earlier intention that a rate of $104 should apply from January 1 to March 31, 1979. That is so because the PWC is aware that if it wishes to apply the $104 rate to the period January 1 through March 31, 1979, by means of this special-docket application, the statute and case law require that it file the $104 rate.[3]

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[2] Although the only way in which I believed it might be possible to grant this application with only the $114 rate on file would be if the shipment was received by the carrier at the terminal on or after April 1 under the pertinent effective date of rate change rule, Mr. Griffith, at my request furnished me with evidence that the shipment arrived at the terminal on March 27, 1979. See Port of San Francisco Fright Consolidation Station receipt No. 13212. Mr. Griffith has cooperated in an effort to give me a full and complete record even when the evidence does not help his position and has conscientiously striven to persuade me that the application should be granted. However, I cannot agree with his arguments and believe that under applicable principles of law his only recourse is to persuade the PWC to file the correct, conforming tariff rate.

[3] As I mentioned in my initial decision in Special Docket No. 649, the PWC was involved in one of the *Munoz y Cabrero* type cases in which its application had to be denied for failure to file the correct, conforming tariff rate. The case was *Henry I. Daty, Inc. v. Pacific Westbound Conference*, 17 SRR 1439 (1978). Moreover, in my letter and telephonic conversations with Mr. Griffith of the PWC, I advised him of these cases and the need, in my opinion for PWC to file the $104 rate if it wished to have the application granted. In fairness to Mr. Griffith, I should add that he has the right to urge the Commission to reverse or modify the *Munoz y Cabrero* doctrine and he has cited another special docket case (SD No. 631) in which an application was granted although the new tariff had also incorporated a general rate increase into the rate filed, thereby changing it from the previous rate which had been deleted. As I mentioned in my initial decision in Special Docket No. 649, however, it does not appear that the *Munoz y Cabrero* problem was noted in the decision in SD No. 631. Moreover, if applicants are allowed to change their rates

ULTIMATE CONCLUSIONS

The application in this case, as in a companion case, Special Docket No. 649, cannot be granted because of a jurisdictional defect relating to the fact that the PWC has not filed a new, corrective tariff which publishes a rate which conforms to the rate which had been quoted to the shipper and had been unintentionally deleted from the PWC's republished tariff. This defect is fatal because the second proviso of section 18(b)(3) and a least five decisions of the Commission and its administrative law judges emphasize that the new rate must conform to the earlier quoted or deleted rate. Unless the PWC is willing to file the quoted and deleted rate of $104 together with a new application, there simply is no way in which the shipper can be given a refund. The fact that the shipper will receive no refund though the PWC erred in publishing its tariff may be unfortunate but the remedy is for the PWC to refile a correct, conforming tariff with a new application. Any alternative solution would require the Commission to disregard the second proviso of section 18(b)(3) and five decisions arising thereunder so that special-docket applications can be opened to abuse and unsavory pressures.

Since the shipment sailed on April 6, the PWC can still refile its application preceded by a correct, conforming tariff at any time up till October 3, 1979, (180 days after April 6, 1979), in which event its application can be given favorable consideration if no further errors or defects appear.

The application must therefore be denied.

(S) NORMAN D. KLINE
Administrative Law Judge

WASHINGTON, D. C.
August 13, 1979

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from those quoted or published earlier, on which shippers relied, the special-docket procedure could be open to abuse, for example, if shippers could insist that carriers file even lower rates than those quoted earlier for retroactive application and refunds in special-docket cases.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-15

WESTINGHOUSE ELECTRIC CORPORATION

v.

SEA-LAND SERVICE, INC.

ORDER

November 20, 1979

This proceeding is before the Commission upon its determination to review the Order issued by Administrative Law Judge William Beasley Harris, approving the settlement agreement and discontinuing the proceeding. The proceeding was initiated by a complaint filed March 12, 1979 by Westinghouse Electric Corporation alleging that Sea-Land Service, Inc. assessed an unreasonably high rate for a shipment of fluorescent bulbs in violation of section 18(b)(5) of the Shipping Act, 1916 (46 U.S.C. 817).

On March 7, 1977, Westinghouse delivered to Sea-Land in New York City 1875 cartons of fluorescent bulbs weighing 14,628 kilograms and measuring 4,000 cubic feet, to be shipped from New York to Bilbao, Spain. The applicable tariff was Tariff No. 166, FMC-43 ("U.S. North Atlantic Ports" to "Ports in Spain"), and the rate was $27 per 40 cubic feet, for a total charge of $2,700.

On March 18, 1977, Westinghouse delivered to Sea-Land in Houston, Texas 1791 cases of fluorescent bulbs weighing 13,973 kilograms and measuring 3940 cubic feet, to be shipped from Houston to Bilboa, Spain. The applicable tariff was Tariff No. 233, FMC-105 ("U.S. Gulf Ports" to "Ports in Spain") and the rate was $3.70 per cubic foot.[1]

Westinghouse alleged that the rate charged for this latter shipment was unreasonably high and violative of section 18(b)(5) of the Act, noting that the shipments were nearly identical (the latter shipment, in fact, was slightly smaller), and that the longer distance from Houston did not justify the Gulf rate exceeding by five times the Atlantic rate. Sea-Land denied that the rate was so unreasonably high as to be detrimental to the commerce of the United States in violation of section 18(b)(5). By Agreement of Settlement and Mu-

[1] Or $148 per 40 cubic feet.

tual Release, filed June 11, 1979, the parties agreed to settle the dispute upon Sea-Land's payment to Westinghouse of $4,000, and Sea-Land's modification of the Gulf Coast/Spain tariff item "as deemed by Sea-Land to be commercially sound."[2]

The Presiding Officer concluded that the settlement agreement

does not constitute rebating or the use of unjust or unfair devices which would allow the complainant to obtain transportation at rates below those published in the tariffs. In other words the settlement itself is proper and does not violate any provision of law.

He noted in addtion that settlements are encouraged by the Commission's Rules of Practice and Procedure and the Administrative Procedure Act. The Presiding Officer granted the parties' Motion for Approval of the Agreement of Settlement and Mutual Release, and discontinued the proceeding.

DISCUSSION AND CONCLUSIONS

Section 18(b)(5) does not by its terms forbid any specific activity; it is purely prospective in nature.[3] In *Federal Maritime Commission v. Caragher,* 364 F.2nd 709, 717 (2nd Cir. 1966), the court stated that a carrier could be liable for penalties under section 18(b)(5) only if it continued to charge unreasonable rates *after* the Commission determined they were unreasonable. The *Caragher* rationale has been applied to awards of reparation as well as to assessment of penalties. Only after the Commission has determined a particular rate to be unreasonable under section 18(b)(5) may a carrier's continued assessment of that rate be considered a violation of section 18(b)(5) for which reparation may be awarded.[4] In the instant situation, no such determination of a violation has heretofore been made.

The Commission is then presented with the question whether it may approve the settlement of a proceeding in which no apparent relief is warranted. It is clear that no reparations may be awarded in this proceeding. Nor is disapproval of the challenged rates appropriate; the tariff item has been cancelled by Sea-Land. The only justification offered for the $4000 payment by Sea-Land is the avoidance of litigation. Under the circumstances present here, the Commission concludes that the avoidance of such litigation is insufficient to justify a cash settlement, particularly where, as here, no effective relief is available to the Complainant. As no other justification has been offered, the settlement is therefore disapproved, and the proceeding remanded to the Presiding Officer.

THEREFORE, IT IS ORDERED, That the Agreement of Settlement and Mutual Release of Westinghouse Electric Corporation and Sea-Land Service, Inc. is disapproved; and

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[2] *The tariff item has been cancelled.*

[3] Section 18(b)(5) reads:

The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

[4] *Pacific Westbound Conference—Investigation of Rates Pertaining to Wastepaper*, 19 S.R.R. 19, 29 (1979); *Commodity Credit Corp. v. American Export Isbrandtsen Lines, Inc.*, 15 F.M.C. 171, 191 (1972); *Valley Evaporating Co. v. Grace Line, Inc.* 14 F.M.C. 16, 26-27 (1970).

IT IS FURTHER ORDERED, That this proceeding is remanded to the Presiding Officer.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 666

APPLICATION OF SEA-LAND SERVICE, INC.
FOR THE BENEFIT OF NEW ERA SHIPPING
AS AGENT FOR CENTRAL NATIONAL CORPORATION

ORDER ON REMAND

November 21, 1979

This proceeding was instituted pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)), upon the application of Sea-Land Service, Inc., for permission to refund and waive a portion of certain freight charges to Central National Corporation through New Era Shipping Co., Inc., a licensed independent ocean freight forwarder, as agent for Central National Corporation. Administrative Law Judge Stanley M. Levy served an Initial Decision on September 5, 1979 granting Sea-Land's application. Although no exceptions were filed, the Commission, on its own motion, determined to review the Intial Decison.

In this case, the evidence presented satisfactorily shows that Sea-Land intended to charge a special rate of $69.00 W for the shipments in question. A higher rate was inadvertently put into effect when, on January 1, 1979, the Pacific Westbound Conference (PWC), of which Sea-Land is a member, republished its tariffs for the exclusive purpose of converting commodity item numbers to conform to the 1978 edition of Statistical Classification of Domestic and Foreign Commodities Exported from the United States. Because of a clerical error, the $69.00 special rate was deleted from the republished tariff resulting in a higher-than-intended rate on the commodity in question.

On March 29, 1979, the PWC filed a corrective tariff reinstating the $69.00 special rate effective March 30, 1979. Based upon this record, the reinstatement appears to conform to the intended rate level. However, the corrective tariff also adds a provision which is not explained in the record. This new provision canceled the special rate on the day after it became effective.

It is well settled that a corrective tariff must conform to the tariff originally intended. *Munoz y Cabrero v. Sea-Land Service, Inc.*, 20 F.M.C. 152 (1977). Here, there is no evidence that the PWC intended to cancel the $69.00 special rate on April 1, 1979 when, effective January 1, 1979, it republished its tariff

(Exhibit No. 2). If, on January 1, 1979, the PWC did not intend to cancel the $69.00 special rate on April 1, 1979, then the corrective tariff (Exhibit No. 3) fails to conform to the PWC's intent and the application must be denied. Therefore, this proceeding is remanded for additional evidence regarding the corrective tariff filed by Sea-Land as Exhibit No. 3.

Consistent with Commission policy,* should Sea-Land's application ultimately be approved, New Era should also be required to certify that it has remitted to the shipper the refund granted or explain why such remittance has not been made. New Era should simultaneously certify that it has refunded a proportionate percentage of brokerage compensation it has received for these shipments.

One final point raised in the Initial Decision needs to be addressed. The Presiding Officer stated at page 3 of his decision: "The requested refund and waiver will apply only to the ocean portion of the through charge." Although not incorrect in the context of this refund and waiver, this statement is potentially misleading. The important fact in all special docket applications involving intermodal rates is that the refund or waiver not affect the land portion of the through rate.

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the Presiding Officer for the receipt of evidence regarding the conformity of the corrective tariff and the issuance of a supplemental Initial Decision consistent with the directions of this Order.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

* *Application of Sea-Land Service, Inc. For The Benefit Of BDP International, Inc. As Agent For Champion International Export Corporation*, ____ F.M.C. ____ (Special Docket No. 660, November 2, 1979).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 675

APPLICATION OF SEA-LAND SERVICE, INC.
PACIFIC WESTBOUND CONFERENCE FOR THE
BENEFIT OF CHURCH WORLD SERVICE

NOTICE OF ADOPTION OF INITIAL DECISION

November 21, 1979

The Commission by notice served October 30, 1979, determined to review the initial decision of the Administrative Law Judge in this proceeding. Upon review, the Commission has determined to adopt that decision with the following minor clarifications.

The headnote on page 1 and ordering paragraph (B) on pages 4 and 5 of the initial decision are clarifed to indicate that the authorized waiver is for a $10,186.37 portion of the $20,655.23 total otherwise applicable to the shipments. The $10,468.86 figure represents the total charge to be assessed under the rate authorized by this decision.

Applicant shall promptly publish in its appropriate tariff the following notice.

Notice is given as required by the decision of the Federal Maritime Commission in Special Docket 675 that effective January 1, 1979 and continuing through May 29, 1979, inclusive the rate on 'Wheat Flour viz: Durum Flour and Semolina,' in bags donated for relief or charity is $100.00 W to Manila and $112.00 W to Busan, 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.

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

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 675

APPLICATION OF SEA-LAND SERVICE, INC.
PACIFIC WESTBOUND CONFERENCE FOR THE
BENEFIT OF CHURCH WORLD SERVICE

Adopted November 21, 1979

Application granted to waive a $10,186.37 portion of aggregate freight charges of $10,468.86 sought to be applied due to administrative error.

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

This is a proceeding under 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.

The applicant-conference Pacific Westbound Conference who joined in this application with the carrier-applicant Sea-Land Service, Inc., certifies that the instant application was mailed at San Francisco, California, August 24, 1979, to the Secretary of this Commission. It was received in the Office of the Secretary August 27, 1979. Under Rule 92(a)(3) and such circumstances, said mailing date is the filing date of this proceeding.

The commodity shipped is given in the application as "Wheat Flour viz: Durum Flour and Semolina, in bags, donated for relief or charity." In the application the date of sailing of the two shipments involved is given as February 25, 1979, which is within 180 days of the filing of this application. Thus, the application is filed timely.

On Sea-Land Service, Inc. (Sea-Land), the applicant-carrier's bills of lading for each shipment is found:

(1) B/L No. 992-735034 dated February 22, 1979, 988 Bags "All Purpose Bread Flour" (100 lb. bags) "For Charitable Purposes Only," by Church World Service of New York shipped from Seattle on the vessel *McLean,* voyage 108W to Inchon. The gross weight was 99,541 lbs., 45,517 Kgs; measurements 2568.8 cu. ft., 72.70 cbm. Charges of 72.70 M^3 at $133 per cbm =

[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).

\$9,669.10. AB 72.70 M^3 at 6.00 cbm = \$436.20. CY 72.70 M^3 at 6.50 per cbm = \$472.55. Total charges = \$10,577.85.

(2) B/L No. 992-735030 dated February 22, 1979, 996 Bags "All Purpose Bread Flour" (100 lbs. bags) "For Charitable Purposes Only" shipped by Church World Service from Seattle to Manila on vessel *McLean* 108W, gross weight 100,347 lbs., 45,517 Kgs; measurements 2589.6 cu. ft.; 73.29 cbm. OF 73.29 M^3 at \$131.00 per cbm = \$9,600.99. CY 73.29 M^3 at \$6.50 per cbm = \$476.39. Total = \$10,077.38.

The total charges for the two were \$20,655.23 (B/L 992-735030 charge was \$10,077.38 and B/L 992-735034 charge was \$10,577.85).

Both shipments, one destined to Manila and other destined to Inchon, Korea, via Busan, sailed in the vessel *McLean*, Voyage 108W on February 25, 1979. The rate applicable at the time of shipment according to the application was to Inchon, Korea, \$133.00 per cubic meter and to Manila, \$131.00 per cubic meter, plus outport rate of \$6.00 per ton as freighted. The bills of lading were rated on the basis of Cereal Grains per Item 001-0700-00 in Pacific Westbound Conference Local and Overland Freight Tariff No. 11, FMC-19, 2nd Revised Page 214, effective January 1, 1979 (Exh. No. 7, page 1 of 2 attached to application).

Sea-Land is a member of the Pacific Westbound Conference (PWC). PWC published rates to Far East destination on: Wheat Flour (except Meal and Groats) in Bags—Donated for Relief or Charity in Item 046-0110-03 on 8th Revised Page 218 of its Local and Overland Freight Tariff No. 5, FMC-13, effective November 29, 1978 (Exhibit No. 1 attached to application). The rate to Manila was \$100.00 per ton (w) and the rate to Busan, Korean, was \$112.00 per ton (w). Effective January 1, 1979, the PWC republished its Tariff No. 5 as Tariff No. 11, FMC-19. This is the rate sought to be applied in this proceeding, i.e., \$100.00 per 1,000 kilos as to B/L No. 992-735030 and \$112.00 per 1,000 kilos plus outport rate of \$6.00 per 1,000 kilos as to B/L No. 992-735034. The charges then would be as to B/L 992-735030 \$4,847.56 and as to B/L 992-735034 \$5,621.30, a total of \$10,468.86, which subtracted from the total charges of \$20,655.23 would leave aggregate charges of \$10,186.37 to be waived.

In its republishing of its Tariff No. 5 as to Tariff No. 11, FMC-19, it was PWC's intention to reissue its Local and Overland tariff to conform to the new 1978 Edition of Schedule B Commodity Classification and at the same time eliminate those commodities having very low movement. Due to an administrative oversight, the rates for large movements of Wheat Flour, viz: Durum Flour and Semolina donated for relief or charity were not carried forward and did not become effective until after the shipments had been made. Upon discovery of the error, the PWC issued 3rd Revised Page 219A effective May 30, 1979, to correct the omission by publishing a new commodity item 131-4010-04 (R) Wheat Flour, viz: Durum Flour and Semolina in Bags at the rate levels of \$100.00W to Manila and \$112.00W to Busan which had previously been in effect.

Discussion and Conclusions

In addition to the above information in support of this application for waiver, the applicants also asserted there are no other special docket applications or decided or pending formal proceedings involving the same rate situation. It is also asserted that there are no other shipments of other shippers of the same or similar commodity which (a) moved via applicants during the period of time beginning on the day the bills of lading were issued and ending on the day before the effective date of the conforming tariff and (b) moved on the same voyage of the vessel carrying the shipments decided above.

The administrative error on the part of the Pacific Westbound Conference, which resulted in a delay in publication of an existing rate into a new tariff was corrected.

In view of the applicants' explanation and information supplied herein and section 18(b)(3) of the Shipping Act, 1916, and Rule 92 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.92, the Presiding Administrative Law Judge *finds* and *concludes* there was an error of an administrative nature; that the requested waiver will not result in discrimination among shippers; that the circumstances herein comport with the special docket requirements and that the application should be granted.

Upon consideration of the above and 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 waiver would be based.

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

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

(5) The application for waiver should be granted.

Wherefore, it is ordered that:

(A) The application be and hereby is granted.

(B) Sea-Land Service, Inc., and Pacific Westbound Conference are granted permission to waive a $10,186.37 portion of aggregate freight charges of $10,468.86 sought to be applied for the benefit of Church World Service, the shipper herein of Wheat Flour, viz: Durum Flour and Semolina, in Bags, Donated for Relief or Charity.

(C) Appropriate notice of this proceeding shall be published in the appropriate tariffs.

William Beasley Harris
(S) *Administrative Law Judge*

Washington, D.C.
September 21, 1979

DOCKET NO. 79-55
MATSON NAVIGATION COMPANY—PROPOSED BUNKER SURCHARGE IN THE HAWAII TRADE

REPORT AND ORDER ADOPTING INITIAL DECISION

This proceeding was instituted by an Order of Investigation and Hearing of the Commission served May 25, 1979, to determine the lawfulness of a 4.43% bunker surcharge filed by Matson Navigation Company. The surcharge became effective May 30, 1979 and although scheduled to expire in 120 days was superseded by a 5.90% surcharge effective August 25, 1979, which was made the subject of a separate Commission investigation in Docket No. 79-84. The fuel surcharge applied to all of Matson's tariff commodities with the exception of bulk sugar and molasses from Hawaii to the continental United States, which move under specially negotiated rates. It is this difference in treatment of fuel costs that prompted the Commission to institute this investigation. Specifically, the Commission put at issue:

1. The proper method of allocating Matson's increased fuel costs to the tariffs affected by the proposed bunker surcharge; and
2. Whether the proposed bunker surcharge is unjust, unreasonable, or otherwise unlawful in that it will provide Matson with an amount in excess of its increased fuel costs.

Matson was named Respondent in this proceeding and two of Matson's shippers, Oscar Mayer & Co., Inc. and George A. Hormel & Co. were named Protestants. The Commission's Bureau of Hearing Counsel was also made a party. The State of Hawaii intervened. Documentary submissions were received by Administrative Law Judge Norman D. Kline and an evidentiary hearing was held on July 23, 1979. Further written submissions were received and made a part of the record and an Initial Decision was issued by the Presiding Officer on September 21, 1979. Exceptions to that decision were filed by Respondent, Protestants and Hawaii. Replies to the Exceptions were filed by Matson and Hearing Counsel.

The Initial Decision found the surcharge unreasonable to the extent it exceeded 4.24%. In reaching this finding, the Presiding Officer rejected the methodology utilized by Matson in computing the instant surcharge and adopted that advanced by the Commission's staff as being the most reasonable.[1] The Presiding Officer also rejected Protestants' split-voyage accounting methodolgies as having been disposed of in prior Commission proceedings as well as by Commission General Order 11 (G.O. 11). Hawaii's revenue projection methodology was dismissed as unreliable and its actual experience data was largely rejected save for the data regarding base fuel costs. Finally, the Presiding Officer held that Matson's collection of excess revenues derived from the levying of the 4.43% surcharge could be adequately remedied by applying such excess past recoveries against current fuel costs in any future surcharge (Commission Form FMC-274).[2]

Hawaii's only exception to the Initial Decision is procedural and concerns the modification of initial projections of the carrier with subsequent data of actual experience. It alleges that the Presiding Officer should have based his decision on the submissions of current operational data compiled as of the date of the evidentiary hearing, and in any event should have relied on the data available at the time the direct exhibits of all parties were submitted.

Oscar Mayer's exception advances three arguments: (1) vessel operating expenses must be allocated to segments of a voyage, *i.e.,* split-voyage accounting;[3] (2) interpreting G.O. 11 to require round-trip accounting is contrary to the requirements of section 16 of the Shipping Act, 1916 because an unfair portion of expenses would be allocated to headhaul cargo; and (3) such an interpretation is also contrary to the public interest in that it allows carriers to set commodity rates without regard to the costs of service.

Matson's exceptions reargue its position that the allocation of fuel costs in the Hawaii trade is fair and reasonable and should not be disallowed in favor of the arbitrary allocation methodology advocated by the Commission's staff. Matson contends that it is not seeking an excess recovery of fuel costs, and advises that if the Initial Decision is adopted, it will renegotiate the sugar and molasses carriage contracts to remove the fuel escalation clauses and apply Domestic Circular Letter 1-79 procedure to these commodities. This will allegedly result in these commodities paying less fuel costs and the balance of general cargo paying more.

Hormel excepts to the finding that the procedure prescribed in Domestic Circular Letter 1-79 will automatically adjust the overrecovery of fuel costs in future bunker surcharges. It is argued that Matson will attempt to levy the revenue deficits on general cargo shippers and that the Commission should order Matson to recover this shortfall from the sugar and molasses shippers who have heretofore enjoyed a preferential and prejudicial allocation of fuel

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[1] Matson calculated the cost of unanticipated fuel price increases, from which it subtracted the amount of recovery under the sugar and molasses fuel escalation clauses and assessed the remainder to general cargo on a percentage of revenue collected basis. The Commission's staff, on the other hand, allocated the increased fuel costs between bulk sugar and molasses and general cargo on a measurement ton basis, and charged general cargo its share of these costs on a revenue-collected basis, leaving the remaining fuel costs to be either recouped by the sugar and molasses fuel escalation clauses or absorbed by Matson.

[2] The filing date of this surcharge, April 30, 1979, preceded the effective date of Domestic Circular Letter 1-79, June 6, 1979. However, this surcharge was filed pursuant to Special Permission Nos. 6312 and 6313 which closely parallel the Circular Letter. Also, all subsequent Matson surcharges will be subject to the requirements of the Circular Letter and not the Special Permission.

[3] *Alcoa Steamship Co., Inc.—General Increase in Rates in the Atlantic-Gulf Puerto Rico Trade,* 9 F.M.C. 220 (1966) is cited in support of this proposition.

costs resulting from the contractual fuel escalation clauses negotiated with Matson.

In its reply to exceptions Matson contends that: (1) Hormel's exceptions go beyond the scope of this proceeding; (2) Matson is precluded by Commission regulation from utilizing split-voyage accounting; and, (3) Matson's original data should be utilized in determining the reasonableness of its surcharge.

In its reply to exceptions, Hearing Counsel takes the position that: (1) Matson's "reasonable results" argument and its stated intended treatment of bulk sugar and molasses, should the Initial Decision be adopted, do not justify its unreasonable methodology; (2) Hawaii's procedural suggestions are unworkable; (3) Hormel's refund request is beyond Commission authority although a section 22 complaint would lie; and (4) Oscar Mayer's views on split voyage accounting and the percentage of revenue methodology of the Domestic Circular Letter are contrary to the Commission's regulations.

Discussion

1. *Data Submission*

Reliance on the submission of current operational data collected after an investigation is ordered, as suggested by Hawaii, although theoretically appealing, fails to take into consideration the time limitation imposed by P.L. 95–475 on proceedings under section 3 of the Intercoastal Shipping Act. There is no allegation of a denial of due process with the procedure followed in this proceeding. The procedural methodology in this case was fair, reasonable and fully complied with the intent of Congress in enacting P.L. 95–475. Moreover, it follows Commission policy established prior to the implementation of P.L. 95–475. See *Matson Navigation Company—Rate Increases,* 18 S.R.R. 1441, 1444 (1978); *TMT Corp.—General Increase in Rates,* 18 S.R.R. 1374, 1375, n. 4 (1978).

2. *Split-Voyage Accounting*

The arguments advanced by Protestants in favor of split-voyage accounting and the allocation of expenses on that basis are not convincing. The Presiding Officer was correct in his interpretations of *Alcoa, supra,* the Commission's G.O. 11 and the fundamental transportation economic principles applied to this proceeding. In an imbalanced trade such as is the case with the Hawaii trade, a significant portion of the backhaul leg expenses must be allocated to headhaul cargo. Splitting the voyage expenses would impose transportation costs on backhaul cargo directly related only to the headhaul movement. Moreover, this approach would have an adverse effect on the economic viability of not only the carrier and the backhaul shippers but also on the economy of the State of Hawaii generally.

Oscar-Mayer's exceptions, however, do raise, albeit indirectly, a significant issue regarding Matson's overall rate structure. The pricing system in the Hawaii trade does appear to differentiate in favor of backhaul cargo based upon value-of-service principles at the expense of headhaul cargo. See, *i.e., Matson Navigation Company—Increased Rates,* 18 S.R.R. 649, 657 (1978). However, such rate differentiation has been held to be lawful by the Commission based upon traditional transportation economic theory, *Id.* But, in any event, these considerations are beyond the scope of this proceeding as defined in the Order of Investigation.

3. *Fuel Cost Allocation*

The Initial Decision correctly finds that the most fair and reasonable method of allocating increased fuel costs between general cargo subject to a bunker surcharge and cargo subject to a specific fuel cost escalation clause is on the basis of respective measurement tons carried under the tariff provisions. Under this methodology the two types of cargo bear their fair share of the fuel costs as determined by sound cost of service principles.

Matson advises, however, that if the staff's methodology is adopted by the Commission, it will cancel the fuel escalation clauses applicable to bulk sugar and molasses and apply a surcharge as constructed in Domestic Circular Letter 1-79. This will result in those cargoes bearing an even smaller proportion of the total fuel costs than was required by the escalation clauses and impose an even greater burden on general cargo.

While the Initial Decision is equitable and reasonable, based upon the primacy of cost of service principles in fuel surcharges, unless the surcharge assessment mechanism contained in Domestic Circular Letter 1-79 is modified to reflect these principles, the intended result of this methodology can easily be frustrated in the future. The Domestic Circular Letter was promulgated on an emergency basis under crisis conditions. Under the circumstances the Commission could not reasonably anticipate all the potential operational difficulties that might arise with the application of the requirements of the Circular Letter. It is not surprising, therefore, that the application of the Circular Letter has shown a need for some revisions. Accordingly, while the Initial Decision in this case will be adopted, the Commission will undertake a review of the Domestic Circular Letter to determine what revisions may be necessary to bring the surcharge assessment procedures established in that Circular Letter in line with the principles enunciated in this decision.

4. *Remedies*

The Initial Decision relies completely on the mechanism provided in Domestic Circular 1-79 to adjust the "excess recovery" of fuel costs from commodities subject to this bunker surcharge. This will require Matson to absorb $42,860 in fuel costs by applying these funds to future fuel costs and proportionally reducing the level of subsequent surcharges. As discussed above, the assessment mechanism for such surcharges will have to be modified to some extent to ensure the effectuation of this intended result.

While Hormel's concern that Matson will attempt to evade the effects of this decision by imposing these costs on general cargo shippers is well founded in light of its exception, the Commission can only deal with the specific actions actually presented in this case and cannot order any further remedies solely on the basis of such vague concerns of anticipated actions.

In any event, Hormel's suggestion that Matson be required to assess the misallocation of fuel costs against the bulk sugar and molasses shippers must be rejected as beyond the Commission's statutory authority. Similarly, because the excess fuel cost recovery in this case will be absorbed by Matson in succeeding surcharges, these funds could not thereafter be awarded in a section 22 complaint case as suggested by Hearing Counsel.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding is adopted, and

IT IS FURTHER ORDERED, That the Exceptions to the Initial Decision of Matson Navigation Company, Oscar Mayer & Co., Inc., George A. Hormel & Co. and the State of Hawaii are denied, and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

*Commissioner Leslie Kanuk will issue a separate opinion.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-55

MATSON NAVIGATION COMPANY—PROPOSED BUNKER SURCHARGE IN THE HAWAII TRADE

Adopted November 23, 1979

Respondent Matson Navigation Company filed a 4.43 percent fuel surcharge effective May 30, 1979, later canceled by a 5.90 percent surcharge on August 25. Matson's original evidence, as adjusted to extract foreign cargo, supports 4.39 percent as reasonable. Hearing Counsel's evidence shows 4.32 percent while the State of Hawaii shows 3.87 percent. It is held that:

(1) Hearing Counsel's data, with a slight adjustment, are the most reasonable approximation of costs, being based upon accounting methodologies supported by law and General Order 11.

(2) Matson's allocation methodology using special sugar and molasses contracts is not shown to be reliable or valid.

(3) The State's position that any evidence showing later data should be introduced at any time to decide these expedited rate cases would frustrate the purposes of P.L. 95-475. Matson is entitled to rely upon its original evidence subject to reasonable corrections to eliminate errors in methodology, errors caused by oversight, or to incorporate obviously more reliable evidence.

(4) The State's later evidence, presented as an attachment to its posthearing brief, is untested, unexplained, relies on different time periods, and cannot therefore be found to be reliable in this proceeding.

(5) Any errors in forecasting or in data can be compensated by later adjustments according to the Commission's Form FMC-274.

(6) Protestants, two meat shippers, advocate totally different and unsound split-voyage accounting methodologies, fail to appreciate that G.O. 11 corrects any unfair allocation of costs among domestic shippers, and fail to establish that the percentage per revenue form of surcharge is unreasonable.

(7) Hearing Counsel's and the staff's evidence, as adjusted to utilize more reliable evidence of base fuel cost, shows that the allowable surcharge was 4.24 percent. This later evidence comports with FMC Form-274 and is admittedly more reliable.

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Wayne Minami, Lance Inouye, Barry M. Utsumi, and *R. Dennis Chong,* for intervener State of Hawaii.
John D. Kratochvil, for protestant Oscar Mayer & Co.
Harold M. Finch, for protestant George A. Hormel & Co.
John Robert Ewers, C. Douglass Miller and *Charles C. Hunter*, as Hearing Counsel.

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

This is an investigation begun by the Commission by its Order served May 25, 1979, to determine the lawfulness of a 4.43 percent bunker surcharge which was filed by respondent Matson Navigation Company (Matson) on April 30, 1979, as amendments to several of its tariffs. The surcharge became effective on May 30, 1979, and was supposed to expire in 120 days. However, the surcharge expired effective August 25, 1979, with the filing of another surcharge in the amount of 5.90 percent, which is under investigation in another proceeding, Docket 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, August 24, 1979. The situation giving rise to this proceeding is described in greater detail as follows.

BACKGROUND TO THE PROCEEDING

The subject 4.43 bunker surcharge was filed as amendments to four of Matson's tariffs, FMC Nos. 164, 165, 166, and 167. These tariffs name commodity rates on non-containerizable and containerizable cargoes moving between Pacific Coast ports and the State of Hawaii and for forest products and related articles from Portland, Oregon, and Seattle, Washington, to ports in Hawaii. Since the 4.43 percent surcharge cancelled a previous surcharge in the amount of 3.54 percent which had been in effect since May 7, 1979, the effect of the new surcharge was to increase rates in the amount of .89 percent (4.43 less 3.54). The significance of this fact is that the Commission is not treating the subject surcharge as a so-called "general rate increase" as that term is defined in the amendments to the Intercoastal Shipping Act, 1933, enacted by P.L. 95-475, and the pertinent Commission regulations, General Order 11, 46 C.F.R. §512, and Rule 67, 46 C.F.R. §502.67. Accordingly, among other things, the proceeding is conducted under procedures governing non-general increases in rates with different consequences, such as the fact that the Commission cannot order refunds to shippers with interest as now provided in section 4 of the 1933 Act if it finds the surcharge to be unreasonable and excessive, and the carrier was not required to file the increase on 60-days' notice.

Although the surcharge applied to most of Matson's commodity rates, it did not apply to two of Matson's tariffs (No. FMC-F No. 168 and FMC-F No. 169). These two tariffs name rates for the carriage of raw sugar in bulk from Hawaii Ports to Crockett, California, and for molasses in bulk from Hawaii to Pacific Coast Ports. The reason why the across-the-board percentage surcharge did not apply to these two tariffs is the fact that they contain escalator clauses which increase or decrease rates published therein by a certain amount of cents per ton for each percentage increase in fuel cost. This particularized treatment of sugar and molasses under the escalator clauses is the product of negotiations between Matson and sugar and molasses shippers and has created one of the

[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).

major issues in this case, as I discuss below. The 4.43 percent surcharge, furthermore, is the third of five surcharges which Matson has effectuated this year. The first surcharge in the amount of 1.68 percent became effective on April 4, 1979; the second (3.54 percent) became effective on May 7, 1979; the subject surcharge (4.43 percent) became effective on May 30, 1979; the fourth (5.90 percent) became effective on August 25, 1979. This surcharge, as well as the previous 4.43 percent one, is under investigation in Docket No. 79-84, as mentioned. Finally, a fifth surcharge in the amount of 6.66 percent has been filed to become effective on October 1, 1979.

The subject surcharge was filed on April 30, 1979, with supporting data provided by Matson. The filing triggered two protests which were filed by two shippers of meat and meat products, Oscar Mayer & Co., Inc., and George A. Hormel & Co. These protestants claimed that the 4.43 percent surcharge was unjustified, unreasonable, and inflationary, among other things, and should be ordered cancelled or at least suspended and investigated. The filing also provoked a reaction from the Commission's staff which took exception to Matson's methodology in respect to its treatment of sugar and molasses when calculating the amount of surcharge that should be assessed shippers of other commodities. The staff advocated the use of a measurement ton allocation methodology which it believed to be authorized by the Commission's General Order 11, 46 C.F.R. §512, a methodology which Matson did not employ. The need to resolve this conflict in methodology was apparently a major factor in persuading the Commission to begin this formal investigation.

As a result of the protests and the methodological dispute between Matson and the Commission's staff, the Commission launched this proceeding on May 25, 1979, stating that it believed a hearing to be necessary "in order to resolve the issues specified in the second ordering paragraph below in order to determine whether the general rate increase (sic) is unjust, unreasonable or otherwise unlawful under section 18(a) of the Shipping Act, 1916 and sections 3 and 4 of the Intercoastal Shipping Act, 1933." See Order at 2. The Commission further narrowed the issues by stating that the proceeding was to be limited to the following areas:

1. The proper method of allocating Matson's increased fuel costs to the tariffs affected by the proposed bunker surcharge; and
2. Whether the proposed bunker surcharge is unjust, unreasonable, or otherwise unlawful in that it will provide Matson with an amount in excess of its increased fuel costs.

As is usually the case, these two ultimate issues have generated a number of subsidiary issues. For example, the effect of the Commission's Domestic Circular Letter No. 1-79, effective June 6, 1979 (44 Fed. Reg. 32369; 19 SRR 406), i.e., after the filing of the subject surcharge which establishes certain procedures and reporting forms (FMC-274 and 275) has been the subject of dispute among the parties. More particularly there is disagreement as to whether the provision for overrecovery by a carrier makes the methodology issue unnecessary to resolve. Furthermore, there is also disagreement as to the propriety of using certain means and dates to calculate increased fuel costs which would reduce the 4.43 percent surcharge because of the fact that these means and dates were first enunciated in Domestic Circular Letter 1–79 and Form FMC–274, both of which were not in effect at the time Matson prepared its calculations and justifications for the surcharge. Another dispute involves the use of later data prepared by the State of Hawaii, whose petition for intervention, dated June 12, 1979, was granted by my order on June 21, 1979. The use of such data would serve to reduce the allowable surcharge from 4.43 percent to 3.87 percent if accepted. However, both Matson and hearing Counsel believe that the use of later data or methodologies which Matson could not be expected to utilize or to anticipate leads to inequities. Finally, protestants Oscar Mayer and George Hormel raise novel issues of methodology involving a totally different means of apportioning fuel costs between the westbound leg of the Hawaiian trade and the eastbound leg, as well as contending that the different treatment afforded sugar and molasses shippers under the negotiated contracts and escalator clauses is unjustly preferential and discriminatory. These issues will be described in greater detail below.

Procedural Developments

Since the investigation is governed by Rule 67 (46 C.F.R. §502.67) under the provisions relating to non-general rate increases, the parties were instructed to exchange their written cases with underlying workpapers no later than 20 days after May 30, 1979, the effective date of the subject surcharge. The hearing was to close no later than July 29 (60 days after the effective date of the surcharge) and my initial decision was ordered to be served 60 days thereafter (September 27, 1979). A slight delay ensued as a result of the filing of a motion to dismiss by Matson. Matson filed its motion on June 7, 1979, in the belief that this proceeding would become moot because of its filing of a new surcharge and its willingness to utilize the methodology advocated by the Commission's staff and Hearing Counsel in order to effectuate a settlement. When the filing of the new surcharge on June 5, 1979, scheduled to become effective in early July, was rejected for technical reasons and Hearing Counsel as well as other protestants opposed dismissal, Matson withdrew the motion. See Notice of Withdrawal of Motion to Discontinue, June 21, 1979. Under a revised procedural schedule which was necessitated by the pendency of the motion and possibility of settlement, the parties exchanged their cases on June 27, prehearing statements and supplemental exhibits on July 6, and a prehearing followed by a hearing occurred on July 23, 1979. Further evidence necessary to complete the record was furnished by Matson and Hearing Counsel in response to my instructions and requests of the State of Hawaii by early August. See Admission of late-filed Exhibits, August 8, 1979. The parties filed their opening briefs on August 3 and reply briefs on August 15, 1979. See Notice of Post-Hearing Briefing Schedule, July 25, 1979.

Findings Of Fact

Because the facts in this case are so interwoven with the issues and discussion of applicable law, it is more appropriate to set them forth in the discussion and resolution of the issues. However, for a good general summary of critical facts those proposed by Hearing Counsel in their Opening Brief, with some modifications, should be consulted.[2] However, since the issues are somewhat technical and complex, the basic facts can perhaps be better appreciated after discussion and resolution of the issues.

DISCUSSION AND CONCLUSIONS

The Methodology Issue

The two ultimate issues as framed in the Commission's Order are:

(1) What is the proper methodology to be used in allocating Matson's increased fuel costs to shippers utilizing the four non-sugar and molasses tariffs cited above; and

(2) Will the subject surcharge provide Matson with an amount of revenue in excess of its increased fuel costs and thereby be unjust, unreasonable, or otherwise unlawful?

These two issues, as I have indicated, lead to a number of subsidiary issues dividing the parties. Because of the time constraints imposed by the amendments to the Intercoastal Act, 1933, as effectuated by P.L. 95–475, and the pertinent regulations, it is necessary to decide these complex issues expeditiously and it is impossible to consider and explore their many complexities and nuances at a more leisurely pace. In order to expedite the process and get directly to the essence of these issues, I believe the tables set forth below in this decision will be helpful since they will graphically illustrate the differences among the parties and facilitate an understanding of the issues.

As Matson has stated in its reply brief at page one, no party opposes in its entirety the imposition of the 4.43 percent surcharge under investigation. No party has disputed the fact that Matson has endured continual increases in costs of fuel for which its normal rate structure is not designed and that Matson has consequently been forced to resort to periodic rate adjustments in the form of surcharges in an effort to recover these uncontrollable costs. The objective of all the parties is not to deny Matson a fair and reasonable means of recovery but to determine what is a fair and reasonable means of recovery and how is it to be determined. On the means to devise a recovery and on the estimated results of the recovery the parties divide. Thus, Matson calculates that it needed 4.39 percent, after making adjustments to exclude foreign cargo (a concession from 4.43 which it originally advocated). Hearing Counsel (and perhaps George A. Hormel) and the Commission's staff believe that Matson only needed a 4.32 percent surcharge. The State of Hawaii believes only 3.87 percent was necessary. Oscar Mayer believes Matson has failed to justify anything near 4.43 percent because of its failure to assess eastbound shippers more equally in relation to westbound shippers.

In a nutshell, Matson, Hearing Counsel, and the state utilize the same simple ultimate formula to determine the permissible level of surcharge. Very simply,

[2] As will be apparent, however, I do not agree with Hearing Counsel's position that base unit cost of fuel should be $10.48 as proposed by Matson.

they estimate the amount of additional fuel costs which Matson is entitled to recover by a surcharge. Then they estimate the revenue which Matson should derive during that period of time which the surcharge was to be in effect. The first figure (estimated costs) divided by the second (estimated revenue) gives us the percentage for the surcharge. In calculating these basic figures, these three parties began with Matson's estimate of $2,928,156 as additional fuel costs for the four-month period (May 30 through September 30, 1979). Then each of the parties reduced that estimated figure by using different methodologies and applied the reduced figures representing their estimates of fuel costs against their own calculations of estimated revenue. In large measure, Hearing Counsel and Matson agree on basic figures but disagree on one area of allocation methodology. The State departs from both Hearing Counsel and Matson substantially by using different data as well as its own methodologies. The following table shows the basic figures and will aid in understanding the nature of the dispute.

Basic Figures Used To Derive The Parties' Recommended Surcharge Percentages

$2,928,156—Matson's original estimated additional fuel costs reduced as follows:

Matson	*Hearing Counsel*	*Hawaii*
$ 2,792,984	$ 2,749,538	$ 2,557,493
Estimated revenue base:		
$63,617,200	$63,617,200	$66,000,000
Resulting surcharge by dividing reduced rates by revenue base:		
4.39%	4.32%	3.87%

The key to understanding the nature of the disputes among the three parties whose figures are shown in the above tables is a more detailed explanation showing how they each reduced Matson's originally proffered figures estimating additional fuel costs and how they changed the estimated revenues (actually only the State disputes Matson's estimated revenue figure). These changes are the result of different methodologies used to allocate the portion of fuel costs that should be borne by non-sugar and molasses shippers. Matson and the State choose to deduct revenue derived from sugar, molasses and foreign cargo from the original figure and use the remaining net figure as the numerator in their formula.[3] Hearing Counsel and the Commission's staff use the measurement ton ratio to deduct that portion of the gross figure represented by the measurement tons of sugar, molasses, and foreign cargo. The State also arrives at its net figure of recoverable fuel costs by modifying the unit costs of fuel and estimated barrel consumption, modifications which Hearing Counsel and the Commission's staff do not support. Finally, the State changes the estimated revenue figure by use of different data.

[3] However, even the State and Matson use the measurement ton ration methodology to exclude foreign cargo moving to the Marshall Islands.

In addition to the issues regarding the use of the contractual recovery for sugar and molasses rather than the measurement ton ratio advocated by Hearing Counsel and the Commission's staff, there is a fundamental issue arising out of the fact that the State has introduced data submitted in connection with later increases and later methods of calculation which were not made mandatory by the Commission at the time Matson prepared its written justification for filing on April 30, 1979. Both Matson and Hearing Counsel believe that it would be inequitable to impose upon Matson changes resulting from later data and methods when Matson had followed staff directions consistently and had relied upon them in filing not only the subject 4.43 percent surcharge but two previous surcharges this year which were not investigated. The State, however, argues that I and the Commission can rely upon methodological refinements and facts which were not available when Matson submitted its justification on April 30 and that we should consider all relevant and properly noticeable facts available prior to decision. Furthermore, the State argues that in calculating base unit fuel cost, we are free to use the methodology enunciated in the Commission's Domestic Circular Letter 1-79 because it is more reasonable than Matson's calculation regardless of the date of issuance of that Letter.

Of the three calculations of additional fuel costs, estimated revenue, and recommended permissible levels of surcharge, I find that the most reasonable approximation is that of Hearing Counsel and the Commission's staff.[4] Hearing Counsel's calculations are not only based upon reliable evidence for the most part but they correct a basic flaw which affects both Matson's and the State's calculations, namely, the device of allocating the burden of surcharge to non-sugar and molasses shippers by the use of the escalator clauses in the special sugar and molasses contracts.

The first ultimate issue in this case and indeed perhaps the major reason for the case is the question whether Matson's (and now the State's) allocation methodology is proper rather than that advocated by Hearing Counsel and the staff. For a number of reasons, I find that the staff's methodology is indeed more proper. It is firmly rooted in long-standing procedures established by the Commission's General Order 11, 46 C.F.R. §512. It recognizes that the additional fuel costs are joint costs which must be shared by all shippers on the same vessel in an across-the-board fashion. It recognizes the relationship between tons carried and additional costs of fuel. It avoids the pitfalls of utilizing special types of recovery for particular cargoes which appear to be discriminatory or preferential and were based upon negotiations which establish no such clear relationship between fuel costs and rate increase. It avoids argument over how much recovery should be calculated under the sugar and molasses escalator clauses (which the State's calculations create by inflating Matson's figures for such recovery). Finally, it corrects the effect of the use of the special sugar and molasses contracts by ensuring that all shippers will bear an even share of additional fuel costs based upon number of tons carried rather than relying upon the guesses of Matson and the sugar-molasses shippers as to how much additional revenue they should contribute in case of sudden increases in fuel

[4] I do, however, make one adjustment to Hearing Counsel's calculations relating to Matson's base unit cost of fuel, as I discuss later.

costs based upon a formula in special contracts whose derivation is unknown. Ironically, although the State's calculations use the Matson methodology of subtracting additional sugar and molasses revenue under the contracts to derive net additional fuel costs allocated to other shippers, even the State, in its brief, supports Hearing Counsel and the staff's method, stating:

> The State of Hawaii agrees with Hearing Counsel that measurement ton basis for allocating fuel costs is preferable to the use of contract fuel escalation provisions. The use of the measurement ton as a neutral variable removes an unnecessary, and unwarranted, challenge to the equitability of the allocation.

Hawaii, Opening Brief at 16.

Moreover, even Matson as well as the State have swung over to the measurement ton allocation method when removing foreign (Marshall Islands) cargo from the calculations to determine the portion of costs to be allocated to domestic shippers.

The entire allocation issue between sugar/molasses and general cargo shippers should have been unnecessary as Hearing Counsel note in their reply brief. It would have been far more simple and proper for all Matson's domestic shippers to bear the additional fuel costs evenly according to the volume of tons they shipped and allocation should only have been necessary to break out the minuscule portion of cargo which Matson carries to the Marshall Islands, which amounts to only .78 percent of all measurement tons carried by Matson from June through September 1979. Matson Reply Brief at 3. However, as Matson itself acknowledged in its opening brief:

> (I)f there were no fuel oil cost escalation provisions in Matson's molasses and sugar freight agreements and they were subject instead to the same bunker surcharges as all other commodities, there would be no allocation issue.

It is my opinion that any evidence or methodology presented by any party which is based upon reason, precedent, or some other test of reliability, should be accepted unless those parties advocating a different system, methodology, or evidence show that they are more reasonable and more reliable. Merely to present an alternative system does not mean that the first system or evidence should be discarded. The alternative must be superior and should be shown to be with reasonable certainty.

In this instance Matson is presenting an alternative system to that prescribed by the Commission's General Order 11, namely, an allocation method based not upon tonnage ratios but upon an arbitrary division among cargoes based upon specially-negotiated contracts with certain shippers. Very simply, Hearing Counsel have determined that general cargo carried by Matson in the Hawaiian trade consists of 93.90 percent of all cargo in measurement tons carried in Matson's combination vessels, i.e. vessels carrying general domestic cargo, sugar and molasses, and cargo to the Marshall Islands. See Attachment 1 to Hearing Counsel's Opening Brief. Therefore, according to Hearing Counsel and staff, shippers of general cargo in the Hawaiian trade should bear 93.90 percent of the additional fuel costs. Matson (and curiously the State in its calculations but not in its argument on brief as I have noted above) use a different ratio. Thus, Matson would allocate to general cargo shippers

95.38 percent of the additional fuel costs, not 93.90 percent. This percentage is not derived by determining the volume of tons carried for general cargo shippers as was Hearing Counsel's and the staff's. Rather the percentage is derived by determining how much cost is left for general cargo shippers after deducting estimated increases in revenue to be gained by the sugar and molasses escalator clauses. Thus, a ratio is derived which is not based on tons but merely on use of revenue recovery under special contracts. But even so, Matson (and the State) are not consistent because they throw in a measurement ton allocation together with the escalation revenue clause to arrive at their percentages. The following table illustrates graphically how Matson's allocation percentage differs from Hearing Counsel's.

DOMESTIC GENERAL CARGO
ALLOCATION PERCENTAGES—HOW DERIVED

Hearing Counsel		*Matson*	
Total MTs	3,352,583	Total fuel costs	$2,928,156
Less MTs of sugar/molasses and foreign cargo	178,271 26,316	Less sugar/molasses escalated revnue	112,332
		Less Marshall Islands Allocated Costs on MT Basis	22,840
Domestic General Cargo MTs	3,147,996	Domestic Cargo Costs Remaining	2,792,984
Ratio of Domestic MTs to Total	$\frac{3,147,996}{3,352,583}$	Ratio of Domestic Costs of Total Costs	$\frac{\$2,792,984}{\$2,928,156}$
Percentage	93.90%	Percentage	95.38%

Notice two significant features from the above table. First, Matson has determined what portion of total costs should be allocated to domestic general cargo shippers merely by deducting revenue recoveries under sugar/molasses contracts and other recoveries from Marshall Islands cargo. But the validity of such a method depends upon the validity of the formula used in the sugar/molasses contracts, which, as I mention below, merely determines that rates will increase by a certain number of cents per ton when fuel increases by a certain percentage. Hearing Counsel's method, on the other hand, corrects the special treatment afforded to sugar/molasses shippers, in effect, by putting everyone on a measurement ton basis. In other words, the general cargo shippers are allocated a portion of costs in relation to the volume of measurement tons they carry.

The second curious defect in the Matson system is that even Matson abandons the revenue-recovery-under-escalation-clauses-system in respect to the Marshall Islands cargo. Note that the figure which Matson has derived for such cargo ($22,840) is derived by applying the measurement ton ratio to total fuel costs (.78 percent times $2,928,156). Matson thus uses Hearing Counsel's methodology. But in so doing, it derives a cost figure, not a revenue figure, which it throws in with a revenue figure derived from the escalation clauses in the sugar/molasses contracts ($112,332) and uses both to subtract from total fuel costs. So Matson not only uses Hearing Counsel's methodology itself with respect to Marshall Islands cargo but mixes it with the sugar/molasses revenue recovery under the escalation clauses. Since the State also uses the method of subtracting escalated revenue under the sugar/molasses contracts (and even inflates the amount of recovery from $112,332 estimated by Matson to $270,863), it also uses a defective methodology although, as I have said, on brief, it argues that the measurement ton ratio is more reasonable and fair. Even without further discussion illustrating the weaknesses and pitfalls of Matson's and the State's use of the escalation-clause revenue recoveries, the above curiosities should alone convince anyone that Matson's and the State's method of apportioning fuel costs to domestic general cargo shippers is at best strange and at worst unreasonable, unwarranted, and dangerously discriminatory. However, as I mentioned above, there are other reasons which demonstrate that the Matson methodology ought to be discarded and that the measurement ton method is far more reasonable.

If it is necessary to allocate expenses between one group of shippers and another, then joint expenses should be allocated by the tonnage ratio method. This principle has long been established with the Commission. In 1966 it was emphatically held in *Alcoa Steamship Co., Inc. General Increase in Rates in the Atlantic Gulf Puerto Rico Trade,* 9 F.M.C. 220, that joint costs should be allocated on a ton-mile ratio basis. (The carrier in that case had advocated a split-leg day basis combined with a revenue basis, which method was rejected by the Commission.) The ton-mile basis has been the prevailing method of allocation before the Commission before and after the *Alcoa* case. Moreover, it is codified by the Commission's General Order 11, 46 C.F.R. § 512. Section 512.7(c)(2)(i) of that General Order states:

> Vessel expense shall be allocated, where an allocation is necessary, to The Trade in the Revenue Ton Mile Relationship. This procedure will be required for all Voyages in the Service. Should any of the elements of Vessel Expense be directly allocable to specific cargo, such direct allocation shall be made and explained.

General Order 11 recognizes that some expenses may be assigned directly, as the above quotation demonstrates. However, if a direct assignment is made, there must be a justification or explanation which shows that the expense directly relates to the service or revenue-producing activity and is not a joint cost to be shared by all ratepayers. Hearing Counsel provides two examples of expenses that can be directly assigned, namely, advertising and port costs. H.C. Opening Brief at 8, 9. For example, if Matson served two trades, Hawaiian and Guam, its advertising pertaining solely to the Guam trade could be directly assigned to that trade to be borne exclusively by Guam shippers. Or, if Matson carried cargo destined to the Marshall Islands, port costs incurred by cargo at the Islands could be directly assigned to that cargo. As General Order 11, *Alcoa, supra,* and Hearing Counsel's staff expert witnesses, Mr. Walker, all confirm, fuel costs on vessels carrying a variety of cargo, namely, sugar, molasses, general, Marshall Islands, are joint costs which are shared by all of the cargo moving on the vessel. Under such circumstances, the proportionate expense for fuel and other vessel operating expenses that should be borne by any one group of cargo varies according to the volume of cargo carried. (In Matson's case, the measurement ton ratio has been utilized with the approval of the staff in lieu of revenue tons since January 7, 1976.) Ex. 5 at 3; H.C. Opening Brief at 11, n. 1. Clearly it is settled that there is a correlation between vessel expense and volume of tonnage handled. But Matson wishes to substitute a different method of direct assignment of fuel cost to its sugar and molasses cargo even when carried on the same vessels as other types of cargo.

There is nothing in the record to persuade me that either in principle or in actual fact this alternative method is reliable. The tonnage ratio method has survived the test of time and is accepted by Matson itself elsewhere in Matson's General Order 11 filings (and, as noted, in the Marshall Islands allocation). Furthermore, Matson's alternative method, which is based upon negotiated contracts which establish that rates will increase by a fixed amount of cents per ton when fuel costs increase by a fixed percentage, shows no evidence of correlation between fuel costs and rate increases. The record does not explain how the fixed escalation clause figures were derived nor what principles of costs accounting were followed. But we do not need to rely merely upon lack of explanation or justification for the alternative methodology to determine that it must be rejected. There are positive fallacies attached to it, as Hearing Counsel have noted. H.C. Opening Brief at 9–10.

The fixed escalation clauses in the sugar and molasses contracts show no evidence of considering changes in total volume of cargo carried, changes in vessel speed, or alterations in vessel scheduling. By merely stating that rates will increase by so many cents when fuel increases by so much of a percentage, there is no accounting for increased fuel costs which shippers would have to bear if volume of cargo diminished but the number of sailings remained the same. Similarly, if the vessels increased speed or triangulated vessel routing, thereby consuming more fuel, the fixed escalator clauses would not reflect the increases in fuel costs stemming from these factors. But these factors, i.e., changes in volume of cargo, vessel speed and itineraries were considered by Matson when determining the level of surcharge which non-sugar and molasses shippers would be assessed. Tr. 96, Kane. This discussion suggests that there may be dangers inherent in the different treatment afforded one type of shipper (sugar and molasses) and the other type (domestic general cargo). The danger is not merely theoretical, i.e., that the recovery under the fixed clause *may* be too low with consequent additional burden thrust upon general cargo shippers. The record quantifies this concept by application of the tonnage allocation methodology. It shows that domestic general cargo shippers are asked to shoulder an additional $42,860.

Matson's main witness, Mr. Christopher A. Kane, Manager-Pricing, opposed Hearing Counsel's and the staff's position which he believed would tamper with Matson's dual system of recovery under the escalator clauses by cents per ton and recovery from general cargo shippers by percentage of rates.

He believes that Matson was bound by its contracts with the sugar and molasses shippers. Tr. 94. However, no one is telling Matson that it must breach its contracts for the period during which they were or are in effect. If Matson wishes to recover only a limited amount of additional fuel costs from these sugar/molasses shippers as calculated under the contracts, that is Matson's business and, indeed, this is a contractual obligation. But as Hearing Counsel assert and, I believe, correctly, Matson's adherence to its contractual obligations should not result in extra burdens being thrust upon domestic general cargo shippers. Matson and the contract shippers have estimated in some fashion how much more money these shippers should pay in the event of fuel increases. If their estimates are too low, as they are shown to be by the tonnage allocation methodology, why burden the other rate payers by casting the deficit upon them? If Matson wishes to guarantee sugar and molasses shippers a fixed escalation limit, there may be no harm, discriminatory though the practice may be,[5] provided that general cargo shippers do not pick up the tab in case of low recovery. I therefore agree with Hearing Counsel and the staff that the additional $42,860 which general cargo shippers were being called upon to pay, should be absorbed by Matson. This is the price which Matson must pay for deciding to rely upon a specially negotiated arrangement with particular types of shippers.[6] If it tires of absorbing costs because of wrong estimates or formulas in its contracts, Matson can renegotiate the contracts and place sugar and molasses shippers under the same type of recovery as all other domestic general cargo shippers. (Mr. Kane testified that these contracts are periodically renegotiated.) If so, all shippers could pay on a percentage surcharge basis rather than some paying by percentage and others by cents per ton, as under Matson's present system, thus removing the apparent discriminatory treatment among different shippers.[7]

[5] I do not reach the basic question whether Matson's system of negotiating escalator clauses in special sugar and molasses contracts is an unreasonable practice per se. Perhaps it is only unwise rather than illegal although the formula reached by negotiation seems unrelated to so many factors influencing costs of fuel. If the other shippers are not called upon to pick up deficits resulting from these negotiations, the only harm would be to Matson which would have to absorb the deficits itself. However, as I discuss in the body of the decision, Matson can always renegotiate the contracts and place sugar/molasses shippers on the same percentage surcharge basis by using form FMC-274 so as to avoid future problems of underrecovery or overrecovery.

[6] The price is really a rather small one to pay. If Matson absorbs $42,860, rather than passes it on to the domestic general cargo shippers, it absorbs this amount out of an estimated $63,617,200 revenue for the four-month period June through September 1979. In other words, the absorption is only seven-hundredths of one percent of revenue (.07 percent; $42,860 divided by $63,617,200).

[7] Matson has attempted to justify its recovery under the contractual clauses by contending that the actual recovery on a cents per ton basis translates to a percentage increase of 7.54 and 5.67 for sugar and molasses respectively and that the sugar and molasses rates are FIO (free in and out) respectively. FIO rates mean that the shippers pay for loading and unloading, i.e., stevedoring costs, and the carrier pays for vessel costs and other costs associated with line-haul transportation than cargo handling. Matson claims that FIO rates are more associated with fuel costs so that the higher percentage increase is understandable and in fact shows that sugar and molasses shippers may be paying more than a proper share, in other words, they may be "to some degree subsidizing" general cargo. Exhibit 1 at 5, 6 (Kane). Finally, Matson claims that Hearing Counsel's methodology would require Matson to convert its bunker surcharge assessment to a measurement ton basis. None of these contentions justifies Matson's use of its special contracts so as to burden general cargo shippers with an additional $42,860. The fact that recovery under the special contracts can be converted to a 7.57 and 5.67 percentage of rates (rather than 4.43 for general cargo shippers) does not necessarily mean that sugar and molasses shippers are paying more than they should. Even Matson argues that they are not. It may merely mean that the FIO sugar and molasses rates, like FIO rates generally, are lower than regular rates because the shippers pay cargo handling. (Indeed, they appear to be only $9.11 and $4.06 per ton according to Exhibit 1, "Exhibit 2.") Therefore, additional recovery is divided by a smaller base rate. More importantly, however, the measurement ton methodology, which Matson uses everywhere else in its G.O. 11 filings, shows that sugar and molasses are underpaying by $42,860. Finally, as Hearing Counsel correctly state (H.C. Opening Brief at 13) use of the G.O. 11 methodology does not require Matson to convert to a measurement ton basis in assessing sugar and molasses shippers. It only determines how much general cargo shippers should be required to pay on a percentage-of-rates surcharge basis. In other words, if Matson insists on continuing to use escalation clauses in special sugar and molasses contracts, the G.O. 11 methodology will ensure that general cargo shippers are assessed only their proper share. It will not otherwise affect the special contracts.

The Issue of the Proper Level of Surcharge

The preceding discussion involved a dispute primarily between Matson and Hearing Counsel (and the Commission's staff) on allocation methodology. To the extent that the State relied upon Matson's escalation-clause recovery method, the State would therefore also be in error. The remaining discussion centers upon the question as to whether the subject 4.43 percent surcharge was unreasonable because it was excessive and overrecovered costs. Because of Matson's and the State's departure from use of the G.O. 11 allocation methodology, this question has to some extent already been answered. As shown in the previous tables, after correction of Matson's data favoring the 4.43 percent surcharge, by application of G.O. 11 methodology, as adjusted by removal of Marshall Islands cargo, the proper level of surcharge would be 4.32 percent. In virtually every other respect, Matson and Hearing Counsel agree on figures and on the general methods now codified in FMC-274, by which percentage of surcharges are to be determined. However, the State disagrees with both Matson and Hearing Counsel in several significant ways and believes that the proper level of surcharge should only be 3.87 percent. I have examined the State's contentions and find them to be less persuasive than those of Matson and Hearing Counsel with one exception.

The State's Position Analyzed

As seen from the tables previously set forth in this decision, the State departs from Matson's supporting data to a much larger extent than did Hearing Counsel. Thus, the state reduced the amount of recoverable additional fuel cost from $2,928,156, as originally proffered by Matson, to only $2,557,493 (almost 200,000 lower than Hearing Counsel's and the staff's final calculation of allowable recovery). Furthermore, although Matson and Hearing Cousel agree on the estimated four-months' revenue base against which the above $2 million cost is to be applied to derive a reasonable percentage of surcharge, the State contends that the revenue base is significantly larger, specifically $66,000,000, rather than $63,617,200, the figure which both Matson and Hearing Counsel support. Therefore, contends the State, the allowable surcharge should have been only 3.87 percent, not 4.43 percent or 4.32 percent ($2,557,493 divided by $66,000,000). The State calculates these figures by using its own methodologies. If, as I find, for the most part, these methodologies have not been shown to be more reliable than Hearing Counsel's, then the State's ultimate figures cannot be accepted. I now examine these methodologies.

The State reduces the figure for allowable additional cost from that proffered by Matson by employing Matson's system of deducting recovery as calculated under the escalation clauses in the sugar and molasses contracts, modifying Matson's figures showing unit increases in fuel cost, and adjusting for Marshall Islands cargo. I have already explained why the method of deducting the recovery under the contracts is unreliable and need not repeat my discussion. I note, however, that the State has inflated the amount of recovery under those contracts from $112,332, which Matson shows, to $270,863. This alone illustrates one of the problems in utilizing the Matson method, namely, the additional arguments which it creates because one has to estimate the amount of recovery under these contracts before arriving at allowable recovery allocated to non-sugar and molasses shippers. Since, under G.O. 11 methodology, the amount of recovery under sugar and molasses escalation clauses is irrelevant, the dispute between the State and Matson is likewise irrelevant.[8] However, even if relevant, as Matson contends, the State may have inflated the original figure by employing figures supplied by Matson for a later period and a later surcharge. Matson Reply Brief at 10–11. And, as Hearing Counsel note, the State may have included revenue from the Matson vessel *Kopaa* incorrectly. H.C. Reply Brief at 7. Again, this illustrates the problem with Matson's and the State's methodology since there is additional uncertainty or dispute over the amount of recovery under the special contracts which must be resolved if that methodology is to be used.

The State also reduces the amount of additional fuel recovery by changing Matson's figures showing the additional unit cost of fuel per barrel of $6.04 per barrel, as shown by Matson (and accepted by Hearing Counsel and the Commission's staff) to only $4.88 per barrel. The State does this by raising the base unit cost from $10.48 per barrel to $10.59 and lowering the "present" unit cost from $6.52 to $16.47. It also changes estimated fuel consumption by removing Marshall Islands cargo by means of the measurement ton allocation methodology. The following table shows how the State restated Matson's data:

FUEL SURCHARGE JUSTIFICATION AS RESTATED BY THE STATE

Line No. (1)	*Description* (2)	*Matson* (3)	*Restated* (4)
1	Base Unit Cost of Fuel	$ 10.48	$ 10.59
2	Present Unit Cost Fuel	16.52	16.47
3	Fuel Cost Differential	6.04	5.88
4	Estimated Consumption for Next Four Months	484,794	481,031*
5	Recoverable Fuel Costs	2,928,156	2,828,356
6	Recovery from Sugar and Molasses Contract on Combination Vessels	112,332	270,863
7	Unrecovered Fuel Costs	2,815,824	2,557,493
8	Revenue Base for Calculating and Surcharge	63,617,200	66,000,000
9	Surcharge Percentage	4.43%	3.87%

*Hawaii Service allocation (99.22%) of 484,794 barrels fuel consumption; reference Matson late-filed exhibit, Exhibit 8E.

I have no problem with the State's adjustment for removal of fuel cost allocable to Marshall Islands cargo. This was done by the State and indeed by Hearing Counsel and Matson by applying the measurement ton ratio for that foreign cargo (only .78 percent, as noted previously). As I explain later, I have

[8] The only value in determining recovery under the escalation clauses is to determine how much of an underrecovery results and how much additional cost will be cast onto general cargo shippers. This amount is $42,860, as shown by comparing recovery under the clauses with the measurement ton calculation.

little problem accepting the State's figure for base unit cost of fuel ($10.59 per barrel) which relies upon later and more reliable evidence, accords with the Commission's subsequent formula established by Domestic Letter 1-79 and FMC-274, and is opposed by Matson and Hearing Counsel mainly upon equitable grounds, not because it is unreliable. However, the State's restatement of "present" fuel cost ($16.47 per barrel) I have trouble accepting.

The State reduces the "present" or "effective" cost of fuel by five cents (from $16.52 to $16.47 per barrel) because it believes that Matson's (and Hearing Counsel's) figure reflects only a quoted cost on May 16, 1979, and previous study shows that quoted costs run about five cents higher than actual costs. The problem with this approach is that the "present" or "effective" cost of $16.52 does not in reality appear to be a figure merely quoted on that one day and secondly, the study upon which the State relies, which the State believes to show that the present quoted rates are higher than actual costs is a study going back to December and January of 1978-1979.

Matson's original filing on April 30, 1979, with the staff also shows a figure of $16.52 per barrel for "present" unit cost of fuel. The supporting papers show, however, that this figure was a weighted average cost between San Francisco and Los Angeles and reflected a series of continual increases in fuel and barging costs occurring between December 1978 and May 1979. Ex. 1, notes to "Exhibit A." Even the State's witness, Mr. Simat, states that this cost "is reasonable if adjusted for the small differences noted between quoted rates and the recorded costs of purchasing." Ex. 4 at 8. Then Mr. Simat reduces the present unit cost by five cents. *Id.* These "small differences noted" are shown in Hawaii's "Exhibit No. 4" attached to Exhibit 4. This exhibit does show that on four days in late December and early January of 1979 (December 27, 28, 29; January 2), quoted ("effective") prices were higher than what Matson apparently actually paid at that time. I do not know, however, whether this situation continued to prevail beyond early January 1979. Furthermore, even during the four dates shown on the exhibit, the amount by which the quoted (so-called "effective" price) exceeded apparent actual price varied widely from as low as 1.1 cent on December 29, 1978, to 7.3 cents on December 28, 1979. I cannot therefore find that the State's evidence based on those four days is so reliable and indicative of a consistent trend that I can accept Mr. Simat's decision to reduce Matson's (and Hearing Counsel's) "current" figure of $16.52 per barrel by five cents and reject that figure which Hearing Counsel and the Commission's staff had accepted apparently on the basis of the original submission on April 30, 1979, with its supporting data. I note furthermore that since we are dealing with an ongoing series of surcharges (the subject surcharge, which has already been superseded, being only the third of a series of five this year) any error favoring Matson at this time is subject to correction because of line 7 of FMC-274. In other words, if it does in fact develop that Matson and Hearing Counsel were wrong in estimating "present" unit cost of fuel at $16.52 per barrel, later submissions will show what the actual cost was and if $16.52 was too high an estimate and Matson consequently overrecovered, a subsequent adjustment had to be made when filing the later surcharges with a reducing effect on later surcharges. While not a perfect solution to the problem, if it is a problem, line 7 is a partial remedy.

As I discuss below, however, the base unit cost which the State changed from $16.48 to $10.59 per barrel is a change which I find acceptable because it is clearly more reliable. This will result in a slight adjustment to Hearing Counsel's exhibits which I otherwise find to be reasonable and reliable, which adjustment I will discuss later.

The final significant change which the State would make to Matson's and Hearing Counsel's exhibits relates to the revenue base. The State estimates that Matson would derive $66,000,000 in revenue during the four-month period June through September 1979, whereas Matson and Hearing Counsel estimate $63,617,200. If the State's estimate is more reliable, obviously Matson's use of a 4.43 percent surcharge would result in significant overrecovery since Matson stood to derive approximately $2.4 million in extra revenue against which the surcharge could be applied.

The State originally inflated Matson's estimated revenue to $67,155,000. This was based upon Matson's original data showing an estimated increase in fuel consumption of 10.68 percent over the equivalent period in 1978. From this the State assumed that additional revenue would flow. Ex. 4 at 10; Tr. 120. There is no persuasive evidence in the record which would establish that revenue must necessarily increase if fuel consumption does. Or if there is some correlation, there is no showing as to how much revenue should increase in proportion to an increase in fuel consumption. As Hearing Counsel note (H.C. Opening Brief at 19), the theory assumes no change in efficiency. However, any number of factors could cause an increase in fuel consumption without affecting revenue to a corresponding degree. For example, additional voyages could be scheduled, vessel itineraries or speed could be altered, but with little additional cargo. If so, revenues might rise slightly but not in proportion to increases in fuel consumption. Mr. Simat's theory of revenue projection based upon fuel consumption may have merit but it is too incompletely developed to recommend it in this proceeding. More importantly, however, it is irrelevant because Matson revised its estimated fuel consumption to reveal that the number of barrels to be consumed would be virtually identical (35 more barrels) to those consumed during the equivalent period in 1978. Ex. 2, "Exhibit 3." Therefore, the State stopped applying this theory and accepted Matson's estimated number of barrels consumed (484,794) as adjusted to remove Marshall Islands cargo, although expressing some doubt about the figure as being "not consonant with other indications of an increasing volume of capacity and service." Hawaii Opening Brief at 15. Nevertheless, the State revised its original revenue projection downward to $66 million.

Having discontinued use of the fuel-consumption theory to project future revenue, the State relies upon other factors in revising Matson's (and Hearing Counsel's) revenue base. For example, it contends that Matson increased its rates three times to aggregate 6.75 percent over the equivalent 1978 four-month period. Then it contends that Matson's actual revenues are usually shown to be higher than Matson's forecasts, judging from later Matson submissions in other cases. The State does not believe that these factors have been adequately considered by Matson.

As in the case of the allocation theory issue discussed earlier, if a party suggests that one theory or fact is less reliable than another, then such party ought to show that the second theory or fact is superior or more reliable before expecting the first one to be rejected, assuming the first theory or fact is based upon reason, precedent, or reliable evidence. In this case, the bases for Matson's and Hearing Counsel's estimate of $63,617,000 were explained by witnesses Miggins for Matson and Walker for Hearing Counsel. See Exhibit 9, Miggins; exhibit 10 (Walker). It is true that these exhibits came into the record after the hearing and at my request. See Order to Supplement the Reocrd, July 27, 1979. This situation may have occurred because the Commission's staff took no issue with Matson on its revenue projection and therefore made no request on Matson to submit formal explanations in testimonial form for the record and for cross-examination. However, the State does challenge Matson's projection and consequently I instructed both Matson and Hearing Counsel to fill in the record so that it would show the bases for those projections. Ideally, this evidence should have been presented before the close of the hearing so that cross-examination could have been utilized. However, the press of time under the newly mandated rapid procedures makes it difficult to develop every facet of the record as thoroughly as was the custom under the previous more leisurely procedures. In any event, no party objected to the admission of the post-hearing exhibits of Messrs. Miggins and Walker and they have provided the necessary explanations.

Without going into the details which are contained in exhibit 9, Matson's method is essentially a forecast of cargo volume based largely upon customer contacts conducted by its regional sales offices. See Ex. 10. Preliminary forecasts from these offices are transmitted to Matson's main offices in San Francisco where they are combined to arrive at projected cargo volume. Matson applies historic revenue figures for different classes of cargo and multiplies those figures by the forecasted cargo volume for each class of cargo. The regional sales managers moreover, in submitting their volume forecasts to San Francisco, not only make customer contacts but evaluate the competitive situation, analyze economic trends, and review past customer performances and historical trends. Ex. 9. In addition to considering volume forecasts applied to historic revenue figures for classes of cargo, Matson also adjusts revenue forecasts to reflect relevant rate increases.

This method of forecasting revenue has been used by Matson since approximately 1973. The method has been used in several Commission proceedings, namely, Docket Nos. 73-22, 75-57, and 76-43, and has been relied upon by the Commission in its decisions in those cases. The method has furthermore been used in forecasting numerous rate increases filed in 1977, 1978, and 1979, which were not formally investigated by the Commission. Matson also uses this method for internal planning purposes. Mr. Walker of the Commission's staff states that he has reviewed numerous rate increases filed by Matson which have used this method of forecasting and has found that the projected revenue figures submitted by Matson "have been reasonably accurate." Ex. 10 at 2. As Hearing Counsel point out, furthermore, in Docket No. 76-43, *Matson Navigation Company—Proposed Rate Increasesin the United States Pacific Coast/Hawaii Domestic Offshore Trade*, 18 SRR 707, (1978), the presiding judge found that "Matson's revenue forecast for Constructive Year 1976 . . . was very close to the mark" and in fact noted that Matson's forecast "exceed(ed) the actual 1976 revenue . . . of $141,129,000 by $266,000, a margin of error of approximately .2 percent." 18 SRR at 713-14, quoted in Hearing Counsel's Opening Brief at 18.

Matson's revenue forecast of $63,617,200 amounts to an increase over revenue during the equivalent four-month period of 1978, which was $56,838,000, in the amount of 11.93 percent. Matson contends that considering two rate increases of 2.5 and 2.9 percent occurring in August 26, 1978, and February 1979, respectively, this leaves room for cargo growth in excess of 6 percent. Matson Opening Brief at 12. Matson argues that there is no evidentiary basis for accepting an alternative figure to that supported both by Matson and Hearing Counsel. Matson Reply Brief at 12. Hearing Counsel and the staff also accept Matson's figures and believe that the State is improperly using later data which Matson was not required to utilize when submitting its justification. H.C. Opening Brief at 16-18; H.C. Reply Brief at 5-7.

The State questions the reliability of Matson's forecast. It believes that certain factors such as the historic revenue factor used by Matson are not articulated or fully explained and states that the State's own examination of Matson's forecasts compared to actual revenue show that the forecasts have been too low. State, Opening Brief at 13-14. Also the State believes that rate increases alone will account for 6.75 percent increase in revenue while another 8.75 percent will result from increase in traffic volume. State, Opening Brief at 14-15. These assertions and contentions are contested by both Hearing Counsel and the State and what emerges is some confusion as to what was factored into the revenue forecasts or what should have been factored into the revenue forecasts by all parties. However, although Matson's and Hearing Counsel's explanation for the $63,617,200 forecast are not perfect, I am not persuaded that the method of forecasting employed by Matson and accepted so many times by the Commission and its staff must now be modified by more reliable evidence proffered by the State.

The State's criticisms of Matson's use of historic revenue factors seems to have some appeal. However, it is rather late to raise these questions on brief rather than at the hearing or at the time the State examined Matson's submissions. Or even after the hearing the State could have raised the point so that perhaps further questions could have been asked. None of this was done. Moreover, since Matson has consistently used this method in so many proceedings in which the State has participated and the State has had so many opportunities to explore and test Matson's method of forecasting, it is hard to believe that the State is so puzzled as to how Matson's forecasting method works or how the historical revenue figure is derived. The State, after all, is not a novice in Matson rate cases and has been exposed to Matson rate increases and its methods of forecasting revenue for many years in many cases.

The State furthermore injects into its arguments data from later Matson submissions and uses percentage figures for the first time in its brief without fully explaining what they are, where they come from, and why they should be relied upon. In effect, the State claims that Matson underestimates revenue because Matson's submissions relating to other rate increases shows that Matson's "actual" revenue exceeded its forecasts. But the evidence which the State cites is an attachment to its brief ("Attachment 2") and Hearing Counsel contend that the State may have improperly used data affected by other rate changes in deriving "actual" and "constructed" revenue. But the State compares the two revenue figures. For example, in "Attachment 2" to the State's Brief, "actual" revenue is compiled from submissions in connection with a Matson filing of June 1, 1979, relating to a later bunker surcharge and with a filing submitted in connection with a general rate increase on "August 15, 1979." This illustrates a point made by Hearing Counsel, that to a large extent, because of the extremely tight time schedule mandated by the new law and Commission regulations, Rule 67, it is not feasible to keep inserting into the record later data and that in large measure, a carrier is entitled to rely upon its case as originally submitted (in this case, on April 30, 1979) provided that obvious errors in methodology or obviously unreliable data can be corrected and corrected in timely fashion. Otherwise the procedural requirements cannot be met. See H.C. Opening Brief at 16, 17, and citations to the legislative history of P.L. 45-475.

In this instance I cannot determine whether the State has used irrelevant or distorted data in its figures purportedly showing "actual" or "constructed" revenue in its "Attachment 2." It is suggested by Hearing Counsel that they may have. "Attachment 2" was compiled by the State after the hearing and placed in its brief, leaving the parties not time to analyze and test it. The data does indeed seem to relate to other periods of time and to rate changes other than the surcharge under investigation in this proceeding. Hearing Counsel are also troubled and apparently puzzled by this "Attachment 2." They suggest that some of the data may improperly include the effects of later rate changes which should be filtered out to remove their effects in accordance with the decision in Docket No. 76-43, *Matson Navigation Co., etc.*, 18 SRR 707, (I.D.), affirmed, 18 SRR 1351 (1978). It appears that Hearing Counsel cannot remove the mysteries from this "Attachment 2" and bereft of proper explanation and analysis neither can I. There simply are too many unanswered questions about the data, comparison of different time periods, method of compilation, how figures were "interpolated" as the document mentions in one instance, etc., for me to accept its substantially different conclusions from those put forth by witnesses Miggins and Walker regarding the reliability of Matson's revenue forecasts.

I cannot therefore find that the State's contention that Matson's revenue forecasts are too low compared to actual results is based upon reliable, relevant evidence which has been submitted in timely fashion so that opportunity for testing has been afforded. It would appear that the proper place to test the reliability of the later data would be a proceeding for which the data were submitted given the strict time constraints imposed by P.L. 95-475, Rule 67, and the Commission's Order.[9]

In the last analysis, the State arrives at its $66 million revenue projection by applying a factor of 3.7 percent to Matson's and Hearing Counsel's forecast of $63,617,200. Hawaii Opening Brief at 15-16. But this factor comes out of the previously discussed "Attachment 2" which is of doubtful relevance and reliability for the reasons noted. Furthermore, the 3.7 percent figure appears to stem from a comparison of one three-month period (March 31, 1979, through August 31, 1979). See "Attachment 2." The underlying revenue data which purportedly are "actual," as I have mentioned, are derived from later Matson submissions in connection with subsequent rate changes which may or may not be "actual," which relate to different time periods, and have been thrown into this case at a late hour on brief. I am totally without benefit of any examination of this data or "Attachment 2" and have no way of determining its reliability at this stage of the proceeding. I cannot therefore accept it in lieu of Matson's and Hearing Counsel's revenue forecasts.

I do not mean to say that Matson's and Hearing Counsel's forecasts are perfect or without defects. In rate cases, exactitude is impossible anyway and only a reasonable approximation is expected. See, e.g., *Sea-Land Service, Inc.—Increases in Rates in the U.S. Pacific Coast/Puerto Rico Trade*, 15 F.M.C. 4, 10 (1971); *TMT Corp.—Rates*, 19 SRR 177, 187-188 (I.D. 1979; F.M.C. May 16, 1979) and cases cited therein at 187-188. For example, the State claims that Matson and Hearing Counsel have not considered the fact that three general rate increases occurred in August 1978, February 1979, and July 15, 1979, aggregating 6.75 percent on a weighted average basis making allowance for the time each rate level was effective during June through September 1978 and June through September 1979, the relevant projection period for the subject surcharge. The record shows that Matson did include at least two of these rate increases in its projection but probably omitted the July 15, 1979, increase, as even Hearing Counsel concede. Tr. 161; H.C. Opening Brief at 18. Hearing Counsel's witness, Mr. Walker, furthermore, explained the Matson forecasting method by asserting that the effect of relevant rate increases is taken into account. Ex. 10, at 1.

I do not understand why the effects of the July 15, 1979, rate increase which occurred during the middle of the period for which the subject surcharge was supposed to be in effect could not have been used to make an appropriate adjustment to the revenue forecast for the period. Hearing Counsel's answer is that Matson is entitled to rely upon its original submissions in order that the expedited procedures under the new law can work. H.C. Opening Brief at 17. I am not certain when Matson knew that it would be filing a rate increase effective July 15, 1979, so that it could insert the effects of such increase into

[9] I also note that P.L. 95-475 now requires the Commission to specify issues more narrowly when launching investigations so as to ensure the timely completion of manageable cases. Injection of data from later cases at any time by an intervenor which relate to particular issues such as revenue projection not specified in the Commission's Order may be incompatible with the spirit and possibly even the letter of the new law. I do not, however, mean to imply that parties are forever precluded from raising legitimate issues which arise out of another party's evidentiary submission. I only mean that some rule or reason must be followed lest these rapid rate cases become chaotic and amorphous.

its original justification submitted on April 30, 1979, or in later exhibits presented in this case. However, if Matson should have accounted for this increase, no matter how minor the effect on its $63 million revenue projection, it would appear that it should also be allowed to account for increases in fuel costs which also occurred during the period, certainly after May 16, 1979, the last date used to determine "current" fuel costs. It is no secret that fuel costs continue to escalate far more rapidly than once every four months, judging from the five surcharges already filed by Matson this year, not to mention the two or three surcharges that were rejected for technical reasons after this case began.

Perhaps Hearing Counsel's position that constant tinkering with originally submitted data makes the new rate procedures impossible to follow is valid. Also, perhaps an answer to the problem has already been furnished by the Commission when it adopted Domestic Letter 1-79 and Form FMC—274. As noted before, line 7 of that form serves in large measure to correct erroneous estimates of costs or revenues by requiring a subsequent accounting for over-recovery in later surcharge submissions. Hearing Counsel suggest this also applies to the dispute over the revenue projections. H.C. Reply Brief at 7. Again, although the line 7 solution is not perfect, it is a substantial safeguard and given the practical difficulties of litigating the merits of constantly changing surcharges under strict time constraints, perhaps there is no better solution.[10]

To conclude, therefore, I find that I cannot reject or revise the Matson and Hearing Counsel revenue forecasts which are based upon methodologies previously used and accepted by the Commission and its staff and found to have been reasonably accurate and that the alternative forecast presented by the State is based upon later data prepared for a later proceeding, which data I am unable to find to be reliable and relevant in this proceeding.

Necessary Adjustments to Hearing Counsel's Exhibit

As I have indicated previously, I find that Hearing Counsel's and the staff's exhibits calculating the estimated recoverable fuel costs and estimated revenue to be the most reliable and the most reasonable approximation of Matson's costs and revenue justifying Matson's bunker surcharge among the various exhibits submitted. In only one respect, however, do I differ with Hearing Counsel and that is in regard to the staff's willingness to accept Matson's figure of $10.48 as the base unit cost of fuel from which Matson and the staff estimated a unit increase of $6.04 per barrel. This figure, when multiplied by estimated number of barrels (484,794) to be consumed during the four month

[10] The State also asserts that Matson understated its projections for increases in traffic volume. The State claims that traffic volume should increase by 8.75 percent after revisions made by the State, rather than the 7 percent which it claims that Matson forecasts or the 4.85 percent which it claims is "implicit in the Matson revenue projection." Hawaii Opening Brief, at 14-15. But this analysis stems from "Attachment 2" data which the State claims to show that current rates of traffic growth are running at a rate of about 10 percent annually. *Id.* However, a look at "Attachment 2" shows that the 10 percent figure derives from a five-month period (March 31, 1979, through August 31, 1979) and comes from the same data submitted by Matson in connection with later surcharges and rate changes which I have discussed above. Again, "Attachment 2" is untested, unexamined by the parties, relates to a different proceeding, and I am unable to verify its reliability.

period (June through September 1979), leads ultimately to overall estimated recoverable fuel costs. The State has argued that the amount of recoverable fuel has been overstated for several reasons. One reason is, as the State asserts, that the base unit cost is too low as seen by superior evidence submitted by Matson itself under the format approved by the Commission in Domestic Letter 1-79 and Form FMC-274. Matson has submitted its $10.48 per barrel figure which the staff is willing to accept as the "weighted average fuel cost" for December 1, 1978. See Ex. 1, "Exhibit A" and Notes attached. The State's expert witness, Mr. Simat, states that "[t]he base period used in Matson's April 28 justification is confined to fuel purchased only on December 1, 1978, without disclosing the location at which the fuel was purchased or the quantity purchased. The base cost of $10.48 per barrel is, therefore, less reliable and less valid than the restated cost of $10.59 taken from Matson's later justification." Ex. 4 at 8.

Matson's later base cost figures were submitted in connection with a later surcharge under the format required by Form FMC-274, i.e., the average for units purchased between December 25, 1978, and January 5, 1979. The State is not crazy about this methodology either because it is not sure that it captures a representative average base unit cost from the later information submitted by Matson. However, as the State says, "[t]he prescribed methdology is obviously superior to Matson's reliance on the quoted fuel oil cost per unit for one date in time and an arbitrary weighting of the Los Angeles and Oakland port prices." Hawaii Opening Brief at 9-10.

Neither Matson nor Hearing Counsel dispute the fact that the revised base figure ($10.59) is more reliable. Indeed, they could hardly fight it since it conforms to the Commission's own format and comes from Matson's own data. Rather both parties urge me to reject the revised base figure and stick to the original figure of $10.48 per barrel for December 1, 1978, purchases for equitable reasons. Matson argues that it would be a "gross inequity" to retroactively apply the base period set forth in Form FMC-274 to Matson's detriment when Matson acted in reliance on prevailing staff practice at the time it submitpted its justification on April 30, 1979. Matson cites *Mediterranean Pools Investigation,* 9 F.M.C. 264, 304 (1966) in support of its argument. Matson also explains that the $10.48 figure was derived from weighing purchases at San Francisco and Los Angeles during the month of December 1978, citing its Exhibit 8 C. Matson, Reply Brief, at 8.

Hearing Counsel agree with Matson and state that equitable considerations argue for the use of Matson's figure because at the time of Matson's submission of justification, the staff had believed that the December 1, 1978, unit cost figure was the better figure. H.C. Reply Brief at 5. However, Hearing Counsel admit "that from the present perspective the State's base unit cost may be preferable. . . ." *Id.*

I can well understand these equitable arguments. Certainly Hearing Counsel, speaking for the staff, (and maybe personally, I do not know) feels that the honorable thing to do is to accept Matson's original figures which were furnished to the staff in the manner which the staff itself had recommended. But now that we know that a better figure is available and unlike other data which the State urges that I accept, relates to an actual past period, not a projected period, and conforms to the Commission's own Form FMC-274, is it entirely fair and reasonable for the Commission to ignore the superior figures? If that is done, the rate payers, in principle, are bearing some additional cost burden so that the staff and Hearing Counsel can do what they believe to be honorable and they are asking the Commission to be bound as well.

I am aware of the equitable doctrines of law and the cases which frown upon retroactive changes in policy which adversely affect parties who acted in reliance on previous policy. Such is *Mediterranean Pools Investigation, supra.* In that case the Commission refused to penalize parties who had relied upon previous precedent and in that one case were willing to grant retroactive approval to a section 15 agreement. 9 F.M.C. at 304. The Commission likened the situation to that involved in *N.L.R.B. v. Guy F. Atkinson Co.,* 195 F.2d 141 (9th Cir. 1952), wherein the court refused to allow a company to be punished when the N.L.R.B. suddenly changed its policy regarding jurisdiction over the company. *Id.* There are, of course, other cases in which some type of change in existing law coupled with an attempt to apply it retroactively has disturbed a court's conscience and sense of equity. Cf., e.g., *Arizona Grocery v. Atchison Ry.,* 284 U.S. 370, 389 (1932); *Wainwright v. National Dairy Products Corp.,* 304 F. Supp. 567, 573 (N.D. Ga. 1969). However, there are times when courts have permitted policy or rule changes to apply retroactively, especially if the new rule or policy appears to be reasonable. See, e.g., *General Tel. Co. of the S.W. v. U.S.,* 449 F.2d 846, 863 (5th Cir. 1971); *People of the State of California v. Simon,* 504 F.2d 430, 438-439 (TECA 1974); *South Terminal Corporation v. E.P.A.,* 504 F.2d 646, 678 (1st Cir. 1974); Davis, *Administrative Law of the Seventies,* § 5.08.

At one time it was believed that the Government could never be estopped, i.e., that regardless of staff or agency advice to a person, that person could later be found to be in violation of law if he followed the advice. See Davis, *op. cit.,* § 17.01 et seq. More recently, however, the courts have become concerned over equities so that even the government can be estopped if necessary to prevent a grave injustice, for example, to prevent a person from being deported or from losing valuable property. Davis, *op. cit.,* § 17.03. However, the courts also consider whether estopping the government will result in great cost to the public. Davis, *op. cit.,* at 406; *Union Oil Co. of Calif. v. Morton,* 512 F.2d 743, 748-749 (9th Cir. 1975). Also, bear in mind that the advice to submit a December 1, 1978, figure was given by the Commission's staff, not by any decision of the Commission or because of G.O. 11. Sometimes the Commission indicates that it will not follow the staff's decisions and even reverses them, affecting outside parties. See *Rejection of Tariff Fillings of Sea-Land,* 13 F.M.C. 200 (1970).

In the instant case, we clearly have better, more reliable evidence as to the base unit cost of fuel back in late December and early January 1979. This evidence has been submitted by Matson itself in accordinace with the Commission's own prescribed form. Instead of a base unit fuel cost confined to one day, December 1, 1978, the revised figure encompasses a broader period of time, December 25, 1978, through January 5, 1979. This formula is established in line 1 of Form FMC-274. The use of the improved formula shows that the average unit cost of fuel during the specified period was $10.59, as compared to only $10.48 pertaining to one day in December of 1978. As I show below, the use of the better figure results in a lowering of added fuel costs to be borne by domestic general cargo shippers by $50,075. This is a minuscule amount of money compared to Matson's estimated revenue of $63,617,200, only eight-hundredths of one percent (50,075 divided by 63,617,200 times 100 equals .08 percent).

The requirement, in principle, that Matson absorb this minuscule amount, rather than pass it on to the domestic general cargo shippers, is hardly the type of penalty or hardship which the courts prevent in the equitable estoppel cases. In other words, in weighing the adverse effects on Matson with the public interest that the most reasonable evidence be used to ensure that correct allocation of costs is made, the public interest should take precedence if the private harm is so microscopic. We are not here talking about deporting a person, revoking a license, taking away valuable land, and such other drastic results which courts will prevent under modern concepts of equitable estoppel.

I am not undermining the principle that these expedited rate cases should be decided on the basis of original data submitted by Matson subject to reasonable modification to eliminate obvious errors in methodology or errors resulting from oversight, to the largest extent possible, so that the purposes of the new law can be effectuated. I am holding, however, that when there is obviously available more reliable data which the carrier and staff concede to be superior, it should not be ignored when the equities arguing against using that data are not strong in effect. In other words, if the use of the later figure based upon the staff's revised thinking and the Commission's Form FMC–274 were to have serious adverse effects on Matson, then perhaps principles of equity would dictate that the original figure be used and that the later figure be employed only in later cases dealing with later surcharges. But here, as noted, and as shown below, application of the revised figure has a microscopic impact on Matson and even there, one in principle only, if, as Matson contends, its subsequent filings show that it has underrecovered using the 4.43 percent surcharge and it is already applying a 5.90 percent surcharge as of August 25, which will become 6.66 percent on October 1, 1979, in order to make up for its alleged deficits. In contrast to the above situation, what might be inequitable would be a finding that Matson had violated the law by overrecovering substantial amounts (maybe a million dollars) although Matson followed Form FMC–274 and methodology recommended by the staff, because of a radical and sudden change in basic methodology with retroactive application. I do not believe that the slight modification resulting from changing from use of a one-day base period to one which uses a period of almost two weeks, an obviously more reliable test, is such a substantial shift of policy that it invokes principles of equitable estoppel especially when the retroactive impact is so tiny and may well be completely academic.[11]

[11] In balancing equities certain other facts benefiting Matson should not be overlooked. For instance, Matson has benefited by the fact that the Commission is treating Matson's bunker surcharges not as general increases in rates although they apply across-the-board to domestic general cargo shippers apparently because each incremental increase in surcharge is less than 3 percent. This means that the Commission cannot order refunds with interest if it finds the surcharge to have been unlawful. See section 3(c)(2) of the Intercoastal Shipping Act, 1933, as amended by P.L. 95–475. Also, the Commission has not suspended any of these surcharges, which it could have done since they are not treated as general increases in rates. Section 3(c)(1)(B), as amended. Moreover, although the surcharges now aggregate 5.90 percent (to increase to 6.66 percent on October 1 of this year), they are nevertheless not being treated as general increases in rates. Therefore, they can be and have been filed on only 30-days' notice and there has been no limitation imposed on the number of surcharges that can be filed in any one year.

The following table restates Hearing Counsel's exhibit by employing the more reliable base fuel cost figure:

RESTATEMENT OF HEARING COUNSEL'S CALCULATIONS

Hearing Counsel		*Restatement*	
1. Average fuel cost per unit purchased Dec. 1, 1978	$10.48	1. Average fuel cost per unit purchased between 12/25/78 and 1/5/79	$10.59
2. May 16, 1979 unit fuel cost	$16.52	2. May 16, 1979 unit fuel cost	$16.52
3. Difference (line 2 less line 1)	$ 6.04	3. Difference (line 2 less line 1)	$ 5.93
4. Estimated consumption of fuel barrels	484,794	4. Estimated consumption of fuel barrels	484,794
5. Estimated consumption times difference in unit cost (line 4 times line 3)	$ 2,928,156	5. Estimated consumption times revised difference in unit costs	$ 2,874,828
6. Measurement ton ratio (domestic general cargo divided by all cargo on combination vessels	93.90%	6. Measurement ton ratio domestic general cargo divided by all cargo on combination vessels	93.90%
7. Fuel cost allocated to domestic general cargo (line 6 times line 5)	$ 2,749,538	7. Fuel cost revised (line 6 times line 5)	$ 2,699,463
8. Estimated four-months' revenue	$63,617,200	8. Estimated four-months' revenue	$63,617,200
9. Percentage surcharge needed (line 7 divided by line 8)	4.32%	9. Revised percentage surcharge needed (line 7 divided by line 8)	4.24%

As can be seen from the above table, the necessary percentage surcharge, as revised, amounts to 4.24 percent rather than 4.32 percent recommended by Hearing Counsel, or a difference of only eight-hundredths of one percent. In principle, as I have found above, this means that the amount of fuel cost which Matson should not have allocated to domestic general cargo shippers amounts to only $50,075 ($2,749,538 less $2,699,463, line 7 in the table).

I conclude, therefore, on the basis of the most reliable evidence used to forecast the four-month period for which the surcharge was to have been in effect, that the subject 4.43 percent surcharge was excessive to the extent it exceeded 4.24 percent. If we are to follow the traditional principles in rate cases that carriers are held to reasonable forecasts and estimates in determining whether their decisions to increase rates were just and reasonable, then the decision to increase the previous surcharge to 4.43 percent was unreasonable in that it should have provided Matson with more revenue than needed to recover additional fuel costs. Subsequent evidence showing actual results to be otherwise or evidence submitted in later surcharge cases showing actual under-recovery does not change the finding that the carrier had made an unreasonable decision under these traditional principles. See, e.g., the situation described in *Alaska S.S. Co. v. F.M.C.*, 334 F.2d 810 (9th Cir. 1965) and the Commission's Order Denying Petition of Respondents in *Alaska Steamship Co.—Seasonal Rates*, 6 SRR 325 (1965). In that case the Commission had made its findings concerning the unreasonableness of the carrier's rates on the basis of evidence of estimated projections for the year 1962. The carrier, however, asked the Commission to reopen the record to take later evidence of actual experience beyond the year 1962 and asked the Court of Appeals to order the Commission to do this. The Court refused, however, leaving the matter up to the Commission. The Commission, following traditional principles governing rate cases, adhered to the earlier evidence of record and advised the carrier to file new rate increases if it wished to rely upon later evidence showing actual experience. The Commission believed that the integrity of the ratemaking process was at stake since these cases were to be decided expeditiously and therefore could not be reopened to take additional actual evidence indefinitely. The Commission noted that the introduction of later data would require extended proceedings for the purpose of proper cross-examination and that the requirements of expedition in rate cases would not permit such an exercise. Therefore, the Commission stated:

> The proper procedure for Alaska Steam to follow is to file new rate increases with the Commission if in its opinion such increases are warranted. These rates can then be adjudicated in a new rate proceeding in which Alaska Steam will be free to introduce any evidence of past operating results and future projections. The rate-making process does not envision that respondents be allowed to indefinitely prolong pending cases for the purpose of continually bringing the record up to date. If our suggestion is followed, the best interests of the carrier and the ratepaying public will be protected.

6 SRR at 328.

If the Commission took that position because of the need to conclude rate cases expeditiously, then it is all the more critical to adhere to such position under the new law which concerned the Commission in *Alaska Steam.* It should be noted, furthermore, that this principle of relying upon best estimates and projections in rate cases, not waiting for later experience, is still followed. In the three most recent Matson rate cases, Docket No. 73-22, 75-57, and 76-43, the Commission decided each one on the basis of the evidence and projections in each case rather than on later evidence introduced in the subsequent cases. Finally, the later evidence which the State wishes to use in support of its position can be tested in the subsequent surcharge cases or, if not, line 7 of Form FMC-274 permits evidence of actual experience to be used to cause an adjustment so that future surcharges will be held down.

If the bunker surcharge problem however, were being treated by the Commission not under traditional rate case principles but only as a type of reporting to ensure that actual increases in fuel costs are being and have been passed through to shippers under proper accounting methodologies, then the question of reasonableness of Matson's decision to implement the 4.43 percent surcharge would be decided on the basis of actual results shown in Matson's later evidentiary submissions. If so, then Matson's current decisions would be found lawful or unlawful on the basis of facts to be developed later from actual experience regardless of what principles of forecasting Matson employed when making decisions to file surcharges or how reasonable they appeared to be at the time the decisions were made. This would seem to be inequitable. On the other hand, if the Commission decided that, to avoid this inequity, Matson should not be found to have acted unlawfully on the basis of later facts showing what actually happened under the surcharges, there would be less protection to shippers because Matson would be free to select surcharge levels without too much care subject only to reductions in subsequent surcharges in case of overrecovery. However, shippers paying such surcharges might not be around to enjoy future reductions and in any event would be overpaying while they were shipping. In the last analysis, therefore, apparently the Commission has decided that the best protection for shippers paying surcharges at any particular time is the guarantee that Matson has been required to follow reasonable forecasting techniques (failing which Matson would be liable to reparation cases) and that in the event of overrecovery there will be future reducing effects on subsequent surcharges. This discussion does not answer the question whether the present procedures allowing continual increases on as little as 30-day's notice and treating them as non-general rate increases are the best procedures that can be devised to deal with the continual surcharge problem, considering the fact that the carrier is allowed to project additional costs four months into the future to protect itself from falling behind in its attempts to have its revenues keep up with costs.[12]

Analysis of Positions of George A. Hormel & Co. and Oscar Mayer & Co.

As I mentioned earlier, the two protestants, George A. Hormel & Co. and Oscar Mayer, contended that the subject surcharge was unjustified, unreason-

[12] The State attached five orders of the Civil Aeronautics Board dealing with many general rate increases filed by air carriers during the period June 1976 through November 1977 These orders are very revealing. They show that up to September 1977, the C.A.B. had never allowed cost projections, which they called "anticipatory costs." (This Commission has allowed projections in rate cases for many years.) However, the C.A.B. was forced to reconsider this policy because it caused carriers to file rate increases repeatedly in order to try to keep up with cost increases since they were not allowed to publish rate increases to cover future costs. This policy was changed. (See September 22, 1977, Order of the C.A.B.) The C.A.B. now allows cost projections for three months beyond the effective date of the rate change but in return holds the carriers to only two rate increases a year, i.e., it freezes rates for six-month periods. The C.A.B. felt that this mandatory freeze would encourage carriers to operate more efficiently since they would have to live with their projections for longer periods of time. (The C.A.B. also stated that they wanted "current data," not "old data when current statistics will soon be available." C.A.B., Order of Nov. 1, 1977 at 2. However, the "current data" itself related to past periods not projected periods, and unlike the F.M.C. procedures, there will apparently be no other C.A.B. cases during the six-month period, in which later data can be tested.) The C.A.B., operating under different statutes, apparently treats the air carrier's barrage of rate increases as general rate increases and has no adjustment provision like line 7 of FMC Form FMC 274. A main advantage of the C.A.B. method is to hold down the number of rate increases per year.

able, and inflationary, and should be canceled or at least suspended and investigated. In their testimony (Exhibits 6 and 7), the very sincere witnesses for Hormel (Mr. Finch) and for Oscar Mayer (Mr. Gillings and Mr. Kratochvil on brief) elaborated upon these contentions.

Protestant Oscar Mayer is a substantial shipper of meat and food products from the West Coast to Hawaii. It ships an average of over 5.3 million pounds of its product a year in 193 containers. It pays significant amounts of freight and feels the impact of the 4.43 percent surcharge to be excessive. According to the written testimony of Mr. Gillings, Traffic Manager-Rates and Tariffs (Ex. 7), the application of the surcharge by Matson is unfair because it falls disproportionately on westbound shippers, prefers sugar and molasses shippers, and exceeds increases in fuel costs so that the previous 3.54 percent would have been sufficient. In its opening brief Oscar Mayer recommended that 47 percent of the additional fuel costs should be allocated to eastbound shippers and 53 percent to westbound. In its reply brief, Oscar Mayer suggests alternatively that the allocation ratio be 34 percent to eastbound shippers and 66 percent to westbound.

Like Oscar Mayer, George A. Hormel's witness (Mr. Finch) vigorously argued that Matson's allocation method preferred sugar and molasses shippers and consequently burdened westbound shippers unfairly. He calculated that his company's products would bear an additional $3.02 per ton whereas sugar and molasses would bear only $.69 and $.23 per ton respectively. Ex. 6. He also calculated how many barrels of fuel were used westbound to arrive at the extra cost on his shipments per ton. He concluded from his studies that the two previous surcharges imposed by Matson have recovered more than enough to recover increased fuel costs "with $21,411 left over." He also concludes that on a westbound leg extra revenue derived from the surcharge is well over costs of the westbound leg and indeed well over 50 percent of the eastbound fuel usage. Mr. Finch contends therefore that westbound shippers are paying a disproportionately high amount whereas eastbound shippers are not paying their fair share.

In his opening brief, Mr. Finch emphasizes that Matson's witness was not experienced in the sugar and molasses business to establish that 47 percent of the allocation of fuel costs to shippers of those commodities would be unduly harmful to them and he questions whether negotiations between Matson and its corporate relatives shipping sugar and molasses are really conducted at arm's length. Mr. Finch also questions why the sugar and molasses shippers are assessed under a different method (cents per ton) than other shippers who pay a percentage surcharge on rates when fuel costs increase and how the Commission's G.O. 11 can permit such a thing.

In his final brief submitted for George A. Hormel & Co., Mr. Finch continues questioning the different treatment of the sugar and molasses shippers and contends that such treatment is incompatible with the Commission's Domestic Circular Letter 1-79, forms and regulations. He again questions the good-faith negotiations between Matson and related sugar and molasses companies and questions Matson's witnesses's opinion that these shippers could not bear 47 percent of the fuel cost increases. Mr. Finch concludes that the

Commission should order Matson "to recover all cargo in the voyage on measurement ton flow basis." Hormel Brief, August 31, 1979, at 7.

Both Hearing Counsel and Matson disagree with protestants. However, it appears that some of the dispute between Hearing Counsel and protestants may be based upon their misunderstanding of the manner in which Hearing Counsel and the staff have removed any undue burden which would have been cast upon domestic general cargo shippers as a result of the special sugar and molasses contracts.[13] Both Hearing Counsel and Matson oppose protestants' different method of allocation which is based upon splitting legs of round voyages by assigning percentages of fuel costs to eastbound and westbound shippers using fuel consumed per leg or by applying measurement tons per leg.

I find upon examination of protestants' contentions that notwithstanding the sincerity with which they are argued, they proceed on a radically different and unsound basis of steamship accounting, fail to understand that Hearing Counsel and the staff have eliminated the preference given to sugar and molasses shippers, and otherwise lack support.

The idea espoused by Oscar Mayer, and to some extent suggested by Hormel in Mr. Finch's testimony, that Matson's voyages should be broken down into westbound and eastbound legs and that allocations of the costs of fuel should somehow be made to westbound and eastbound shippers after the splitting of the voyage marks a total departure from Commission case law and the G.O. 11 methodology, as Hearing Counsel and Matson point out.

In *Alcoa Steamship Co., Inc.—General Increase in Rates in the Atlantic Gulf Puerto Rico Trade,* 9 F.M.C. 220, 232 (1966), the carrier had attempted to allocate expenses by splitting its round voyages into legs and then applying a revenue ratio. This idea was emphatically rejected by the Commission in favor of the ton-mile ratio method applied against the total round voyage. The Commission stated:

> The nature of ocean transportation is, furthermore, such that these costs of operating vessels between points are mainly "joint costs" or costs which should be borne proportionately by the users of the services in both directions.

The Commission's General Order 11 codifies the above statement by defining "voyage" as follows:

> "Voyage" normally means a completed round voyage from port of origin and return to port of origin. In no case shall a Voyage be split to reflect outward and inward services separately.

46 C.F.R. § 512.6(K).

Both Mr. Walker, Hearing Counsel's staff expert witness, and Mr. Kane, Matson's chief witness, testified in essence that round voyage accounting is the

[13] For example, in Mr. Finch's (Hormel's) opening brief, he makes the statement as follows: "Witness Walker presented Exhibit 5 which *confirmed* the Matson methodology of observing the restrictive measurement ton escalation clause of sugar and molasses and allocating the remainder of the bunkering fuel cost increase to the other cargo." (Emphasis added.) He then cites his questions to Mr. Walker in which he asked Mr. Walker "[w]hy do you agree that the recognition of the present contractual escalation clause on sugar is proper in this instance?" Hormel, Opening Brief at 5. But witness Walker did not "confirm" the sugar contract in the sense of approving it or agree that it was proper. He tried to explain, as I have done earlier and repeat below in the decision, that he and Hearing Counsel removed any harm resulting from the sugar and molasses contract by applying the measurement ton allocation methodology. Also, later in his brief Mr. Finch seemed to believe that Mr. Walker and Hearing Counsel were *endorsing* two simultaneous different methods of recovery of the fuel cost increases used by Matson, namely, the general surcharge and the special sugar and molasses method. They did not, however, do this. Again, as I have explained, they corrected any harm which may have befallen general cargo shippers stemming from this dual method by applying the measurement ton allocation methodology.

accepted and customary method of steamship accounting. Mr. Walker indeed explicitly testified that expenses may not be allocated to legs of a voyage. Tr. 147.

The problem with splitting voyages, as Matson's witness Mr. Kane demonstrated and Matson showed on brief, is that it leads to absurd and unfair results. In the Hawaiian trade, for example, westbound shippers, who ship the majority of the containers, expect to have them returned to the West Coast so that they can be filled again for more shipments eastbound. However, for voyages terminating in March 1979, as Mr. Kane testified (Ex. 1 at 9), 9,002 containers were carried westbound but only 2,305 were carried full eastbound. Although the westbound shippers have an obvious interest in the ship's returning to the West Coast with available containers, allocation by dividing numbers of containers into costs for each leg split evenly between legs would mean that westbound shippers would pay much less in vessel costs per container. Furthermore, the far fewer eastbound shippers would be paying for the return of the empty containers which were only shipped to Hawaii because of the westbound shippers.[14] But under round voyage accounting, the westbound shippers who use the greater amount of Matson's services must necessarily pay a share of the cost of the back haul. See also *Matson Navigation Co.—General Increase in Rates,* 16 F.M.C. 96 (1973). Back haul (eastbound) shippers are not given a free ride but pay a share of joint vessel costs under the rates they are charged. Ex. 1, "Exhibit 1," at 4. Therefore, any allocation based upon splitting the round voyage such as by applying 53 percent to westbound and 47 percent to eastbound legs on a fuel consumed basis as first suggested by Oscar Mayer or, alternatively, by 66 percent westbound and 34 percent eastbound on a "measurement ton flow basis" (Oscar Mayer Reply Brief, last page) is conceptually defective because of the refusal to recognize that voyages are joint ventures from beginning to completion having joint costs which all shippers must share regardless of legs.

Protestants' fear that sugar and molasses shippers are being preferred is unwarranted once Hearing Counsel's and the staff's remedial application of the measurement ton methodology is accomplished. As I explained earlier in this decision, the disproportionate burden which would be cast upon domestic general cargo shippers if we permitted Matson to calculate the level of surcharge by its own methodology based upon recovery under the sugar and molasses contracts, is relieved by means of the measurement ton methodology. As discussed, application of the methodology shows that an unfair burden in the amount of $42,860 would have been cast upon domestic general cargo shippers and that this amount must be absorbed by Matson if it wishes to adhere to the sugar and molasses escalation clauses in its sugar and molasses contracts. Thus, the entire argument about the relationship between Matson and sugar and molasses shippers and whether their negotiations were conducted at arm's

[14] As an example of what absurd results the split voyage method could lead to, consider an unbalanced trade in which 99 shippers shipped westbound and only one shipper shipped eastbound. If virtually the same fuel cost applies in both legs, (and assume it is $500,000 on each leg) the 99 shippers would share the $500,000 burden while the poor, single shipper eastbound would be asked to cough up the $500,000 for his leg all by himself. Almost equally absurd results would occur if we employ a tonnage ratio by split legs. For example, if the eastbound shippers only shipped 10,000 tons but the westbound shippers shipped 100,000 tons, the eastbound shippers would be responsible for ten times as much in fuel costs as the eastbound on a per tonnage basis although the entire voyage overwhelmingly benefits the westbound shippers.

length is immaterial. If Matson really tried to prefer those shippers (and there is no evidence that this is so),[15] only Matson would suffer because it would be forced to absorb any deficits because of underrecovery resulting from preferential contracts, i.e., Matson could not pass the deficit onto other shippers. Similarly, the fact that sugar and molasses shippers pay so many cents per ton under the escalation clauses rather than by flat percentage of rates has no practical significance as far as domestic general cargo shippers are concerned because any deficits under the contracts are not borne by those other shippers as a result of the corrective effects of Hearing Counsel's and the staff's measurement ton methodology. This leads to the final arguments of Oscar Mayer regarding their belief that westbound shippers will be burdened with 80 percent of fuel costs whereas eastbound shippers will carry only 20 percent of the burden, their confusion over the application of General Order 11 by the staff, and their belief that use of the two different methods of recovery (cents-per-ton for sugar and molasses shippers, percentage-of-revenue for domestic general cargo shippers) is not justified or lawful under governing regulations.

Oscar Mayer believes that there is an unfair burden on westbound shippers because they will have to bear 80 percent of the additional fuel costs. The short answer to this argument is that the shippers who use the bulk of Matson's service, i.e., who ship 80 percent of total tons between Hawaii and the West Coast would naturally be the greatest contributors to Matson's expenses on an overall basis just as they would be paying the bulk of Matson's overall revenue. The Commission recognized furthermore in *Alcoa, supra,* that there is a relationship between expenses and the quantum of service purchased. In the shipping industry, this was taken to mean that the more tons carried and miles involved in the service purchased, i.e., the quantum of the transportation service, the more expenses would be correspondingly involved. That is the basis for the ton-mile allocation methodology in which vessel expenses which are jointly shared on vessels moving in domestic and foreign trades are allocated between shippers in the domestic trade and shippers in the foreign trade. The alternative method which Oscar Mayer urges, however, is to split the domestic trade between two legs of the voyage and assign expenses and apparently to assign expenses on each leg independently of the other leg as if shippers should have no concern over the leg of the voyage in which their commodities are not moving. As mentioned, however, this is a fundamentally unsound concept in steamship accounting which G.O. 11 has long forbidden.

What Oscar Mayer and Hormel apparently do not appreciate is that after application of the G.O. 11 allocation methodology which was made necessary to remove the harmful effects of the special recovery clauses under the sugar and molasses contracts, all domestic general cargo shippers are placed on an even basis, paying the same percentage increase on an across-the-board basis so that the full fuel increase in fuel cost can be recovered. If the percentage

[15] The contention that Matson prefers sugar or molasses or pineapple shippers in negotiating rates has arisen a number of times in past cases and never seems to stand up to analysis. See, e.g., *General Increase in Rates,* 7 F.M.C. 260, 273, 279-281 (1962) in which the Commission found good-faith negotiations notwithstanding Matson's corporate connections with the shippers involved and also found the sugar contracts to be lawful. 7 F.M.C. at 279 281. Furthermore, Matson introduced Exhibit 3, a consent decree in *U.S. v. Alexander & Baldwin, Ltd., et al.* (U.S. District Court, Hawaii, Civil Action No. 2235, August 17, 1964), which places restrictions among Matson and its corporate family members to facilitate arm's-length transactions among them.

increase had been varied among general cargo shippers, perhaps Oscar Mayer or Hormel might have cause to complain unless such discrimination could be justified. But being evenly applied, their only complaint is that they and all westbound shippers end up paying the largest share of the fuel costs on an aggregate basis. But this is because they are all purchasing the vast bulk of Matson's services in an unbalanced trade where westbound tonnages vastly exceed eastbound.

Both Oscar Mayer and Hormel question the propriety of permitting a dual system of recovery under G.O. 11, Domestic Circular Letter 1-79, and pertinent Commission regulations. Either or both protestants believe that the Commission's staff has made an internal decision which should have been done by means of public rulemaking so that an alternative form of surcharge could have been approved by the Commission.

It is true that Form FMC-274 contemplates a percentage of revenue method for fixing bunker surcharges. See line 12 of the Form. There is, however, nothing shocking about this. Ocean carriers have long used either flat percentage surcharges or dollars-per-ton as the methods of imposing emergency rate increases. Each method has its proponents and good and bad points but both have been permitted. See, e.g., the discussion in *Surcharge on Cargo to Manila,* 8 F.M.C. 395, 397, 399-400 (1965) where dollars-per-ton was finally selected and *Surcharge at U.S. Atlantic & Gulf Ports,* 10 F.M.C. 13 (1966) where the flat percentage of rates method was used. See also F.M.C. Domestic Circular Letter No. 74-1, January 8, 1974, in which the percentage of rates method was prescribed. The present Form FMC-274 permitting the percentage method therefore is no sudden change in policy or departure from precedent which requires a rulemaking proceeding as a matter of law. Furthermore, it is well known that rules can be enunciated in adjudicatory proceedings as well as in rulemaking proceedings. Unless there is convincing evidence that a dollars-per-ton surcharge method is more reasonable or that the flat percentage-per-rates method is unjustly discriminatory, which evidence I have not seen, the percentage-of-rates method presently embodied in Form FMC-274 can be found to be proper in this proceeding. This assumes, maybe incorrectly, that the issue is open. As Hearing Counsel note, the Commission has indicated in its Order of Investigation in Docket No. 79-84 (the investigation of the subsequent 5.90 Matson bunker surcharge), that "an investigation is not the proper forum for discussion of the merits of Circular Letter 1-79, Form FMC-274 and General Order 11." Order, served August 24, 1979. As Hearing Counsel again note, if protestants are unhappy with current methodology, they can ask the Commission to reassess its position in a proceeding devoted to the problem. It is important to recall that the recent amendments to the Intercoastal Act, 1933, under P.L. 95-475 require the Commission to detail the "specific issues to be resolved" when commencing a formal proceeding under Sec. 3(a) of the 1933 Act, so that proceedings can be concluded expeditiously and unnecessarily lengthy and complex proceedings can be avoided. See Senate Report 95-1240, 95th Cong., 2d Sess., September 26, 1978, at 1. The issue of one form of recovery (dollars-per-ton) vis-a-vis another (flat percentage) was not specified by the Commission in its Order commencing this case and may therefore be outside the scope of the proceeding.

I believe, however, to conclude the above discussion, that the important point which is being missed by protestants is that Matson's dual use of the flat percentage across-the-board method for domestic general cargo shippers as well as the cents-per-ton method for sugar and molasses shippers, while on its face questionable, in fact is harmless since application of the G.O. 11 (measurement-ton-ratio) methodology prevents Matson from allocating to those general cargo shippers cost burdens which they should not bear.

I cannot therefore conclude that protestants are being unfairly burdened because of preferences given to sugar and molasses shippers, or because of Matson's duel system of recovery, or that G.O. 11 methodologies are being misapplied or misinterpreted by the Commission's staff, or that Matson's voyages should be split into legs so that eastbound and westbound shippers can be separately evaluated to determine which portion of additional fuel costs should fall on each of them, or that there is anything intrinsically wrong with the percentage-of-revenue method of assessing a surcharge.

ULTIMATE CONCLUSIONS

Matson filed a surcharge in the amount of 4.43 percent effective May 30, 1979, which, although supposed to run until September 30, expired on August 25, 1979, with the publication of another surcharge amounting to 5.90 percent. Matson's original data supporting the subject surcharge, as revised by Matson to exclude a tiny portion of foreign cargo, supports 4.39 percent as the permissible level of surcharge necessary to recover additional fuel costs which have been escalating very rapidly, Hearing Counsel's and the Commission's staff's data shows that the level should be 4.32 percent while the State of Hawaii calculates 3.87 percent. Protestants Oscar Mayer and George A. Hormel do not believe Matson to have justified the 4.43 percent figure and believe that an entirely new method of accounting should be employed to determine the necessary level.

Hearing Counsel's and the staff's figure of 4.32 percent is the most reasonable approximation of what Matson needed compared to the other two calculations, and, as adjusted slightly to account for more reliable evidence of base unit cost, the permissible level should have been 4.25 percent. Hearing Counsel's figure is based upon the use of approved and established methodology which had to be employed to offeset the additional burden on domestic general cargo shippers ($42,860) which would result from application of Matson's allocation methodology based upon escalator clauses in Matson's special sugar and molasses contracts. The Matson method has not been shown to be more reliable than Hearing Counsel's methodology which is based upon the Commission's General Order 11 and previous case law. Indeed, there is no showing that Matson's formula devised for its sugar and molasses contracts shows a proper correlation between fuel costs and increased revenue needs. Furthermore, even Matson employs the G.O. 11 methodology in extracting foreign cargo from its calculations. The State also uses the erroneous Matson methodology in calculating its figure.

The State takes the position that all available evidence showing later data should be introduced into the record in this kind of proceeding before deciding what a reasonable maximum surcharge should be. Hearing Counsel, the staff, and Matson believe that evidence and data originally submitted should be relied upon to the fullest extent possible and that constant introduction of changing data will make it impossible to comply with the new rigid time constraints imposed on rate cases by P.L. 95–475. I find that Hearing Counsel's and Matson's position is sound but allow for some flexibility in the event that errors are uncovered in the original calculations whether because of incorrect accounting methodology or oversight or if obviously more reliable evidence becomes available which does not require testing by cross-examination or rebuttal evidence. Thus, in one respect only I have modified Hearing Counsel's calculations to allow for the use of evidence submitted by Matson for another surcharge which Hearing Counsel acknowledged may be "preferable" but feel honor-bound not to use against Matson under principles of equitable estoppel. I do not find that the Commission should be estopped from using the data which complies with the Commission's own Form FMC–274, after balancing all the interests, and, in any event, the adjustments resulting from use of the more reliable data are minimal and perhaps somewhat academic since Matson has already filed two subsequent surcharges allegedly showing underrecovery under the 4.43 percent and previous surcharges. I cannot, however, find that I can rely upon the State's data which it proffers as an "attachment" to its post-hearing brief. This data was never introduced into evidence so that the parties could have the opportunity of testing it by cross-examination or rebutting it with contrary evidence if necessary. The data shown in the "attachment" would make substantial changes in Matson's and Hearing Counsel's revenue projections but it relies upon underlying data submitted by Matson in connection with other rate changes, compares different periods of time, "interpolates" certain figures, and reaches significant conclusions without explanation as to how the "attachment" was constructed. If these conclusions are reliable, they should be tested together with the underlying data in the proper manner, by examination in the later proceedings. Without adequate examination in this proceeding, I find it virtually impossible to understand the bases for its conclusions or to evaluate its reliability. Moreover, if Matson's and Hearing Counsel's revenue projections are incorrect, line 7 of Form FMC–274 will provide some measure of compensation.

By using the later, more reliable data pertaining to a broader base period for unit cost of fuel, as now prescribed by Form FMC–274, and as urged by the State, I have adjusted Hearing Counsel's calculations to show that the maximum surcharge should have been 4.24 percent rather than 4.32 percent which Hearing Counsel support, or a difference of .08 of one percent. This amounts to $50,075 in revenue which Matson theoretically should not have cast onto domestic general cargo shippers and should have absorbed. This figure compares with $63,617,200 in revenue for the four-months' period for which the surcharge had been projected.

Protestants George A. Hormel and Oscar Mayer, but especially the latter, believe that entirely new methodologies should be employed to ensure that westbound shippers are not unfairly burdened with the additional fuel costs as compared to eastbound shippers. However, these new methodologies would split round voyages into eastbound and westbound legs, an unsound method of accounting which the Commission has rejected in a previous case and which G.O. 11 forbids. When the G.O. 11 allocation methodology is applied, furthermore, any excess burden which domestic general cargo shippers might have had to bear will be eliminated and all domestic general cargo shippers will bear a proportionate share of costs of the round voyage depending upon the volume of cargo they ship in measurement tons. Protestants' belief, furthermore, that there is something harmful about the fact that Matson uses one basis for recovery of extra fuel costs on sugar and molasses shippers (cents per ton) while using another basis for domestic general cargo shippers (percentage of rates) is unwarranted since both bases have been used by carriers in the past and accepted by the Commission and application of the G.O. 11 allocation methodology ensures that domestic general cargo shippers are not bearing costs which should be allocated to sugar and molasses shippers.

The procedures which the Commission now follows to deal with continual filings of bunker surcharges provides for adjustment of overrecovery or underrecovery under line 7 of Form FMC-274. This adjustment does to some extent protect shippers against mistaken forecasts by Matson since if Matson overrecovers it will be required to reduce subsequent surcharges, although the procedure is not perfect and to some extent seems inconsistent with accepted principles of law in ratemaking cases followed by the Commission which decide whether a carrier's rates are just and reasonable by use of forecasts and estimates, not by retrospective historical experience. However, the merits of the present procedures are beyond the scope of this case. The new law, P.L. 95-475, requres the Commission to specify issues so that rate cases can be decided expeditiously, and the merits of the Commission's procedures shown in Domestic Circular Letter 1-79, Form FMC-274, or G.O. 11, have not been specified for determination. For the Commission's information, however, the Civil Aeronautics Board deals with continual rate increases in a somewhat different manner allowing three-month cost forecasts but holding carriers to their rates for six months and treating the many rate increases as general increases in rates, at least so it appears from various orders of the C.A.B. issued during 1976 and 1977.

(S) NORMAN D. KLINE
Administrative Law Judge

WASHINGTON, D. C.
September 20, 1979

FEDERAL MARITIME COMMISSION

[46 C.F.R. §547; DOCKET NO. 79-12]

IMPROVEMENTS IN PREHEARING AND DISCOVERY PROCEDURES

November 27, 1979

ACTION: Discontinuance of Proceeding

SUMMARY: The Commission has determined that this proceeding which was initiated by Advance Notice of Proposed Rulemaking of March 13, 1979 (44 Fed. Reg. 14582) should be discontinued because the comments received demonstrate that there is no consensus that the Commission's discovery rules need amendment. However, the Commission will consider whether certain comments justify the institution of a rulemaking proceeding and is providing appropriate explanations to eliminate particular misunderstandings about some of the rules.

DATES: Effective November 30, 1979

SUPPLEMENTARY INFORMATION:

The Commission initiated this proceeding by Advance Notice of Proposed Rulemaking which was published in the *Federal Register* on March 13, 1979 (44 Fed. Reg. 14582). The purpose of the proceeding was to elicit comments to determine if there is a need to amend the Commission's rules relating to prehearing inspection and discovery in order to improve efficiency and eliminate undue delay in the conduct of formal proceedings. The Commission was aware that special committees of both the American Bar Association and the Judicial Conference of the United States had conducted studies and recommended that certain amendments be made to the federal rules of discovery followed by the United States district courts to which the Commission's discovery rules, in large measure, conform.

The comments generally demonstrate that there is no consensus that further amendments to the Commission's rules are necessary at this time. Furthermore, we note that the special committee of the Judicial Conference has withdrawn most of the recommendations relating to discovery and that the remaining recommendations are still subject to further consideration before they may be presented to the Supreme Court.* Consequently it appears that there is no compelling reason to revise our discovery rules at this time. However, the Commission is interested in exploring any idea which may improve the discovery process and reduce delay in its proceedings. Some of the comments relating to the need for earlier rulings and elimination of unnecessary pleadings, in our opinion, deserve further consideration as does one of the remaining recommendations of the special committee of the Judicial Conference concerning early discovery conferences. Furthermore, because certain comments expressed concern about the operations and effects of certain of the Commission's rules, which comments were apparently based upon misunderstandings of the particular rules involved, the Commission believes that explanatory or clarifying remarks would be helpful.

One particular area of concern which appeared in the comments relates to the possibility that the present prehearing inspection and discovery rules might interfere with the expedited schedules mandated by Public Law 95-475, 92 Stat. 1494 (1978), which amended the Intercoastal Shipping Act, 1933. Matson Navigation Company, which commented on this problem, recommends that we amend our rules to provide that discovery procedures be "available in proceedings arising under Section 3 of the Intercoastal Shipping Act, 1933, only to the extent authorized by the Presiding Administrative Law Judge in his discretion." The Commission agrees with Matson that care must be taken to ensure that discovery procedures are not misused so as to create delay and prevent the prompt conclusion of the hearing and other phases of rate cases set forth in the law and pertinent Commission regulation (Rule 67, 46 C.F.R. §502.67). However, the regulations of the Commission already embody the controls which Matson wishes to have inserted by way of amendment. For example, Rule 67(g), 46 C.F.R. §502.67(g), states that the "Administrative Law Judge 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" (i.e., to complete a hearing within sixty days after the proposed effective date of the tariff changes and submit an initial decision within one hundred twenty days after that date). The Commission's rules contain numerous provisions eleswhere which authorize the presiding judge to curtail unnecessary discovery. See, e.g., Rules 201(b)(2), 201(b)(3), 204(b), 206(b). Moreover, if necessary to ensure that the proceeding progresses expeditiously, the presiding judge is authorized to waive any discovery rule. See Rule 10, 46 C.F.R. §502.10.

Another problem area which appears to be based upon a misunderstanding of the Commission's rules relates to the requirement in Rules 206(a) and 207(c) that a party filing a motion seeking an order compelling answers to interrogatories or requests for production of documents submit an affidavit certifying that counsel have conferred in a good-faith effort to resolve their differences. The Committee on Practice and Procedure of the Maritime Administrative Bar Association (MABA) states that conferences among counsel are seldom successful and most often waste time and suggest, furthermore, that if

* See Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, February 1979, Vol. 461—No. 2, Federal Supplement.

such conferences are to be held, they should take place prior to the time of filing motions when there is still some likelihood of agreement among counsel. These comments misconceive the purpose of the requirement and the procedure to be followed.

The requirement that counsel meet in an effort to resolve differences prior to seeking a formal order is also imposed in several district courts and has salutary purposes. It recognizes that counsel have a duty to cooperate in an effort to fulfill the purposes of all discovery rules, namely, to seek narrowing of issues, avoidance of unnecessary trial-type hearings, and the elimination of surprise. Considering the broad scope and salutary purposes of discovery, the Commission does not believe that discussions among counsel conducted in a good-faith effort to achieve the above purposes should be a waste of time. On a number of occasions in formal proceedings, furthermore, counsel have been able to reach agreement in discovery matters without taking up the time of the Commission or presiding judge with formal motions and replies. The requirement that counsel certify that they have sought agreement informally and that they file an affidavit not later than the date set for replies to motions to compel answers does not mean, as MABA seems to believe, that such informal discussions among counsel can only take place after the motions are filed. On the contrary, the rules are intended to encourage these discussions as early as possible. Affidavits certifying that further discussions will be futile can therefore be filed at any time that such a fact becomes apparent (e.g., at the time counsel files a motion to compel answers) so long as they are not filed after the date set for the filing of replies to the motion.

The commentators have given careful thought to other possible problem areas which the Commission identified (e.g., the broad scope of discovery, the need for written justification for discovery, broader use of depositions, limitation on number of interrogatories). However, as noted above, there is no consensus that there really are problems in these areas and if some commentators believe that problems do exist, there is no agreement as to the remedy. Moreover, if appears that the Commission's rules are exceedingly flexible so that solutions to many if not all of the problems discussed can be devised by presiding judges and the parties as these problems arise.

Accordingly, the Commission is discontinuing this proceeding but will give further consideration to particular comments and, if we believe that they have merit, will institute an appropriate rulemaking proceeding.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-60

NEW YORK FREIGHT BUREAU INTERMODAL AGREEMENT (AGREEMENT NO. 5700-26)

Agreement proposing unrestricted intermodal ratemaking authority in Far East/U.S. Atlantic and Gulf trade found not justified under the *Svenska* doctrine and disapproved.

Charles F. Warren, George A. Quadrino and *John E. Ormond, Jr.* for the New York Freight Bureau and its member lines.
John Robert Ewers, Martin F. McAlwee and *John W. Angus, III* for the Bureau of Hearing Counsel.

REPORT AND ORDER

November 27, 1979

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

By Order served December 12, 1977, the Commission instituted an investigation into the approvability of Agreement No. 5700-26, an amendment to the conference agreement of the four ocean common carriers comprising the New York Freight Bureau (NYFB).[1] Amendment No. 26 proposes an indefinite extension of NYFB's authority to set rates for through intermodal transportation *via U.S. Atlantic and Gulf Coast ports* to inland points located anywhere in the United States. The Commission conditionally disapproved the Agreement on May 18, 1977. Thereafter, NYFB requested a further hearing limited to the exchange of memoranda and affidavits on the question of whether the Agreement's anticompetitive features are necessary to achieve transportation needs, public benefits or other objectives of the Shipping Act, 1916.[2] Now

[1] The NYFB carriers consist of Japan Line, Ltd.; Mitsui O.S.K. Lines, Ltd.; Nippon Yusen Kaisha; and Yamashita-Shinnihon Steamship Co., Ltd., and serve the import trade from Hong Kong, Macao and Taiwan to United States Atlantic and Gulf Coast ports.

[2] *See Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 240 (1968). Agreement No. 5700 26 is a price-fixing arrangement and, as such, is violative of the Sherman Antitrust Act (15 U.S.C. §1) and unapprovable unless justified.

before the Commission are the memorandum and affidavit of NYFB and the "Reply Memorandum" of the Bureau of Hearing Counsel.[3]

The Commission first approved an amendment authorizing NYFB to establish intermodal rates on January 23, 1973[4] After three short-term extensions, this authority lapsed on April 21, 1977 without NYFB having carried any intermodal cargo or even filing an intermodal tariff. Since December 18, 1975, the NYFB carriers have had the right to operate independently as intermodal carriers until such time as the conference commenced a comparable service. None of them has availed itself of this opportunity. In fact, no carrier in the trade offers through intermodal service via Atlantic and Gulf ports. Any intermodal competition faced by NYFB is by carriers providing minilandbridge service through Pacific Coast ports of entry. The NYFB carriers themselves provide such a minilandbridge service.[5]

POSITION OF THE PARTIES

NYFB asserts that it has always intended to publish an intermodal tariff and has taken specific steps towards that end.[6] It further alleges that arranging for joint *interior point* service with inland carriers is especially difficult and that few conferences or carriers have successfully done so. During January, 1978, NYFB adopted a resolution to file promptly its draft intermodal tariff serving four interior points in the event the Agreement is approved. The through rates in this proposed tariff are essentially combinations of the separate rates presently charged by the participating rail and water carriers, rather than rate divisions specially negotiated to attract cargo to the through route.[7]

Proponents further contend that approval is warranted because the Agreement will:

1. Institute a new intermodal service to Chicago, Cleveland, Louisville and East St. Louis via U.S. Atlantic and Gulf ports;
2. Allow NYFB carriers to compete more effectively with the intermodal services of carriers using Pacific Coast ports and "preserve" the all-water route from Hong Kong to U.S. Atlantic and Gulf ports;[8]

[3] NYFB submitted a 13-page "Memorandum in Support of Approval," and a 12-page affidavit from the NYFB conference chairman to which is attached: (1) a 9-page letter dated June 10, 1975 from NYFB's counsel supporting an earlier intermodal amendment; (2) a "Pro-Forma International Tariff" offering joint through service, to four interior points east of the Mississippi River—East St. Louis, Chicago, Cleveland and Louisville; and (3) seven tables illustrating that intermodal carriers serving the Far East trade have established varying charges for seven ancillary activities connected with such service (*e.g.*, rail freight station, detention and free time, bill of lading).

[4] The intermodal aspects of Agreement No. 5700-14 were approved for a one-year term.

[5] The four proponent carriers plus Showa Line, Ltd., comprise the Transpacific Freight Conference (Hong Kong), and file an intermodal tariff under the auspices of that conference.

[6] NYFB states that between January, 1973 and April, 1977, it has: (1) organized an intermodal study committee; (2) retained consultants to work with the intermodal committee; (3) filed an interchange tariff to facilitate the interchange of cargo from ocean carriers to rail carriers; and (4) drafted model intermodal tariffs.

[7] NYFB states that its proposed intermodal tariff is modeled closely after the Japan/Korea Atlantic and Gulf Conference (JKAG) tariff in effect between 1977 and 1979 pursuant to FMC Agreement No. 3103-64. Affidavit of D. Dick, at 4-5. All NYFB members also belong to the larger JKAG.

[8] NYFB alleges that the rapid growth of minilandbridge service through Pacific Coast ports by carriers such as Evergreen Lines and Seatrain International, S.A., threatens its all-water service. American President Line has also filed a tariff offering service to interior points via Pacific Coast ports. NYFB wishes to "meet this intermodal competition before it becomes too entrenched." NYFB also mentions increased all-water competition to Atlantic and Gulf ports by nonconference carriers such as Evergreen and Seatrain, but fails to relate this competition to the present Agreement.

3. Ensure "uniform development" of interior point intermodal service in the NYFB trade. Without a single conference tariff there could be a widely varying and confusing array of ancillary charges (*e.g.*, free time and demurrage charges) connected with intermodal shipments.
4. Subject any intermodal service which NYFB carriers provide to the conference's self-policing system.

Finally, NYFB contends that the Agreement is similar to other permanent intermodal or overland/OCP authority amendments approved by the Commission. *E.g., Pacific Westbound Conference Intermodal Agreement*, 16 S.R.R. 159 (1975); *West Coast U.S./India Conference of Japan/Korea (Agreement No. 150–54)*, unpublished, 1972.

NYFB also opposes any modifications in the Agreement which would allow member lines to take "independent action" whenever they disagreed with the majority's rate decisions.[9] *Atlantic & Gulf/West Coast of South America Conference*, 13 F.M.C. 121 (1969), is cited in support of this position.

Hearing Counsel believes NYFB will promptly initiate a commercially accepted intermodal service, but would still condition approval of the Agreement upon NYFB's submission of the following amendments:

(1) that the Agreement expire in 18 months;
(2) that the so-called "independent action" clause contain the broader "comparable rates, terms, or conditions of carriage" language found in Agreement No. 5700–25;
(3) that the "independent action" clause further require the conference to employ the same"inland mode of transport" as its member lines;
(4) that NYFB submit quarterly reports describing its intermodal discussions, planning activities, services and cargoes carried.

DISCUSSION

NYFB may well file a draft intermodal tariff, but the publication of an implementing tariff cannot alone justify intermodal ratemaking authority. *See Seatrain International S.A. v. Federal Maritime Commission*, 584 F.2d 546, 549, 15 S.R.R. 445, 448 (D.C. Cir. 1978); *Seatrain International, S.A. v. Federal Maritime Commission*, 598 F.2nd 289, 15 S.R.R. 597 (D.C. Cir. 1979). The underlying activity itself must be justified.

In this instance, it has not been demonstrated that the intermodal service NYFB has devised after four years of study will fill a legitimate transportation need. The practice of combining existing rail and water rates and of selecting interior service points 400 to 800 miles from NYFB ports practically assures that NYFB's proposal will be unattractive to potential intermodal shippers.

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[9] Articles 6(B) and (C) of the Agreement would allow member lines to operate independent intermodal services upon 120 days' notice to the conference, but only *unless and until* the conference files a preemptive tariff covering the "same origins, destinations and commodities." These provisions do not create a true right of independent action. They simply specify the conditions upon which the conference may publish its *initial* intermodal tariff when member lines have already begun intermodal services of their own. Articles 6(B) and (C) are better described as a "supercedence" clause than an "independent action" clause. NYFB's previous intermodal amendments (*e.g.*, Agreement No. 5700 25) allowed member lines to operate their own intermodal services until the conference filed a tariff with "comparable rates, terms and conditions of carriage."

Indeed, experience with the JKAG tariff upon which NYFB's draft tariff is patterned has proved this marketing approach to be an ineffective means of attracting cargo from either intermodal Pacific Coast competitors or all-water Atlantic and Gulf Coast competitors. *Conditional Disapproval of Agreement No. 3103–67*, served December 8, 1978, at 5. The JKAG tariff was in effect for over a year without inducing any cargo to move over a through intermodal routing.

Chicago, East St. Louis, Louisville and Cleveland are within the traditional "overland" territory of the Pacific Coast carriers.[10] Shippers located in these midwestern locations may find it convenient to receive port-to-port shipments from the Far East at Atlantic and Gulf Coast ports or at Pacific Coast ports depending on their prevailing needs and interests, yet the economic benefits of *through intermodal transport* are most obvious for shipments moving over the appreciably shorter Pacific Coast route. The potentially unrealistic geographic scope of the proposed Agreement readily distinguishes it from the conference agreements in trades with naturally developing intermodal traffic which have received unrestricted intermodal authority.

The Agreement would authorize NYFB to establish rates for Far East cargo destined to Seattle, Washington via the Port of New York. Service inefficiences of this magnitude have not been proposed by NYFB, of course, but the absence of a proposal to commence intermodal service to more geographically favorable areas like Dallas, Birmingham, Atlanta, Charlotte, Harrisburg or Hartford, suggests that the NYFB lines may not be seriously interested in offering their shippers viable intermodal alternatives to minilandbridge service.[11]

NYFB has the burden of justifying the Agreement's anticompetitive aspects under the *Svenska* doctrine. Under the circumstances, an adequate justification should include substantial evidence that the ratemaking authority it seeks will not be employed to insulate NYFB from competition via alternative intermodal routes, but to assist NYFB achieve a fair, stable and commercially viable intermodal service of its own. Evidence that significant quantities of NYFB's present containerized carryings are destined to the four inland points listed in its proposed tariff, that a significant number of shippers have requested a NYFB intermodal service to these points, or that NYFB faces significant intermodal competition from other carriers serving the designated points via Atlantic and Gulf ports would be most useful to NYFB's cause. The record contains no such evidence.

NYFB's contention that approval of the Agreement is warranted because it would subject any intermodal traffic carried under it to self-policing is not a sufficient justification for approval. Self-policing is an automatic adjunct of concerted ratemaking, a mandatory duty prescribed by Shipping Act section 15

[10] Most carriers serving the Far East via Pacific Coast ports offer reduced "Overland/OCP" rates for cargo originating from or destined to points east of the Continental Divide. These rates tend to equalize the cost of using Atlantic and Gulf Coast and Pacific Coast carriers.

[11] In *Seatrain International (II), supra*, 598 F.2d at 296, 15 S.R.R. at 604, the court indicated that overlapping membership in competing intermodal conferences was a matter requiring particular justification, and stated that:

> The 12 JKAG members with access to the TPF intermodal tariff may have had limited incentives to generate an additional intermodal service and thereby compete with themselves. The possibility emerges, without refutation by the FMC, that the majority of the Conference members wanted no JKAG intermodal tariff at all.

and section 528 of the Commission's Rules. NYFB does not, and could not, claim that the inclusion of intermodal shipments within its ratemaking authority would eliminate *existing malpractices* associated with intermodal shipments because there is presently no intermodal cargo moving in the NYFB trade.

NYFB's argument that the Agreement is necessary to prevent the "destruction" of the all-water route between Hong Kong and U.S. Atlantic and Gulf ports is also unsubstantiated.[12] Even if cargo losses were documented and convincingly related to gains made by Pacific Coast intermodal carriers, there is no basis for concluding that these losses would be prevented by approval of the instant Agreement. That conclusion would require the existence of a sizeable market for NYFB's proposed interior point service to Chicago, East St. Louis, Louisville and Cleveland.

The Commission has found intermodal ratemaking by existing all-water conferences to be justified only when such further section 15 authority would have the probable effect of minimizing commercial disruptions incident to the employment of new technology and the development of new trade patterns associated with intermodalism. When such benefits to United States commerce were not demonstrated, intermodal amendments have been disapproved. *See Far East Conference Intermodal Amendment (Agreement No. 17–34)*, 18 S.R.R. 1685 (1979). The present record fails to establish that unlimited intermodal authority is necessary to secure transportation needs, public benefits or regulatory purposes in the NYFB trade.

THEREFORE, IT IS ORDERED, That Agreement No. 5700–26 is disapproved; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

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[12] NYFB also claims that approval may induce the nine non-conference lines which have entered into a rate agreement with NYFB (FMC Agreement No. 10108) to join the conference. Like self-policing, the enlargement of conference membership is not *itself* a justification for ratemaking authority.

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–44

PIERPOINT MANAGEMENT COMPANY AND RETLA STEAMSHIP COMPANY

v.

HOLT HAULING & WAREHOUSING SYSTEM, INC.

DISCONTINUANCE OF PROCEEDING

November 27, 1979

The Commission by order of June 13, 1979, in this proceeding required the parties to submit a revised settlement agreement for determination as to section 15, Shipping Act, 1916 applicability and if necessary approvability. The parties complied with this order and the agreement was processed pursuant to section 15 procedures.

The Commission has now approved the agreement in question which settles the complaint in this proceeding. Accordingly, no further proceedings in this matter are contemplated and the complaint is dismissed.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-44

PIERPOINT MANAGEMENT COMPANY AND RETLA STEAMSHIP COMPANY v. HOLT HAULING AND WAREHOUSING SYSTEMS, INC.

ORDER

June 13, 1979

This proceeding is before the Commission upon its determination to review the Order of Discontinuance of Administrative Law Judge William Beasley Harris (Presiding Officer).[1]

On October 30, 1978, Pierpoint Management Company and Retla Steamship Company jointly filed a complaint with the Commission against Holt Hauling & Warehousing System, Inc. pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. § 821) in which it was alleged that Holt violated sections 15, 16 and 17 of the Shipping Act, 1916 (46 U.S.C. §§ 814, 815 and 816). The Commission's Bureau of Hearing Counsel intervened in the proceeding.

Central to the resolution of this dispute is Agreement No. T-3323 (Agreement) to which Pierpoint, Retla, and Holt are signatories. The Agreement is a terminal lease arrangement by which Holt leased to Pierpoint the Pier Seven facility at Gloucester City, New Jersey.[2] According to the terms of the Agreement, Pierpoint, as the tenant, manages and operates the Pier Seven terminal facility, paying annual base rental in monthly installments to Holt. The Agreement provides a formula for adjustment in the event the annual tonnage calculated in the base rental (150,000 tons at $2.00 per ton) is less than 150,000 tons. The base rental applies only to wood and steel products carried or controlled by Retla. If an annual short fall of tonnage for wood and steel products occurs, the rental formula allows Retla to elect to treat other commodities as base cargo under the base rental formula. The tonnage allowable for election is determined by calculating the difference between 150,000 tons and the tons of base cargo actually carried during the lease year. The Agreement was approved by the Commission on August 26, 1976.

[1] Rule 227 of the Commission's Rules of Practice and Procedure permits Commission review of initial decisions on its initiative [46 C.F.R. § 502.227].

[2] The Agreement designates Retla, a common carrier by water, as the user of Pier Seven under a special rental arrangement.

In their complaint, Pierpoint and Retla allege that: Holt assigned its interest in Agreement No. T-3323 to the New Jersey Economic Development Authority without prior approval by the Commission or Pierpoint in derogation of section 15; changed competitive circumstances[3] have made the Agreement unjustly discriminatory, detrimental to the commerce of the United States, and contrary to the public interest, in violation of section 15; Holt has violated sections 16 and 17 by providing terminal services to Korean vessels carrying wood products at a terminal tariff rate substantially lower than Retla is required to pay as a result of its reduced carryings.

Complainants and Respondent advised the Presiding Officer at a January 1979 prehearing conference held in conjunction with this proceeding that they were negotiating a settlement agreement disposing of the complaint. Subsequently, on March 7, 1979, they submitted to the Presiding Officer a settlement agreement and a motion for its approval and discontinuance of the proceeding. The settlement agreement requires the Complainant Retla to pay the sum of $500,000.00 to the Respondent Holt and cancels Agreement No. T-3323. Hearing Counsel advised the Presiding Officer that it had no objection to the settlement agreement.

The Presiding Officer approved the settlement agreement on the basis that Agreement No. T-3323 grants the tenant a unilateral right of termination of the lease on 60 days notice and that the "law favors compromise and settlement." He than discontinued the proceeding.

The Commission is aware of and fully supports the policy which favors the settlement of disputes, but it is incumbent upon the decision maker to assure that the settlement proposed by litigants does not violate the law. As was stated in *Inter Equip, Inc. v. Hugo Zanelli & Co.,* 17 S.R.R. 1232, at 1234 (1977):

> The fact that parties seek approval of their settlement does not . . . mean that the presiding officer or the Commission must blindly approve and has no useful function to perform. Care must be taken to insure that no violence is done to any statutory schemes involved especially if there is a question concerning the applicability of Section 15 of the Act. . . .

Here, the proposed settlement appears to modify the termination clause of the Agreement. It also appears to modify the payment terms of the Agreement. If the proposed settlement represents a modification of either of these provisions of the Agreement or any other of the Agreement's provisions, then it must be filed for Commission approval pursuant to section 15. However, the proposed settlement is too vague in regard to these essential clauses to allow for a definitive determination on the status of the settlement agreement under section 15. Before it can be considered for approval, the settlement agreement must be clarified in order that its applicability to section 15 may be determined. If applicable, the Commission must then determine whether or not the proposed settlement can be approved. *Inter Equip, Inc. v. Hugo Zanelli & Co., supra; accord American Export Isbrandtsen Lines, Inc., Order to Show Cause,* 14 F.M.C. 82, 89 (1970).

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[3] The changed competitive circumstances referred to in the complaint were allegedly caused by cargo restrictions imposed by the Korean Government and the entry of a Korean carrier into the trade carrying plywood previously carried by Retla under the terms and conditions of Agreement T-3323. The complaint also alleges that Holt may have entered into an unfiled section 15 agreement in connection with its performance of terminal services for Korean controlled cargo.

Neither the settlement agreement nor the record in this proceeding provides any indication as to what the proposed \$500,000 payment by the Complainant Retla represents. The Commission must know, in detail, what preexisting obligation of the Complainant, if any, will be satisfied by this payment. If the obligation is a liquidated sum, *e.g.,* a rental arrearage, then the Commission must know whether the proposed settlement fully satisfies that obligation or whether it compromises any portion thereof. If it represents a compromise, the Commission must know the amount, identity of the obligation, and the accrual date of the obligation proposed to be compromised. In short, the settlement agreement should make clear what is the *quid pro quo* for the \$500,000 payment.

Accordingly, any settlement agreement reached in this proceeding must be filed with the Commission for a determination as to its section 15 applicability and, if necessary, approvability. Such agreement must be complete and incorporate all of the terms and conditions of settlement. If determined to be subject to section 15, the agreement will be processed pursuant to the Commission's usual procedures.

This proceeding will be held in abeyance for a period of 30 days to allow the submission of a revised settlement agreement. If no settlement agreement is submitted within that time, the Commission will, by further order, direct the Presiding Officer to resume proceedings on the complaint.

THEREFORE, IT IS ORDERED, That the Presiding Officer's Order of Discontinuance approving the proposed settlement agreement is vacated; and

IT IS FURTHER ORDERED, That this proceeding be held in abeyance for a period of 30 days from the date of this Order to permit the submission of a revised settlement agreement.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-22

LAKES AND RIVERS TRANSFER CORPORATION

v.

THE INDIANA PORT COMMISSION

NOTICE

November 28, 1979

Notice is given that no appeal has been taken to the October 24, 1979 dismissal of the complaint in 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. 76-59
AGREEMENTS NOS. T-3310 AND T-3311

No. 76-22

LAKES AND RIVERS TRANSFER CORPORATION

v.

THE INDIANA PORT COMMISSION

(1) TERMINATION OF NO. 76-22
(2) ENLARGEMENT OF TIME FOR REPLY BRIEF IN NO. 76-59

Finalized November 28, 1979

(1) By its order served August 28, 1979, the Commission approved a settlement agreement and six lease agreements (Nos. T-3762, T-3763, T-3764, T-3765, T-3766, T-3767 and T-3768) between the Indiana Port Commission, on the one hand, and on the other, the two principal stevedores, Ceres Marine Terminals, Inc., and Lakes and Rivers Transfer Corporation, at Burns Waterway Harbor.

Docket No. 76-22 is a complaint proceeding, which has been consolidated with Docket No. 76-59, an investigation instituted by the Commission.

Lakes and Rivers agreed to withdraw its complaint in No. 76-22, as part of the settlement agreement above.

Accordingly, it is appropriate now that the settlement agreement (T-3762) has been approved to note that the complaint in No. 76-22 has been withdrawn, and that proceeding (No. 76-22) has been terminated. As a caveat it should also be noted that the entire record in both proceedings remains the record for any factual determinations as to the remaining issues in No. 76-59.

(2) By motion filed October 12, 1979, at 4:37 p.m., Ceres, Inc., asks for an enlargement of the time within which to file its reply brief in No. 76-59 as to the remaining issues in that proceeding. Reply briefs were due on October 12, and Ceres' request is tardy. However, since this proceeding has been under way a long time, during which the parties have resolved many of the issues, and

during which time the Indiana Port Commission expanded its port facilities greatly at a large dollar cost, the additional ten days for Ceres to file its reply brief does not seem excessive. Accordingly, the request of Ceres is granted, without waiting the 15 days allowed in the rules for replies to such a motion, and with no objection having been received to date. When the reply brief of Ceres has been received and all matters have been duly considered, an initial decision on the remaining issues in No. 76-59 will be entered.

(S) CHARLES E. MORGAN
Administrative Law Judge

October 24, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-53

JOHN C. GRANDON D/B/A CONSULSPEED SERVICES
INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 2011

Respondent's freight forwarder license revoked for failure to comply with the Shipping Act, 1916, and the Commission's Freight Forwarder Regulations.

John Robert Ewers, Joseph B. Slunt and *Alan J. Jacobson* for the Commission's Bureau of Hearing Counsel.

REPORT

November 30, 1979

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

By Order served May 18, 1979, John C. Grandon d/b/a Consulspeed Services (Consulspeed), a Commission licensed ocean freight forwarder, was directed to show cause why its forwarder license should not be revoked or suspended for permitting Air Wings International, Inc. (Air Wings), an air freight forwarder, to perform ocean freight forwarding services under Consulspeed's name and license number, in violation of section 44(e) of the Shipping Act, 1916 (46 U.S.C. § 843(e)) and sections 510.23(a) and 510.24(e) of the Commission's Rules.[1] The hearing in this proceeding was limited to affidavits of fact and memoranda of law.

[1] 46 C.F.R. § 510.23(a) reads, in part:

(a) No licensee shall permit his license or name to be used by any person not employed by him for the performance of any freight forwarding service. No licensee may provide freight forwarding services through an unlicensed branch office or other separate establishment without written approval of the Federal Maritime Commission.

46 C.F.R. § 510.24(e) requires the licensee to certify on the ocean bill of lading before receiving compensation from a common carrier that it is operating under a license issued by the Commission and:

[h]as performed in addition to the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for such cargo, two or more of the following services:

(1) The coordination of the movement of the cargo to shipside;
(2) The preparation and processing of the ocean bill of lading;
(3) The preparation and processing of dock receipts or delivery orders;
(4) The preparation and processing of consular documents or export declarations;
(5) The payment of the ocean freight charges on the cargo.

Consulspeed applied for and was granted by the Commission independent ocean freight forwarder license No. 2011, effective November 23, 1977. At that time, Consulspeed was given written notice of the requirement that it must conduct its forwarding activities in accordance with the Shipping Act, 1916, and the Commission's Freight Forwarder Regulations (46 C.F.R. Part 510).[2]

A routine compliance check begun on August 2, 1978 by Commission investigators revealed a close business relationship between Air Wings, an air freight forwarder and Consulspeed.[3] The compliance check further disclosed that between March 18, 1978 and August 24, 1978, Consulspeed had collected from twelve ocean carriers $9,607.69 in brokerage fees. The fees involved approximately 229 shipments for which ocean freight forwarding services were performed not by Consulspeed but by Air Wings under Consulspeed's name and license number.[4] While Air Wings billed the shippers for the services rendered, Consulspeed collected compensation from the carriers on these same shipments even though it had not performed the services required by section 44(e) of the Shipping Act and section 510.24(e) of the Commission's Rules.[5]

Although Consulspeed did not deny the charges, it contends that it did not willfully violate the Commission's rules and argues that revocation of its ocean freight forwarding license would be too harsh a sanction.

The Commission's Bureau of Hearing Counsel submits that the number of shipments involved, the amount of money collected and the duration of the violations together warrant a revocation of Consulspeed's license.

DISCUSSION

The uncontroverted facts are that between March 18, 1978 and August 24, 1978, Consulspeed permitted Air Wings to use Consulspeed's name and license number in the performance of ocean freight forwarding services on approximately 229 shipments of Air Wings' clients. Consulspeed also collected brokerage fees on these shipments even though it had not performed freight forwarding services required by the Shipping Act and the commission's Rules.

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[2] Prior to and at the time of the issuance of the license, the Commission's *Office of Freight Forwarders* sent Consulspeed copies of sections 1 and 44 of the Shipping Act, 1916 (46 U.S.C. §§801 and 843) and of 46 C.F.R. Part 510.

[3] In his affidavit, William L. Ausderan, a Commission investigator, states that Consulspeed, whose only employee appears to be Mr. Grandon occupies one room in Air Wings' offices for which Air Wings pays the rent and that Air Wings also keeps Consulspeed's records of freight compensation received and fees collected.

[4] The President of Air Wings stated, when interviewed by Mr. Ausderan, that with regard to those shipments Air Wings booked the cargo, prepared export documentation, provided drayage to dockside, arranged for packaging and crating services, advanced freight monies and invoiced the shippers. In return for the office space it occupied Consulspeed was expected, but apparently did not, provide messenger and banking services.

[5] Section 44(e) provides, in relevant part:

(e) A common carrier by water may compensate a person carrying on the business of forwarding to the extent of the value rendered such carrier in connection with any shipment dispatched on behalf of others when, and only when, such person is licensed hereunder and has performed with respect to such shipment the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for, such cargo, and at least two of the following services:

(1) The coordination of the movement of the cargo to shipside;
(2) The preparation and processing of the ocean bill of lading;
(3) The preparation and processing of dock receipts or delivery orders;
(4) The preparation and processing of consular documents or export declarations;
(5) The payment of the ocean freight charges on such shipments.

Consulspeed's argument that the violations were not willful is not convincing.[6] The principle is well established that an act is willful if it is intentional or if committed with careless disregard of statutory requirements.[7] Consulspeed does not contend that allowing the use of its name and license number or its own collection of brokerage fees were unintentional. Moreover, Consulspeed's ignorance of the Commission's rules appears to be due to its admitted failure to take the time to read them. Consulspeed's actions must be considered, therefore, as willful.

Consulspeed is therefore found to have willfully failed to comply with the Shipping Act, 1916 and the rules and regulations of the Commission promulgated thereunder. In view of the number and nature of these violations, F.M.C. License No. 2011 issued to John C. Grandon d/b/a Consulspeed Services, is hereby revoked.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[6] Shipping Act section 44(d) provides, in relevant part:

[A licensee's license] . . . may . . . be suspended or revoked for *willful* failure to comply with any provision of this Act, or with any lawful order, rule, or regulation of the Commission promulgated thereunder. (Emphasis added.)

[7] *U.S. v. Ill. Central Ry.*, 303 U.S. 239, 242 243 (1938); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir. 1974), *cert. den.* 419 U.S. 830 (1974); *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B. 483, 486 (1954).

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-42

P & M CRANE SERVICE, INC.

v.

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS

NOTICE

November 30, 1979

Notice is given that no appeal has been taken to the October 29, 1979 discontinuance 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 discontinuance has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 77-42

P & M CRANE SERVICE, INC.

v.

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS

MOTION FOR APPROVAL OF SETTLEMENT GRANTED; PROCEEDING DISCONTINUED

Finalized November 30, 1979

Complainant and respondent have filed a joint motion seeking approval of a settlement which they have reached and ask for discontinuance of this proceeding. This settlement, if approved, would bring to a conclusion at long last a series of cases arising out of practices long since discontinued by respondent as a result of the Commission's decision in Docket No. 75-51, *Perry's Crane Service, Inc. v. Port of Houston Authority of Harris County, Texas,* 19 F.M.C. 548 (1977). That case as well as another similar complaint was settled with my approval, and my rulings of approval became administratively final by subsequent notice of the Commission. See Docket No. 75-51, cited, Motion for Approval of Settlement granted, June 21, 1979, Commission Notice, July 27, 1979; Docket No. 76-57, *H & H Cranes, Inc. v. Port of Houston Authority of Harris County, Texas,* Motion for Approval of Settlement granted, July 10, 1979, F.M.C. Notice, August 16, 1979, 19 SRR 547.

As in the two previous settlements, the present settlement represents a successful effort on the part of both sides to avoid time-consuming and costly litigation which in all probability would benefit neither side economically regardless of who might have prevailed on the merits. As was the situation in the two previous settlements, the issue to be litigated here is that concerning the amount of reparation which should be awarded to complainant because of previous episodes in which he allegedly lost jobs and was displaced from jobs already commenced. As set forth in the Commission's decision in Docket No. 75-51, the measure of damages depends upon a determination of financial injury caused by "bumping" of complainant's cranes from jobs already commenced as well as loss of jobs because of respondent's previous preferential practices. Counsel for both sides have spent considerable time attempting to identify "bumping" episodes and attempting to formulate a means to quantify the lost jobs aspect of the formula for damages. This has proved to be a sizeable task and should the matter have proceeded to a trial-type hearing, the many factual disputes and the need for subsequent pleadings, initial decision, exceptions, commission decision, etc., made it apparent that a settlement would be far the wiser course of action. Thus, complainant has determined that accepting a payment of $12,800 with costs as compensation for his injury would be more prudent than to pursue the uncertainties of prolonged litigation.

As I explained in greater detail in the two previous rulings approving settlements in Docket Nos. 75-51 and 76-57, the Commission and courts favor settlements and exert every effort to find them reasonable because of the strong policy discouraging needlessly expensive litigation. Again, as I explained in those previous rulings, a settlement such as the present one does not raise any questions under other provisions of the Shipping Act, 1916, i.e., it does not constitute an agreement subject to approval under section 15 of the Act and it does not involve tariff matters under section 18(b)(3). In short, all it does is attempt to settle an issue of damages arising out of respondent's discontinued practices which were found to be unlawful under sections 16 and 17 of the Act.

With approval of this settlement, the long history of litigation between various private crane operators and the Port of Houston which began in 1975 will come to an end and will do so amicably. The parties are commended for their sincere efforts to terminate these long controversies and in my opinion have acted in the best traditions of American law in so doing. Accordingly, as I found in the two previous cases which were settled for similar reasons, the settlement which the parties have submitted for approval is reasonable, violates no law or policy, and fully comports with the Commission's policy which encourages settlements. Therefore, subject to rule 227(c), as amended (i.e., subject to Commission review), the settlement is approved and this complaint case is discontinued.

(S) NORMAN D. KLINE
Administrative Law Judge

October 29, 1979

FEDERAL MARITIME COMMISSION

[45 C.F.R. PART 510; DOCKET NO. 78-53]

INDEPENDENT OCEAN FREIGHT FORWARDER BIDS ON GOVERNMENT SHIPMENTS AT UNITED STATES PORTS

December 5, 1979

ACTION: Discontinuance of proposed rulemaking

SUMMARY: On December 12, 1978, the Federal Maritime Commission published a notice of proposed rulemaking (43 Fed. Reg. 58098) with respect to practices of independent ocean freight forwarders who submit bids to United States Government agencies. After full consideration of the issues and comments from interested parties, the Commission has decided that the adoption of a new rule at this time is unnecessary.

SUPPLEMENTAL INFORMATION:

On March 18, 1977, the Commission issued a decision in Docket No. 74-10[1] holding that fees assessed the General Services Administration (GSA) for ocean freight forwarding services were, in certain instances, so low[2] as to be in violation of section 16 First, of the Shipping Act, 1916 (46 U.S.C. §815), and the Commission's General Order 4 (46 C.F.R. §510).

Section 16 First, of the Shipping Act, 1916, *inter alia,* makes it unlawful for a forwarder:

> To make or give undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .

Rule 510.24(b) of General Order 4 provides:

> No (Forwarder) shall render, or offer to render, any forwarding service free of charge or at a reduced forwarding fee in consideration of . . . receiving compensation from an oceangoing common carrier on the shipment. . . .

However, in its decision in Docket 74-10 the Commission stated:

[1] *Freight Forwarder Bids on Government Shipments at United States Ports—Possible Violations of the Shipping Act, 1916, and General Order 4,* 19 F.M.C. 619 (1977).

[2] Fees as low as four and one half cents were being bid on GSA shipments.

We are reluctant to establish binding rules of universal application governing the level of freight forwarder fees on the basis of the existing limited record. The important matter of what objective standards, if any, should be adopted to judge the acceptability of forwarding GSA bids under the Shipping Act, 1916, and the Commission's regulations, is one that requires considerably more study and analysis. We do not intend to take any precipitous action, no matter how well motivated, that might result in the establishment of requirements which could prove impossible of application or unduly or unnecessarily disruptive of the freight forwarder industry. Whatever standards are finally adopted must be well-reasoned, economically sound and consistent with responsible regulatory policy . . . We will therefore hold under advisement, pending further study and review, the issue raised in our Order instituting this proceeding, of 'whether the Commission's General Order 4 should be amended to include a rule governing the practices of forwarders bidding on GSA contracts and providing services thereunder.'. . .

After the above mentioned "further study and review" of the issue was concluded, it appeared that a new rule might be the most effective method of preventing the type of unlawful practice found in Docket 74-10.[3] The Commission therefore published a notice of proposed rulemaking (43 Fed. Reg. 58098) instituting the instant proceeding, Docket No. 78-53, on December 12, 1978.

After consideration of all the comments submitted and carefully weighing the advantages and disadvantages of the proposed rule, the Commission has determined that the benefits to be derived from a new rule do not currently justify the burdens which would be imposed on the forwarding industry. Accordingly, this proposed rulemaking proceeding will be discontinued.

The Commission now gives notice that it intends to monitor the level of forwarder bids submitted to GSA and take whatever action it deems appropriate on a case-by-case basis. Appropriate action includes civil penalties and license suspension or revocation.

THEREFORE, IT IS ORDERED, That Docket No. 78-53 is discontinued; and

IT IS FURTHER ORDERED, That notice of this Order be published in the *Federal Register.*

By the Commission

FRANCIS C. HURNEY
Secretary

[3] Despite the findings in Docket 74-10, GSA's next request for bids produced bids as low as one cent.

FEDERAL MARITIME COMMISSION

[46 C.F.R. §508; DOCKET NO. 78-33]

ACTIONS TO ADJUST OR MEET CONDITIONS UNFAVORABLE TO SHIPPING IN THE UNITED STATES/ECUADOR TRADE

December 11, 1979

ACTION: Discontinuance of Proposed Rule

SUMMARY: The proposed rule in this proceeding was designed to counteract apparent unfavorable conditions to shipping in the U.S./Ecuador trade. An Ecuadorian Government decree appeared to preclude a Norwegian registered vessel (M.V. *Lionheart*) from competing on the same basis as other vessels. Temporary relief was afforded through U.S. Coast Guard waivers giving the vessel American registry status. These waivers are likely to continue until a replacement vessel is available and therefore no immediate need exists for continuing this proceeding.

DATES: Effective December 14, 1979

SUPPLEMENTARY INFORMATION:

This proceeding was instituted by notice of proposed rule published September 28, 1978 (43 Fed. Reg. 44554). The proposed rule could have suspended tariffs of Transportes Navieros Ecuatarianos in the trade between the U.S. and Ecuador. The proposal was designed to counteract apparent unfavorable conditions to shipping created by the Ecuadorian Government in implementing its Decree 7/78 in such a way as to preclude a Norwegian registered vessel in that trade (the M/V *Lionheart*) from competing on the same basis as other vessels. Ecuadorian law appeared to favor carriage by Ecuadorian and U.S. flag vessels in this trade. Issuance of a final rule was deferred when the U.S. Coast Guard granted a temporary waiver of survey, inspection and measurement requirements for the vessel in question in order to admit the vessel to American registry, thereby qualifying it for more favorable treatment under Decree 7/78.

The U.S. Coast Guard on October 22, 1979 has extended the waiver for the M/V *Lionheart* through September 30, 1980, or until a replacement vessel is placed in operation, whichever occurs first. The Coast Guard also indicates that a replacement barge may be available as soon as March 1, 1980. Another new vessel (*Ro-Ro*) to be built in West Germany, has been contracted for delivery scheduled for September 1, 1980.

The proposed rule was designed simply to afford the M/V *Lionheart* relief from Decree 7/78 in regard to its U.S./Ecuador operations. Coast Guard waivers have provided effective relief. It appears likely that such waivers will continue until such time as a U.S. registered permanent replacement vessel is available. If it turns out that this does not occur, the Commission could reissue a proposed rule for further comment. No purpose is served by continuing this proceeding and it is hereby ordered to be discontinued.

By the Commission.

FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-6

PUERTO RICO MARITIME SHIPPING AUTHORITY AND TRAILER MARINE TRANSPORT CORPORATION PROPOSED REDUCED RATES

ORDER ON APPEAL FROM DENIAL OF MOTION TO DISCONTINUE

December 11, 1979

This proceeding is before the Commission upon the appeal of Trailer Marine Transport Corporation (TMT), from the ruling of Administrative Law Judge Stanley M. Levy denying TMT's motion to discontinue the proceeding.

PROCEEDINGS

On December 22, 1978 and January 5, 1979, Puerto Rico Maritime Shipping Authority (PRMSA) filed revisions to PRMSA Tariff No. 6, FMC-F No. 7, which in effect, imposed upon Charleston, South Carolina the same rate structure applicable to the Jacksonville and Miami, Florida/Puerto Rico Trade. TMT protested PRMSA's tariff filings and in addition, reduced its trailer-load rates on Bakery Goods and Furniture, N.O.S. moving between Jacksonville and Miami, Florida and Puerto Rico. PRMSA protested TMT's rate reductions after proposing to reduce its trailerload rates on Bakery Goods and Furniture, N.O.S. in the Charleston, South Carolina/Jacksonville and Miami, Florida/Puerto Rico trade.

By Order of Investigation and Hearing, served February 2, 1979, the Commission instituted this proceeding to determine the lawfulness of the various tariff revisions submitted by TMT and PRMSA. Specifically, that Order put at issue: (1) the validity of the rationale of *Rates From Jacksonville, Florida to Puerto Rico,* 10 F.M.C. 376 (1967), cited by both TMT and PRMSA as controlling authority in this case, in light of changed circumstances since that case was decided; (2) the applicability of the Commission's decision in *Rates From Jacksonville* to the factual situation in this proceeding; and, (3) the compensatory level of PRMSA's reduced Charleston rates.

Subsequently, on February 28, 1979, TMT withdrew its protest to PRMSA's tariff revisions and filed a motion to discontinue the proceedings on grounds of mootness, which motion was opposed by both PRMSA and the Commission's Bureau of Hearing Counsel. On the same date, TMT filed rate increases which restored the prior level of rates on bakery goods and furniture moving in the South Atlantic/Puerto Rico Trade. PRMSA, on March 12, 1979, filed similar rate increases on bakery goods and furniture moving in the South Atlantic/Puerto Rico Trade. The Presiding Officer, by Order served March 16, 1979, denied TMT's Motion to Discontinue.

TMT subsequently requested the Presiding Officer to reconsider his denial of TMT's Motion to Discontinue. This request was opposed by PRMSA and Hearing Counsel and denied by the Presiding Officer on April 9, 1979. The matter is now before the Commission on appeal.

THE PRESIDING OFFICER'S DECISION AND POSITION OF THE PARTIES

From the filing of TMT's Motion to Discontinue to the present there have been no less than fourteen (14) substantive filings in this matter. Rather than attempt to trace the development of the arguments and rulings through the record, a summary of the positions of the parties and the findings of the Presiding Officer should serve to fairly present the issues now before the Commission or disposition.

The basis of the Presiding Officer's refusal to discontinue this proceeding is that TMT has, since the institution of the proceeding, filed new intermodal rail-water rates on shipments of furniture and dry goods originating at 20 additional inland points which affect the matter under investigation. He explained that while he could not on the basis of the record determine whether TMT has in fact revived the rate differential it purported to have cancelled, he would not proceed further in this regard until the Commission advises whether it intends to assert jurisdiction over intermodal rates in this proceeding in view of the fact that this matter was not raised in the Commission's Order of Investigation. The Presiding Officer found that any inquiry into the efficacy of the *Rates From Jacksonville* precedent would be purely theoretical at this point and standing alone would not warrant continuation of this matter. He reached no decision, however, on the issue of the compensatory nature of PRMSA's reduced rates.

TMT has maintained that this proceeding is moot as there is no valid regulatory purpose to be served by its continuance. TMT notes that it has cancelled its port-to-port rate reductions and withdrawn its protest against PRMSA's rate reductions restoring rate parity on the port-to-port rates. It contends that its intermodal rates should not be made an issue in this proceeding because: (1) these rates are not below its port-to-port rates, precluding any possibility of cross-subsidization of services; (2) the Commission has no jurisdiction over its intermodal rates, not only as to filing such rates, but also as to being entitled to any information concerning them; and (3) PRMSA's institution of reduced through rates from the same inland points as TMT's shifts the focus of this proceeding to an issue concerning only through rate competition, a matter over which the Commission has no jurisdiction. Although TMT is willing to allow rate parity at this time, it reserves its "right" under *Rates From Jacksonville* to a rate differential in the future. TMT concludes that in any event, no material issues of any practical effect allegedly remain to be decided in this proceeding.

PRMSA, on the other hand, urges the Commission not only to continue the present proceeding but to broaden it to a general inquiry into TMT's overall rate structure and the relationship between TMT's port-to-port rates and its through rates. PRMSA maintains that the cancellation of TMT's reduction of its port-to-port rates is a subterfuge and in fact TMT has revived the rate differentials by reductions in its through rates. PRMSA alleges that TMT has intentionally misled the Commission and that the reduced through rates seriously undercut PRMSA's port-to-port rates.

PRMSA further asserts that the Commission has jurisdiction over the water portion of TMT's intermodal rates,[1] and that the Commission does not need jurisdiction over the through rates to prevent the cross-subsidization of those rates by the port-to-port rates. PRMSA maintains that TMT continues to enjoy a rate differential under *Rates From Jacksonville* to which it is not entitled, is engaging in unlawful destructive price competition and discrimination, and is attempting to evade the Commission's regulation of its port-to-port rates through the use of intermodal rates. It further argues that even without jurisdiction over intermodal rates, the Commission has an obligation to regulate port-to-port rates and has the right to obtain information necessary to perform this function. This proceeding is allegedly sufficiently broad in scope to permit an inquiry into the effect of TMT's intermodal rates on the port-to-port rates. PRMSA believes that the *Rates From Jacksonville* issue is viable and that the Commission can in fact order TMT to establish a rate differential in PRMSA's favor.

Hearing Counsel opposes a discontinuance of this proceeding but does not agree with PRMSA that its scope should be expanded. It argues that this proceeding should not be discontinued until the principles established in *Rates From Jacksonville* are thoroughly reexamined. Hearing Counsel points out that while TMT has withdrawn the rate actions at issue in this proceeding, it nevertheless asserts continuing rights under that case. Hence, a valid regulatory purpose exists in pursuing this matter to a final conclusion.

As to the effect of TMT's intermodal rate reductions on its port-to-port rates and the competitive effect of such action on PRMSA, Hearing Counsel is of the opinion that while there may be validity to PRMSA's contentions in this regard, these matters could not be addressed without a restructuring of this proceeding, or the institution of a new proceeding. Hearing Counsel suggest that if the Commission is inclined to address this matter further, it should consider the impact of the court's stay order in *Trailer Marine Transport Corporation v. Federal Maritime Commission,* 602 F.2d 379 (D.C. Cir. 1979).[2]

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[1] PRMSA cites *In re: Trailer Marine Transport Corporation—Joint Single Factor Rates, Puerto Rico Trade,* 20 F.M.C. 524 (1978).

[2] Further argument was advanced by Hearing Counsel regarding the impact and effect of the court's stay in that proceeding. However, in light of the court's intervening decision on the merits in the case, discussed *infra,* further discussion on this point is unnecessary.

Finally, Hearing Counsel notes that even if it is assumed that TMT's port-to-port rates are subsidizing the intermodal rates the only available remedy would be a reduction in TMT's port-to-port rates, an action which would reestablish the rate differentials challenged in this proceeding.

DISCUSSION

Intermodal Rates

This case does not involve a question of whether the local rates at issue are unreasonably high in relation to through rates but whether they are, standing alone, unreasonably low. The reasonableness of any rate differential between TMT's through rates and its port-to-port rates is a matter beyond the scope of this investigation. Therefore, the reduced rates of TMT having been cancelled and its protest against PRMSA's rates having been withdrawn, the Commission perceives no valid regulatory purpose in continuing this proceeding on this issue.

However, even if the Order of Investigation in this proceeding had included an examination of TMT's through rates, it would still be affected by the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Trailer Marine Transport Corporation v. Federal Maritime Commission, supra,* reversing in part and remanding in part the Commission's order in *In re: Trailer Marine Transport Corporation—Joint Single Factor Rates, Puerto Rico Trade, supra.* The court held that the Federal Maritime Commission lacks jurisdiction over joint through rail-water rates in the Puerto Rican domestic offshore trades beginning or ending at an inland U.S. point and cannot require a carrier to file such rates with it. The court also determined that any demand by the Commission for information concerning intermodal through rates must articulate a basis therefor sufficient to allow a reviewing court to determine that the Commission has " 'given reasoned consideration to all the material facts and issues' and 'pertinent factors' at stake in the agency's order." This court decision clearly limits the Commission's authority to examine TMT's through rates in this or in any other proceeding.

The question remains, however, as to the manner and extent the Commission may examine and consider through rates in its investigations of port-to-port rates, such as the subject proceeding. Local rates set at unnecessarily high levels merely to facilitate the movement of cargo under through rates from inland points could be prejudicial to cargo originating at ocean ports, and would present a situation that the Commission can and should regulate.

Considered in the context of this proceeding, however, the only apparent remedy available to the Commission to prevent cross-subsidization would be to order TMT to *lower* its local rates, an action which would restore the very rate differential protested in this matter. Without the authority to directly regulate through rates, the Commission's ability to prevent unreasonable cross-subsidization of rates becomes somewhat tenuous. In any event, this proceeding is not the proper vehicle for the Commission to deal with the matter of the cross-subsidization of rates in a comprehensive and effective manner. Legislative action may be required to resolve this matter completely.

Application of Rates From Jacksonville

The cancellation of the rate differential put at issue in this proceeding obviates the need for any further hearing on the applicability of *Rates From Jacksonville.* PRMSA's contention that the cancelled differential has been revived in the form of through rates is somewhat undermined by its own action in instituting reduced through rates in the South Atlantic/Puerto Rico Trade. In terms of *carrier competition,* which was the primary concern of *Rates From Jacksonville,* through rates generally compete with through rates and local rates generally compete with local rates. It is only in terms of the internal revenue needs of carriers and the potential discriminatory effect of their rate structures that the through-rate-to-local-rate relationship and the overall rate structure of the carrier become relevant. Therefore, even if it is assumed that TMT has instituted through rates substantially lower than PRMSA's local rates this does not necessarily put *Rates From Jacksonville* at issue. Moreover, it is clear that the Commission may not order TMT to increase its through rates to prevent such a differential. PRMSA's suggestion that the Commission order TMT to increase its local rates is without merit in terms of remedying a through rate differential. Furthermore, such a remedy could only be ordered by a finding that PRMSA, rather than TMT, is entitled to a favorable rate differential under *Rates From Jacksonville,* an inquiry not contemplated by the Order instituting this proceeding.

The applicability of the principle established in *Rates From Jacksonville* is based, to a large extent, upon the factual circumstances presented in that case.[3] It does not stand for the proposition that TMT has a right to a discretionary rate differential. Clearly, TMT has not, and, in view of its motion to discontinue, will not allege facts in this case to bring it under the rationale of that precedent. We agree with the Presiding Officer that a continuation of this proceeding is not warranted solely for the purpose of further examining this theoretical legal issue.

PRMSA'a Reduced Rates

There remains the matter of the legality of PRMSA's reduced rates from Charleston, South Carolina. Because these rates are now in effect, Commission action on these rates could still have a practical consequence. However, these rates were investigated to determine the validity of TMT's allegations in its protest against them. Although the withdrawal of TMT's protest does not of itself moot the issue, it does remove the principal motivation for the inquiry into

[3] In *Rates From Jacksonville,* the Commission ordered a rate differential under circumstances where: (1) a service-handicapped carrier had reduced its rates to a compensatory minimum; (2) the carrier had been put into receivership and might have been forced to discontinue service; and (3) the service of that carrier was deemed to be essential to the public interest. The general principle involved in that case, that the Commission may regulate rates so as to preserve and foster meaningful yet stable carrier competition, can not seriously be questioned. However, difference in quality of service alone, in any case, is not sufficient to justify the prescription of a rate differential. *Reduced Rates—Atlantic Coast Ports to Puerto Rico,* 9 F.M.C. 147 (1965).

the rates. Moreover, the matter does not appear to be of immediate or significant concern to either TMT or Hearing Counsel. Under the circumstances, pursuing this matter would not appear to serve any valid regulatory purpose or warrant the expenditure of resources that such further proceeding would entail. These considerations warrant the discontinuance of the investigation of PRMSA's reduced rates.

THEREFORE, IT IS ORDERED, That the Presiding Officer's ruling of April 9, 1979, denying TMT's Motion to Discontinue this proceeding is vacated, and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 671

APPLICATION OF SEA-LAND SERVICE, INC.
FOR THE BENEFIT OF ALIMENTA (USA), INC.

ORDER ON REMAND

December 11, 1979

This proceeding was instituted pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)), upon the application of Sea-Land Service, Inc., for permission to waive a portion of certain freight charges to Alimenta (USA), Inc. Administrative Law Judge Joseph N. Ingolia served an Initial Decision on August 29, 1979 granting Sea-Land's application. Although no exceptions were filed, the Commission, on its own motion, determined to review the Initial Decision.

It appears from the Initial Decision that the shipment at issue may have predated the negotiation of a modified rate. If so, the waiver requested must be denied. The purpose of the proviso clauses in section 18(b)(3) is to allow the ocean carrier to correct tariff filing errors which result in freight charges other than those intended.[1] Clearly this section requires that the carrier be legally able to file the rate negotiated in the first instance. If, for example, a shipment has already commenced before a lower rate is negotiated, the tariff rate charged is not only not being assessed as a result of an error, but the carrier cannot publish, *post hoc,* a tariff rate which would apply to that shipment.[2] In this example, the carrier would be charging and the shipper would be paying exactly the tariff rate understood to be applicable. If such is the case in the proceeding here under consideration, then the relief requested, *i.e.,* waiver of the difference in freight charges, cannot be granted.

[1] House Report No. 920, November 14, 1967 [to accompany H.R. 9473, 90th Congress 1st Sess. (1967)], which amended section 18(b) to grant waiver and refund authority, states:

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

[2] In *Munoz y Cabrero v. Sea-Land Service, Inc.,* 20 F.M.C. 152, 153 (1977), the Commission said:

. . . [I]t is clear that "the new tariff" is expected to reflect a prior intended rate, not a rate agreed upon after shipment.

Here the tariff rate assessed was a joint intermodal rate for a through land-ocean movement. The shipment in question was being loaded in Jacksonville, Florida, to begin the ocean leg of the through movement, on February 21, 1979, six days after a new tariff rate had been negotiated between Sea-Land and Alimenta. The record does not show the date of shipment of the land leg of this through movement from Panama City, Florida to Jacksonville. Therefore, in order for the Commission to adequately determine whether this shipment had, for the purposes of section 18(b)(3) applicability, already begun when the new rate was negotiated, additional facts are necessary.

A final point requires discussion. The Presiding Officer found that "the waiver only applies to the ocean portion of the through charge." However, the rate applicable to the shipment in question absent a waiver and the rate sought to be applied are through intermodal rates. Nowhere in the decision is there a discussion of the portion of this rate which accrues to the ocean carrier and we are of the opinion that it is unnecessary to focus on the ocean portion. Recently, in its Order on Remand in Special Docket 666—*Application of Sea-Land Services, Inc. for the Benefit of New Era Shipping as Agent for Central National Corporation,* served November 21, 1979, the Commission pointed out that similar language was potentially misleading, advising that: "The important fact in all special docket applications involving intermodal rates is that the refund or waiver not affect the land portion of the through rate." This statement, which applies equally here, is intended to make clear that the division accruing to the land carrier participating in the intermodal movement, over which the Commission has no regulatory jurisdiction, can in no way be altered by the grant of an application for waiver or refund.

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the Presiding Officer for the receipt of evidence regarding the date on which the shipment in question was tendered to the first participating carrier and accepted by that carrier for commencement of the through movement and the issuance of a supplemental Initial Decision consistent with the directions of this Order.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-80

SALOU TRADING CORPORATION

v.

SEA-LAND SERVICE, INC.

NOTICE

December 14, 1979

Notice is given that no appeal has been taken to the November 9, 1979 dismissal of the complaint in 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. 79-80

SALOU TRADING CORPORATION

v.

SEA-LAND SERVICE, INC.

MOTION TO DISMISS GRANTED

Finalized December 14, 1979

On July 27, 1979, the complainant, Salou Trading Corporation, filed a claim for overpayment of freight against the respondent, Sea-Land Service, Inc., in the amount of $5,370.70, under section 18(a), Shipping Act, 1916, 46 U.S.C. § 817. It alleged that the respondent had charged the incorrect rate for the transportation of feathermeal, in bulk, in containers.

The parties agreed to the shortened procedure set forth in Subpart K of the Commission's Rules of Practice and Procedure and an amended complaint was filed. On October 16, 1979, prior to the filing of a response the complainant moved to dismiss his complaint. He states:

> Since the time of this shipment, petitioner is informed and believes that the tariff has been amended and the amendments have corrected many of the problems which gave rise to the misapplication of the tariff as alleged in this action. As a result of these changes, petitioner believes continuation of the present proceeding would not be in its best interests. It therefore respectfully requests that the action be dismissed with each party to bear its own costs, if any.

Wherefore, since the complainant's motion to dismiss is unopposed by the respondent, and since the issue is a narrow one involving no other parties or intervenors, it is

Ordered that the motion to dismiss is granted and the proceeding is discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

November 9, 1979

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

SUBCHAPTER A—GENERAL PROVISIONS

[DOCKET NO. 79-52; GENERAL ORDER 16; AMDT. 33]

PART 502—RULES OF PRACTICE AND PROCEDURE

FILING OF PETITIONS FOR RECONSIDERATION AND STAY

December 21, 1979

ACTION: Final Rule

SUMMARY: Rule 261 is revised to limit the grounds upon which petitions for reconsideration of final decisions or orders of the Commission may be sought and to restrict the filing of petitions for stay of Commission orders. A petition for reconsideration will be subject to summary rejection unless it specifies that (1) there has been a change in material fact or applicable law which has occurred after issuance of the decision or order; (2) such decision or order contains a substantive error in material fact; or (3) it addresses a matter on which the party had not previously had the opportunity to be heard. A petition for stay of a Commission order directing the discontinuance of a statutory violation will not be received.

EFFECTIVE DATE: February 8, 1980

SUPPLEMENTARY INFORMATION:

This proceeding was instituted by a Notice of Proposed Rulemaking published in the *Federal Register* on May 23, 1979 (44 Fed. Reg. 29936–37). The Commission proposed to limit the grounds upon which petitions for reconsideration and stay would be entertained. In response to the notice, comments were received from Matson Navigation Company; Military Sealift Command; Maritime Administrative Bar Association; Sea-Land Service, Inc.; the law firm of Coles and Goertner; Cummins Engine Company, Inc.; and four conferences* in a joint comment.

Matson would add language to the proposed rule which would permit reconsideration of a finding or conclusion which was not addressed in the briefs or arguments of the parties or to which reply was not afforded. MABA takes a similar position and suggests specifically that the Commission's proposal should not apply to conditional approvals of section 15 agreements where the parties have not had the opportunity to address the conditions imposed by the Commission and to final rules which contain provisions upon which the public has not had the opportunity to comment. We agree that petitions for reconsideration may be appropriate in such instances and, as the parties indicate, may avoid costly court litigation of issues which the Commission should first consider. We have therefore modified the rule to provide for such petitions in instances where the Commission's order contains a finding, conclusion or other provisions upon which the parties have not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party.

MSC's three recommendations can be considered together. They would restrict our proposal even further, limiting reconsideration to matters which could not be raised in a petition to reopen. Concurrently with this, they would create a new right to file a supplementary memorandum of law and clarify that a motion to reopen can be based only on a change in law. These proposals are unnecessary. A supplementary memorandum can be made under existing rules to the Presiding Judge or the Commission. MSC's interpretation of the basis for reopening a proceeding is erroneous; the Commission's Rule 230(a) makes clear that reopening can be made solely upon a change in *fact* or *law*. MSC's proposed revision is therefore more restrictive than our proposal and is rejected.

In addition to the comments addressed above, MABA also wants to preserve the right of petition for reconsideration in the event the Commission takes official notice of matter in its decision. This concern is adequately covered by Rule 226.

The conferences' primary recommendation is that counsel submit a certificate that the petition for reconsideration or stay is submitted in good faith. While the Commission's rules on discovery require such a certificate in certain instances, it is based on the *fact* of negotiations between counsel for various parties. A certificate based on any attorney's *subjective* judgment is quite a different matter and would not necessarily eliminate repetitious argument. The conferences' recommendation is therefore rejected.

Sea-Land seeks to expand the rule to provide for reconsideration where there is a substantive error of *law* or fact in the Commission decision or order. To adopt Sea-Land's suggestion in full would frustrate the intent of this proposal to prevent the filing of petitions containing repetitive arguments over divergent legal interpretations. However, Sea-Land's proposal has some merit insofar as it would base a petition on a substantive error of fact. Accordingly, the final rule will incorporate this provision.

*Far East Conference; Inter-American Freight Conference; Atlantic and Gulf/Indonesia Conference; and Atlantic and Gulf/Singapore, Malaya and Thailand Conference.

Coles proposes three bases for a petition for reconsideration. The first is "new" matter which is described a "new matters or new issues." It is difficult to see how this differs from the language of the proposed rule which provides for consideration of a petition for reconsideration upon a "change in material fact or applicable law." We perceive no difference between "new" and "changed" matter. The other two comments by Coles deal with petitions based on errors in fact and the use of official notice, subjects which have already been dealt with in the discussions of the comments filed by Sea-Land and MABA, respectively.

A further Coles' comment relates to the proposal that petitions for stay will not be entertained if a violation of the shipping statutes has been found. Coles points our that such a finding can involve a close question of fact or law. The firm also points out that at least some Federal courts require that a petition for stay be made to the agency before it can be filed with the court. Insofar as court practice is concerned, it is doubtful that a court would require a party to file a petition for stay when the filing of such a petition is expressly precluded by agency rule. We remain unpersuaded by the basic thrust of Coles' argument. As we stated in the Notice of Proposed Rulemaking, the public interest requires that practices violative of the law should not be permitted to continue. We have reworded the final rule to specify that the rule applies in proceedings where the Commission has directed the discontinuance of conduct found to be violative of the law.

We have also eliminated reference to orders and decisions of the Administrative Law Judges; this rule is not applicable to those orders and decisions.

Cummins would retain the right of petition for reconsideration in informal dockets. Upon reflection, we agree that petitions for reconsideration in informal dockets should be governed by the general rule and have modified our proposal accordingly.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. §553) and sections 22 and 43 of the Shipping Act, 1916 (46 U.S.C. §§821 and 841(a)), section 261 of Part 502 is revised to read as follows:

§502.261 Petitions for Reconsideration and Stay.

(a) Within 30 days after issuance of a final decision or order by the Commission, any party may file a petition for reconsideration. Such petition shall be served in conformity with the requirements of Subpart H of this Chapter. A petition 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. Petitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received. A petition shall be verified if verification of original pleading is required and shall not operate as a stay of any rule or order of the Commission.

(b) A petition for stay of a Commission order which directs the discontinuance of statutory violations will not be received. (Rule 261)

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 664

APPLICATION OF SEA-LAND SERVICE, INC.
FOR THE BENEFIT OF HAYNES FURNITURE CO., INC., ET AL.

REPORT AND ORDER ADOPTING INITIAL DECISION

December 27, 1979

This proceeding was instituted pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817), upon the application of Sea-Land Service, Inc. for permission to waive $1,257.24 of the applicable freight charges on 10 shipments of furniture parts and components, shipped between January 31, 1979 and March 3, 1979 from Taipei and Kaohsuing, Taiwan, via ocean carrier to Oakland and Long Beach, California, then via rail carrier to the Ports of New York, Philadelphia, Norfolk, and Savannah.

Administrative Law Judge Charles E. Morgan served his Initial Decision on October 22, 1979 granting Sea-Land's application. No exceptions were filed, but the Commission on its own motion determined to review the Initial Decision.

The findings and conclusions of the Initial Decision are well founded, correct and are adopted. However, amplification is needed concerning a point raised in the Initial Decision. The Presiding Officer found that: "The requested waiver will apply only to the ocean portion of the through charge." However, the rate applicable to the shipment in question absent a waiver and the rate sought to be applied are through intermodal rates. Nowhere in the decision is there a discussion of the portion of this rate which accrues to the ocean carrier and we are of the opinion that it is unnecessary to focus on that portion. Recently, in its Order on Remand in Special Docket 666—*Application of Sea-Land Service, Inc. for the Benefit of New Era Shipping as Agent for Central National Corporation,* served November 21, 1979, 19 SRR 1088, the Commission pointed out that similar language was potentially misleading, advising that: "The important fact in all special docket applications involving intermodal rates is that the refund or waiver not affect the land portion of the through rate." This statement, which applies equally here, is intended to make clear that the division accruing to the land carrier participating in the intermodal movement, over which the Commission has no regulatory jurisdiction, can in no way be altered by the grant of an application for waiver or refund.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding, as clarified by the above discussion, is adopted; 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 664, that effective January 31, 1979, for purposes of refund or waiver of freight charges on any shipments which have been shipped during the period from January 31, 1979 through March 16, 1979, the rate from Taiwan on furniture parts and components is $67M, subject to all rules, regulations, terms and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 664

APPLICATION OF SEA-LAND SERVICE, INC.
FOR THE BENEFIT OF HAYNES FURNITURE CO., INC. ET AL.

Adopted December 27, 1979

Application for permission to waive $1,257.24 of the applicable freight charges granted.

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

By application timely mailed on July 27, 1979, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.92(a), and section 18(b)(3) of the Shipping Act, 1916 (the Act), the applicant, Sea-Land Service, Inc., seeks permission to waive a total of $1,257.24 of the applicable freight charges on ten shipments of furniture parts and components, shipped from Taipei (port of loading—Keelung) and from Kaohsiung (port of loading—Kaohsiung), Taiwan, via ocean carrier to the Ports of Oakland and Long Beach, California, thence via rail carrier to the Ports of New York, Philadelphia, Norfolk, and Savannah, bills of lading dated January 30, 1979, and later (latest bill of lading dated March 2, 1979), and sailing dates, January 31, 1979, and later (latest sailing date March 3, 1979).

The application is for the benefit of the consignees, the Haynes Furniture Co., Inc., Norfolk, Virginia (one shipment), L & B Products Corp., Bronx, New York (one shipment), Manow International Corporation, New York, New York (one shipment), Marlon Creations, Inc., Long Island City, New York (one shipment), Rachlin Furniture, Inc., Philadelphia, Pennsylvania (one shipment), and Universal Furniture Industries, Inc., North Brunswick, New Jersey, and Atlanta, Georgia (five shipments).

The consignees listed above paid total freight charges on the ten shipments of $22,262.93, except that Rachlin Furniture, Inc., did not pay, and instead freight charges on its shipment were prepaid by the shipper, Jardine Enterprise, Ltd., in the amount of $2,583.16 (bill of lading No. 970-190051).

[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).

The requested waiver will apply only to the ocean portions of the through charges on the ten shipments.

At the time of movement of the shipments, the applicable basic freight rate was $71 per ton of one cubic meter (M) or $88 per ton of 1,000 kilos (W), whichever produces the greater revenue. Generally, measurement tons were over three times as great as the weight tons of the ten shipments, and in all cases the $71 M ton rate was applicable (item No. 0990–75 of the pertinent tariff of Sea-Land).

The rate sought to be applied on these shipments is $67 M, intended to be effective January 25, 1979. This rate was intended to match the all-water $67 M rate of the New York Freight Bureau (HK) Independent Lines Rate Agreement, FMC Agreement No. 10108. Sea-Land is a member of Agreement No. 10108, but Agreement No. 10108 lacks intermodal (ocean-rail) authority. Prior to March 1, 1979, Sea-Land published its own all-water tariff, but with the filing of a common tariff for all members of Agreement No. 10108, Sea-Land's all-water tariff was canceled effective March 1, 1979.

A telegraphic message was transmitted on January 22, 1979, from Sea-Land's Hong Kong office to its Tariff Publications office in Menlo Park, New Jersey, requesting publication of various rates to match No. 10108, including the publication in item 0990–75 of a special rate of $67 M on furniture parts and components to be published in both the all-water and minibridge (ocean-rail) tariffs of Sea-Land. However, because of clerical error, only the all-water tariff was amended.

The clerical error of non-publication of the $67 M rate in the minibridge tariff was discovered, and subsequently, corrected, effective March 16, 1979 (14th revised page 120, Sea-Land Freight Tariff No. 325, F.M.C. No. 148). This was after the subject shipments had moved and before the subject application was filed. Also, effective July 26, 1979, 22nd revised page 120 of the minibridge tariff deleted an expiration date for the $67 M rate and its geographical restriction to Taiwan, thus making item 0990–75 the same geographically as it was before the shipments moved and when they moved.

In the application as originally filed Sea-Land stated that it was conducting an internal audit to determine if additional shipments of the same commodity herein were made during the period in issue. By letter dated August 30, 1979, from Mr. Frank A. Fleischer, Sea-Land states that only the ten shipments listed in this application were affected by the delayed filing of the $67 M reduced rate.

In addition to the ocean-rail freight charges, one shipment was subjected to a container handling charge at the origin port which was prepaid by the shipper, and four shipments were subjected to a container service charge at destination points paid by the consignees. These charges are not in issue herein.

The furniture parts and components measured as follows:

Original Bill of Lading No.		*Cubic Meters*
980-143923		32.81
970-189158		32.99
970-186309		29.08
970-188202*		0.79
970-190051*		14.44
980-141958		40.50
980-141959		40.77
980-143581		35.50
980-144632		43.22
980-144677		44.21
	Total	314.31

*Note: On two bills of lading there were other commodities listed, which are not affected by this decision. Their measurements totalled 25.56 cubic meters.

The total cubic meters above of 314.31 times the $4 per ton (M) difference (in the applicable rate of $71 and sought rate of $67) results in $1,257.24, the total waiver sought.

The statutory requirements have been met. It is concluded and found that there were errors of administrative or clerical nature in that the Sea-Land intended rate of $67, meant to match the Agreement No. 10108 rate of $67, was not published in Sea-Land's intermodal (ocean-rail) tariff prior to the movements of the ten shipments in issue; that the intended rate was made effective after the ten shipments moved and prior to this application; that the application was timely filed; and that the authorized waiver herein will not result in discrimination among shippers.

The applicant is authorized to waive a total of $1,257.24 of the applicable freight charges. Charges on the sought basis have been collected. An appropriate notice of this matter and of the rate on which the waiver is based shall be published in the pertinent tariff.

(S) CHARLES E. MORGAN
Administrative Law Judge

WASHINGTON, D.C.
October 17, 1979

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 655

APPLICATION OF SEA-LAND SERVICE, INC.
FOR THE BENEFIT OF TRADE WINDS IMPORTING CO.

Adopted December 27, 1979

Application for permission to waive $708.29 of the applicable freight charges granted.

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

By application mailed on June 29, 1979, and timely filed on Monday, July 2, 1979, pursuant to Rule 92(a) of the Commission's Rules of Practice and Prcedure, 46 C.F.R. §502.92(a), and section 18(b)(3) of the Shipping Act, 1916 (the Act), the applicant, Sea-Land Service, Inc., seeks permission to waive $708.29 of the applicable freight charges on two shipments of footwear, all kinds, from Singapore via ocean carrier to Oakland, California, thence via rail carrier to Norfolk, Virginia, bills of lading dated January 2, 1979, and sailing date the same.

The application is for the benefit of the consignee, the Trade Winds Importing Co., of Lynchburg, Virginia, which paid freight charges on the two shipments in the aggregate amount of $4,654.25.

The requested waiver will apply only to the ocean portion of the through charge.

At the time of movement of the two shipments the applicable basic rate on the footwear was $81 M (per cubic meter), subject to container service charges to cover handling at the destination ports. In addition, one shipment was assessed a container handling charge at the port of Singapore, which charge was prepaid by the shipper, Ace Rubber, MFY. PTE. LTD., and this charge is not in issue herein. The issues relate to the ocean freight charges and destination charges paid by the consignee, Trade Winds Importing Co.

One of the two shipments measured 14.39 cubic meters. Basic applicable charges on this shipment at the $81 M rate are $1,165.59. The destination container service charge of $5 per revenue ton applied on "cargo delivered ex

[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).

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding, as clarified by the above discussion, is adopted and made a part hereof; 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 655, that effective January 2, 1979, for purposes of refund or waiver of freight charges on any shipments which have been shipped during the period from January 2, 1979 through January 12, 1979, the rate from Singapore on footwear, all kinds is $70W, subject to all rules, regulations, terms and conditions of said rate and this tariff.

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 655

APPLICATION OF SEA-LAND SERVICE, INC.
FOR THE BENEFIT OF TRADE WINDS IMPORTING CO.

Adopted December 27, 1979

Application for permission to waive $708.29 of the applicable freight charges granted.

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

By application mailed on June 29, 1979, and timely filed on Monday, July 2, 1979, pursuant to Rule 92(a) of the Commission's Rules of Practice and Prcedure, 46 C.F.R. § 502.92(a), and section 18(b)(3) of the Shipping Act, 1916 (the Act), the applicant, Sea-Land Service, Inc., seeks permission to waive $708.29 of the applicable freight charges on two shipments of footwear, all kinds, from Singapore via ocean carrier to Oakland, California, thence via rail carrier to Norfolk, Virginia, bills of lading dated January 2, 1979, and sailing date the same.

The application is for the benefit of the consignee, the Trade Winds Importing Co., of Lynchburg, Virginia, which paid freight charges on the two shipments in the aggregate amount of $4,654.25.

The requested waiver will apply only to the ocean portion of the through charge.

At the time of movement of the two shipments the applicable basic rate on the footwear was $81 M (per cubic meter), subject to container service charges to cover handling at the destination ports. In addition, one shipment was assessed a container handling charge at the port of Singapore, which charge was prepaid by the shipper, Ace Rubber, MFY. PTE. LTD., and this charge is not in issue herein. The issues relate to the ocean freight charges and destination charges paid by the consignee, Trade Winds Importing Co.

One of the two shipments measured 14.39 cubic meters. Basic applicable charges on this shipment at the $81 M rate are $1,165.59. The destination container service charge of $5 per revenue ton applied on "cargo delivered ex

[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).

containers at carrier's freight station." This charge amounts to $71.95, making total applicable charges payable by the consignee on this shipment of $1,237.54.

The second of the two shipments measured 50 cubic meters, and basic applicable charges at the $81 M rate were $4,050. The destination container service charge of $1.50 per revenue ton applied on "cargo delivered in containers at carrier's yard." This charge amounts to $75, making total applicable charges payable by the consignee on this shipment of $4,125.

Aggregate applicable charges payable by the consignee on the two shipments herein are $5,362.54. The consignee paid total charges on the basis sought herein of $4,654.25. Thus the application seeks waiver of the difference which is $708.29.

The basic rate sought to be applied is $70 W, per cubic meter, and charges on this basis, plus applicable destinations charges, result in the total sought charges on the two shipments of $4,654.25.

Sea-Land Service is a member of the Straits/New York Conference (SNYCON), FMC Agreement No. 6010, which governs the all-water trade from the Republic of Singapore and West Malaysia to U.S. Atlantic and Gulf Ports. SNYCON lacks intermodal (ocean-rail) authority. Consequently intermodal (ocean-rail) shipments, such as the two shipments herein, move under Sea-Land's own tariff. This tariff generally reflects the same level of rates as published by the all-water conference (SNYCON).

During December 1978, SNYCON published a reduced rate on footwear, all kinds, of $70 M, effective January 1, 1979,. Reacting to this action, Sea-Land's Hong Kong office requested Sea-Land's Menlo Park, New Jersey, office to match the SNYCON rate effective January 1, 1979. Telex message accordingly was sent on December 21, 1978, and received the same date in New Jersey, and was forwarded the same day via interoffice mail to the Tariff Publications office of Sea-Land.

Normally the Tariff Publications office received telex proposals between one and four hours after their receipt in the telex room. But, in the present case the telex proposal was stamped in the Tariff Publications office one week later on December 28, 1978.

Even then there was time to meet the requested effective date for the $70 rate of January 1, 1979, but there was a second delay or second error in that the proposed rate was assigned an effective date of January 12, 1979.

Applicant states that there are no other shipments of the same or similar commodity which moved on its line during the same period of time as the two shipments in issue.

The statutory requirements have been met. It is concluded and found that there were errors of administrative or clerical nature in that the rate in issue was not made effective prior to the movement of the two shipments; that the intended rate was made effective after the two shipments moved and prior to this application; that the application was filed timely; and that the authorization of a waiver herein will not result in discrimination among shippers.

The applicant is authorized to waive $708.29 of the applicable freight charges. An appropriate notice of this matter and of the rate on which this waiver is based shall be published in the pertinent tariff.

(S) CHARLES E. MORGAN
Administrative Law Judge

WASHINGTON, D. C.
October 1, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-11

DEL MONTE CORPORATION

v.

MATSON NAVIGATION COMPANY

NOTICE

December 27, 1979

Notice is given that no appeal has been taken to the November 20, 1979 dismissal of the complaint in 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. 79-11

DEL MONTE CORPORATION

v.

MATSON NAVIGATION COMPANY

SETTLEMENT APPROVED; COMPLAINT DISMISSED

Finalized December 27, 1979

On February 23, 1979, Del Monte Corporation, a shipper and the complainant, initiated this proceeding by filing a complaint against Matson Navigation Company, a common carrier by water between California, Guam and the Philippine Islands and the respondent, alleging violations of section 14 Fourth (c) of the Shipping Act, 1916, 46 U.S.C. §812. The cited section of the Shipping Act proscribes unfair treatment of or unjust discrimination against a shipper by a common carrier in adjusting or settling claims. Matson's answer denied the alleged violations and set up eight affirmative defenses.

Thereafter, Del Monte and Matson filed a joint motion on November 9, 1979, seeking approval of an agreement settling all of Del Monte's claims against Matson and asking, further, that the complaint be dismissed with prejudice. Hearing Counsel, an intervenor, interposed no objection to the motion.

As explained in the discussion which follows, in my view the motion should be granted.

FACTS

A brief statement of Del Monte's version of the facts as reconstructed from various filings, which comprise an already considerable administrative record, will be helpful.[1]

In early 1976, Matson carried a number of Del Monte's pineapple product shipments from Bugo, Philippine Islands, to Apra Harbor, Guam, and thence

[1] The "facts" recited in the text should not be construed as findings of fact. Matson does dispute some of the "facts." The purpose of the statement of "facts" is to place the proposals of the parties in proper perspective.

to Los Angeles and Alameda, California. The shipments were received at Bugo in good order and condition but were delivered at destination "short, dented, crushed, wet and otherwise damaged." The reason for the deteriorated condition of the cargo at destination was Super Typhoon Pamela which struck Guam with devastating force in May, 1976.

Apparently, Matson refused to honor Del Monte's claims for damage or even grant further time extensions on those claims whereupon Del Monte filed a complaint against Matson in the United States District Court for the Northern District of California. In that lawsuit, Civil Action No. C77-2069 RFP, filed September 15, 1977. Del Monte asked for damages in the amount of $320,527.87.

During the course of discovery and inspection in the court action, Del Monte learned that at various times between July 27, 1976 and June 15, 1977, Matson paid 13 other shippers for cargo allegedly discharged damaged or short because of Pamela.[2] It is alleged that one of those shippers was Castle & Cooke Foods, one of Del Monte's principal competitors. Castle & Cooke was purportedly paid $25,354.41 for damage to the same type of pineapple cargo, carried at the same time and in the same vessels and damaged in the same storm as was Del Monte's cargo.

When it learned of these other payments, Del Monte sought to amend the complaint in the court action by adding a claim based upon section 14 Fourth (c). However, Judge Beeks, who is presiding over the court action, agreed with Matson that because of primary jurisdiction considerations, the section 14 Fourth (c) issue be referred to the Federal Maritime Commission. The instant proceeding thus ensued.

It should be noted that at or before the commencement of this proceeding control over the litigation passed from the hands of the named complainant and respondent to their insurance carriers. As is evident from the names of the signatories to the "Receipt and Release with Warranty,"[3] Fireman's Fund Insurance Company became subrogated to Del Monte's interest. Matson's interest is represented by St. Paul Fire and Marine Insurance.

The "Settlement Agreement" is a two part document. The first, attached as Appendix A, hereto, releases Matson and, among others, its underwriters, from any claims arising from the pineapple shipments, including any claims asserted in this proceeding, without any admission of liability on the part of Matson. The second, attached as Appendix B, hereto, is designed to accomplish the same result in the court action, also without any admission of liability on the part of Matson. Although the existence of two releases make it appear that Matson (and/or its insurance carrier) is paying $200,000 for each, the entire consideration for both releases is $200,000.[4]

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[2] Some of the damage occurred on land and some at sea. Matson's vessel, *Hawaiian Legislator*, arrived at Apra Harbor on its Voyage 213 on May 11, 1976, to pick up Del Monte's cargo and the cargo of a number of other shippers. The vessel was unable to complete loading prior to the onset of Pamela and was forced to go partly loaded out to sea to avoid the storm. After the storm, the vessel returned to port to complete loading.

[3] That is the title of the document referred to in the motion as the "Settlement Agreement."

[4] See p. 2 of the joint motion, which also states that the parties were able to stipulate damages in the court action at $280,000.

THE MOTION

The joint motion makes the following statements pertinent to the settlement:

The parties to this proceeding submit that it would be in the public interest for their Settlement Agreement to be accepted and approved. This would undoubtedly be an expensive proceeding to litigate to a conclusion, the costs of which would far exceed the settlement payment agreed upon by the parties. No violation of the Shipping Act would result from this settlement.

This proceeding has already involved extensive discovery, including numerous depositions and time-consuming and expensive interrogatories, document production and motion practice. Further discovery, including several more depositions, as well as an evidentiary hearing, would be required should the settlement be disapproved. The parties have estimated the hearing as likely to take two weeks.

Furthermore, in view of the unique and precedent-setting nature of these proceedings, an appeal by the losing party may be anticipated to the full and beyond. (Footnotes omitted.)

The central statutory standard in this proceeding, section 14 Fourth(c) (46 U.S.C. §812 Fourth(c)), has to our knowledge never been definitively construed. The parties submit that in view of the novel legal aspects of this proceeding and of the udoubted need for an evidentiary hearing should this matter proceed, the settlement represents a realistic estimate of the costs of litigation and the risks and uncertainties inherent in the court and administrative proceedings.

In connection with the actual payment of the settlement funds, Del Monte's insurer has satisfied Del Monte's claim and now proceeds under a subrogation agreement. All the monies to be paid by Matson under the proposed settlement would be received and retained by Del Monte's subrogated insurer.

The parties are aware of no other claims arising out of Voyage 213 of the *HAWAIIAN LEGISLATOR*, Eastbound, and the limitation periods for purposes of the Carriage of Goods by Sea Act, 46 U.S.C. §§1300, *et seq.*, as well as for the purposes of Section 22 of the Shipping Act, 1916, 46 U.S.C. §821, have expired. [5]

DISCUSSION AND CONCLUSIONS

It is well settled that legislative, judicial and Commission policy foster the settlement of administrative proceedings.

The right to seek settlement of administrative proceedings is expressly mandated by section 5(b)(1) of the Administrative Procedure Act, 5 U.S.C. §554(c)(1), which provides:

The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceedings, and the public interest permit. . . .

The United States Court of Appeals for the District of Columbia Circuit views this provision and its legislative history "as being of the 'greatest im-

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[5] Section 22 provides in pertinent part, "The (Commission), 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." The "limitation in section 22 is a non-waivable jurisdictional prerequisite for the filing of a complaint seeking reparation." *Celanese Corporation, etc. v. The Prudential Steamship Company,* 18 SRR 747 (1978), FMC Docket No. 78-14, Ruling on Motion for Partial Summary Judgment Deferred, etc., Served August 1, 1978, at 2-3, and cases cited therein. For some causes of action, such as those alleging a violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. §817(b)(3), e.g., overcharges, the cause of action accrues upon payment of freight charges. *Id.* Because of the novelty of a section 14 Fourth (c) proceeding it cannot be said with certainty when a cause of action under that section accrues. However, I cannot perceive any jurisdictional obstacle in the instant proceeding. Fairness, alone, would seem to require that at the earliest, the statute would begin to run on June 15, 1977, when the last of the 13 other claims was paid. Given the nature of the violation, perhaps it would be more equitable to hold that the cause of action accrues when a shipper learns of the unfair treatment or discrimination. In any event, I am satisfied that section 22 poses no problem insofar as a settlement is concerned. But, for the reasons expressed in this note, I cannot agree with the implied statement made in the motion that no other claims of this type can presently qualify under section 22.

portance' to the functioning of the administrative process."[6] *Pennsylvania Gas & Water Co. v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972). The court emphasized that "[t]he whole purpose of the informal settlement provision is to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest." *Id.*

The Commission has implemented its mandate by rule[7] and reinforced the rule with the policy statement that: "The law, of course, encourages settlements and every presumption is indulged in which favors their fairness, correctness and validity generally." *Merck, Sharp & Dohme v. Atlantic Lines,* 17 F.M.C. 244, 247 (1973).

In furtherance of this policy, the Commission has authorized settlements of administrative proceedings on the basis of a full or adjusted payment absent admissions or findings of violations of the Shipping Act. *Foss Alaska Line, Inc. Proposed General Rate Increase Between Seattle, Washington and Points in Western Alaska*, 19 SRR 613 (1979), FMC Docket No. 79-54, Offer of Settlement Approved, etc., Served August 1, 1979, Notice of Administrative Finality Served September 5, 1979 (partial refund and rollback in investigation of a carrier's domestic offshore general revenue increase); *Terfloth and Kennedy, Ltd. v. American President Line, Ltd.*, 19 SRR 581 (1979), FMC Docket No. 78-20, Settlement Approved, etc., Served July 24, 1979, Notice of Administrative Finality Served August 30, 1979 (less than full amount of claims for alleged violations of 46 U.S.C. §§814, 815 First and 816 by a carrier and 46 U.S.C. §841b(c) and 46 C.F.R. §510.23 by a freight forwarder); *Com-Co Paper Stock Corporation v. Pacific Coast-Australasian Tariff Bureau*, 18 SRR 619 (1978), FMC Docket No. 71-83, Approval of Settlement, etc., Served June 29, 1978, Notice of Determination Not to Review Served July 27, 1978 (less than full amount of claims for alleged violations of 46 U.S.C. §§812, 814, 815 First and 816 by a conference and its members); *Robinson Lumber Co., Inc. v. Delta Steamship Lines, Inc.*, 18 SRR 744 (1978), FMC Docket No. 75-22, Settlement Approved, etc., Served July 31, 1978, Notice of Determination Not to Review Served August 8, 1978 (less than full amount of claims for alleged violations of 46 U.S.C. §§814, 815, and 816 by a carrier and settlement of companion court action); *Old Ben Coal Co.*

[6] Senate Judiciary Comm., Administrative Procedure Act—Legislative History, S. Doc. No. 248, 79th Cong., 2nd Sess. 203 (1945). In considering the settlement provision in S. 7, 79th Cong., 1st Sess. (1945), which ultimately became section 554(c) of the Administrative Procedure Act (see note 5, *supra*), the Senate Judiciary Committee stated:

Subsection (b) [now Section 554(c) of the Administrative Procedure Act] provides that, even where formal hearing and decision procedures are available to parties, the agencies and the parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the Administrative process. . . . The statutory recognition of such informal methods should both strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations. It should be noted that the precise nature of informal procedures is left to development by the agencies themselves.

S. Doc. No. 248, *supra*, at 24.

[7] Rule 91 of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.91, provides in pertinent part: "Where time, the nature of the proceeding, and the public interest permit, all interested parties shall have the opportunity for the submission and consideration of facts, argument, offers of settlement, or proposal of adjustment. . . ."

v. Sea-Land Service, Inc., 18 SRR 1085 (1978), FMC Docket No. 78–13, Initial Decision served October 11, 1979, Notice of Determination Not to Review, Served November 29, 1979 (full amount of claims for alleged violations of 46 U.S.C. §816 by a carrier); *Organic Chemicals v. Atlanttrafik Express Service and Organic Chemicals v. Farrell Lines, Inc.*, 18 SRR 1536a (1979), FMC Docket Nos. 78–2 and 78–3, Order on Appeal, Served January 25, 1979, *Organic Chemicals v. Farrell Lines, Inc.*, 18 SRR 1536a (1979), FMC Docket No. 78–3, Settlement and Dismissal of Complaint, Served March 14, 1979 (full amount of claims for alleged violations of 46 U.S.C. §817(b)(3) by a carrier); *Perry's Crane Service v. Port of Houston Authority of the Port of Houston, Texas*, 19 SRR 517 (1979), FMC Docket No. 75–51, Motion For Approval of Settlement Granted, etc., Served June 21, 1979, Notice of Administrative Finality Served July 27, 1979 (less than full amount of claims for alleged violations of 46 U.S.C. §815 First and 816 by a terminal operator); *H & H Cranes, Inc. v. Port of Houston Authority of Harris County, Texas*, 19 SRR 547(1979), FMC Docket No. 76–57, Motion For Approval of Settlement Granted, etc., Served July 10, 1979, Notice of Administrative Finality Served August 16, 1979 (less than full amount of claims for alleged violations of 46 U.S.C. §815 First and 816 by a terminal operator).

As implied by the foregoing references to the statements contained in the motion, I agree with the analysis of the benefits to be obtained by approval of the settlement. I find that the settlement is a bona fide and realistic means of resolving the dispute between the parties and that the settlement will not result in any violation of the Shipping Act nor does it appear to do violence to the regulatory scheme. Accordingly I find that the settlement is well within the public interest and merits approval.

The order of approval and dismissal will be conditioned upon the following consideration. While it is not entirely clear whether Judge Beeks' instructions for the institution of a complaint proceeding before this Commission were tantamount to a mandatory reference, I will require the parties to obtain assurance from the district court, in the form of an order or other writing, that the Commission is under no further obligation to the court in Civil Action No. C77–2069 RFP.[8] The assurance shall be filed not later than the time fixed by Rule 227(d) of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.227(d) for review of an order of dismissal upon the Commission's own initiative.[9]

Therefore, it is ordered that the "Settlement Agreement" be approved and that the complaint be dismissed with prejudice.

(S) SEYMOUR GLANZER
Administrative Law Judge

November 20, 1979

[8] See *Clipper Carloading Company v. Trans-Pacific Freight Conference of Japan, et al.*, FMC Docket No. 72–20, Order of Dismissal, served July 21, 1975.

[9] Subsequent to the preparation of this order, I received a letter from counsel for Del Monte to which was attached a proposed "Order for Dismissal with Prejudice" in Civil Action No. C77–2069 RFP. The proposed order contains the assurance referred to in the text. The letter advises that the proposed order will be presented for Judge Beeks' signature on December 7, 1979. Should he approve and sign the proposed order, the parties should have no difficulty in complying with the schedule established in the text.

APPENDIX A

Receipt and Release with Warranty

The undersigned hereby acknowledge receipt from Matson Navigation Company of the sum of Two Hundred Thousand Dollars ($200,000) in full satisfaction of any claims they now have, ever had or ever shall have on account of damage to or loss of cargo shipped on the vessels TRANSONTARIO (V. 14 and 15), HAWAIIAN LEGISLATOR (V. 213) and TRANS-CHAMPLAIN (v. 19) in or about the year of 1976 from Bugo, Philippine Islands and Apra Harbor, Guam to Los Angeles and Alameda, California under bills of lading Nos. BG 1 and 2 (TRANSONTARIO, V. 14), BG 1 through 8 (TRANSONTARIO, V. 15), E-17240 through E-17247, E-17454, E-17455, E-17487, E-17499 through E-17505, E-17240-D, E-17241-E, E-17242-F, E-17247-I (all HAWAIIAN LEGISLATOR, V. 213), E-17118-A, E-17119-B, E-17123-C, E-17245-H, E-17244-G (TRANS-CHAMPLAIN, V. 19) and hereby fully release and forever discharge said vessels, their owners, charterers, operators, agents, underwriters, master and crew, and said Matson Navigation Company, its employees and agents, of and from any and all such claim or claims, damages suits or causes of action whatsoever, now known or unknown, in connection with or arising out of said aforesaid shipments, including but not limited to all claims asserted in that certain proceeding Docket No. 79-11 in the Federal Maritime Commission which the undersigned agree to cause to be dismissed concurrently with the execution hereof, without any admission of liability on the part of MATSON NAVIGATION COMPANY.

In executing these presents, the undersigned represent and warrant that they are duly authorized and empowered to give a full and valid release and acquittance in respect to all of the aforesaid matters and claims and agree to indemnify the aforesaid parties for any breach of said warranty.

DEL MONTE CORPORATION

Dated: October 22, 1979 By ____________________

Its ____________________

FIREMAN'S FUND INSURANCE COMPANY

Dated: 10/23/79 By ____________________

Its ____________________

APPENDIX B

Receipt and Release with Warranty

The undersigned hereby acknowledge receipt from Matson Navigation Company of the sum of Two Hundred Thousand Dollars ($200,000) in full satisfaction of any cliams they now have, ever had or ever shall have on account of damage to or loss of cargo shipped on the vessels TRANSONTARIO (V. 14 and 15), HAWAIIAN LEGISLATOR (V. 213) and TRANS-CHAMPLAIN (v. 19) in or about the year of 1976 from Bugo, Philippine Islands and Apra Harbor, Guam to Los Angeles and Alameda, California under bills of lading Nos. BG 1 and 2 (TRANSONTARIO, V. 14), BG 1 through 8 (TRANSONTARIO, V. 15), E-17240 through E-17247, E-17454, E-17455, E-17487, E-17499 through E-17505, E-17240-D, E-17241-E, E-17242-F, E-17247-I (all HAWAIIAN LEGISLATOR, V. 213), E-17118-A, E-17119-B, E-17123-C, E-17245-H, E-17244-G (TRANS-CHAMPLAIN, V. 19) and hereby fully release and forever discharge said vessels, their owners, charterers, operators, agents, underwriters, master and crew, and said Matson Navigation Company, its employees and agents, of and from any and all such claim or claims, damages suits or causes of action whatsoever, now known or unknown, in connection with or arising out of said aforesaid shipments, including but not limited to all claims asserted in that certain Action No. C-77-2069 RFP in the Northern District of California which the undersigned agree to cause to be dismissed concurrently with the execution hereof, without any admission of liability on the part of MATSON NAVIGATION COMPANY.

In executing these presents, the undersigned represent and warrant that they are duly authorized and empowered to give a full and valid release and acquittance in respect to all of the aforesaid matters and claims and agree to indemnify the aforesaid parties for any breach of said warranty.

DEL MONTE CORPORATION

Dated: October 22, 1979 By ______________________

Its ______________________

FIREMAN'S FUND INSURANCE COMPANY

Dated: 10/23/79 By ______________________

Its ______________________

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-3

L. H. FEDER D/B/A/ PIONEER
INSTITUTIONAL TRADING COMPANY

v.

ELDER DEMPSTER LINES, LTD.

NOTICE

December 27, 1979

Notice is given that no appeal has been taken to the November 20, 1979 dismissal of the complaint in 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. 76–3

L. H. FEDER D/B/A PIONEER
INSTITUTIONAL TRADING COMPANY

v.

ELDER DEMPSTER LINES, LTD.

ORDER (1) WITHDRAWING COMPLAINT ON DECISION OF COMPLAINANT; (2) DISMISSING COMPLAINT WITH PREJUDICE; (3) DISCONTINUING PROCEDING

Finalized December 27, 1979

The complaint in this proceeding was served January 29, 1976. The answer to the complaint, after an extension of time within which to answer, was served March 1, 1976. By notice served March 9, 1976, prehearing conference was set for Tuesday, March 30, 1976; subsequently by notice served April 6, 1976, prehearing conference was reset for Tuesday, April 20, 1976; further rescheduling was made as to prehearing conference by notice served April 16, 1976, setting date for same on May 25, 1976. The prehearing conference finally was held on the latter date. By order served May 26, 1976, this proceeding was stayed pending disposition of case No. 75, Civ. 4248, between the parties in the United States Court for the Southern District of New York, in which the respondent in this Commission proceeding is the plaintiff (through Atlantic Overseas Corporation, its general agent, through whom it conducts business in New York) in the U.S. District Court pursued the matter of its indemnity claim to recover sum paid Ivory Coast Customs authorities in settlement of fine imposed upon vessel for under-declaration of weight with respect to cargo of used clothing. The District Court, Bonsal, J., held that carrier, which established that shipper breached its warranty as to accuracy of weight of cargo, that shipper had no defenses against indemnity claims, and that settlement of fines with Customs was reasonable, was entitled to indemnity against shipper for amount which carrier paid in settlement of fine imposed by Customs. There was judgment for the plaintiff carrier in the sum of $65,520. *Atlantic Overseas Corporation v. Feder,* 452 F. Supp. 347 (1978). On appeal to the 2nd Circuit United States Court of Appeals, the lower Court was affirmed. *Petition for Certiorari* to the United States Supreme Court (Pet. No. 78–1647) was denied October 3, 1979. *L. H. Feder Corp. v. Atlantic Overseas Corp., cert. den.,* 444 U.S. 829 (1979).

By order served October 10, 1979, the Presiding Administrative Law Judge directed the parties within ten (10) days of that date to file a status report as regards these proceedings now that *certiorari* has been denied.

On behalf of the respondents, a letter dated October 19, 1979 (received October 22, 1979), stated:

> In accordance with Your Honor's order of October 10, 1979, we wish to advise that as a result of the Supreme Court's decision on October 3, 1979, to deny L. H. Feder's *Petition for Certiorari,* we have been advised by counsel for the Petitioner that it will withdraw the captioned action before the Federal Maritime Commission in the very near future. Respondent consents to a withdrawal made with prejudice.

On behalf of the complainants, a letter dated October 19, 1979 (received October 23, 1979), stated:

> Further to your Order of October 10, 1979, requesting the parties to the captioned proceeding to file another status report, we hereby confirm that as stated in your order, the United States Supreme Court denied L. H. Feder Corp.'s *Petition for Certiorari* to the Second Circuit Court of Appeals on October 3, 1979.
>
> We have arranged a meeting with our client early next week at which time a decision will be made as to whether we should proceed forward or discontinue this proceeding. In view of this, we respectfully request an extension of time until Friday of next week (October 26, 1979) within which to respond to your order to file a status report.

In a letter dated October 31, 1979 (received November 5, 1979), the complainants stated:

> Further to your order of October 10, 1979, requesting a status report on the captioned proceeding and our letter of October 19, 1979, requesting an extension to reply to said Order, this is to advise that the complainant has decided to discontinue this proceeding. We have already advised counsel for respondent on this decision and counsel for both parties shall jointly submit to you a stipulation of discontinuance.

DISCUSSION

Since the October 31, 1979, letter from complainant received November 5, 1979, nothing further has been heard or received from the parties to this proceeding. The complainant has given its decision to discontinue this proceeding and communicated the same to all concerned. The respondent would like such withdrawal to be "with prejudice." There is no need for a joint stipulation of discontinuance. Under the circumstances of the case, there seems to be no regulatory purpose which would be served in awaiting further for a stipulation of discontinuance or delaying discontinuance of this complaint case which was served January 29, 1976.

Whereupon, upon consideration of the above and cognizance of the complainant's decision to withdraw the complaint herein, it is deemed that withdrawal of the complaint should be honored. There is no reason present in this proceeding why the withdrawal of the complaint should be questioned or dismissal of the complaint and discontinuance of this proceeding further delayed.

Wherefore, it is ordered,

(A) The complaint is withdrawn on the decision of the complainants.

(B) Having been withdrawn, the complaint is dismissed with prejudice.

(C) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

November 20, 1979

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 487(I)

POIRETTE CORSETS, INC.

v.

CONSOLIDATED EXPRESS, INC.

REPORT AND ORDER

December 28, 1979

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

This proceeding was instituted upon the complaint of Poirette Corsets, Inc., filed December 27, 1977, alleging that Consolidated Express, Inc. charged it rates in excess of the applicable tariff on file with the Commission.[1] On September 25, 1979, Settlement Officer John L. Sheppard, issued a decision awarding Poirette $4,668.62 in reparations. On October 1, 1979, the Settlement Officer issued a supplemental decision awarding Poirette interest from the date of the complaint. The Commission determined to review the Settlement Officer's decisions.

The Settlement Officer found that the evidence submitted by Poirette does not, standing alone, sustain its allegation that it was overcharged on shipments of knock down cartons. The Settlement Officer went on, however, to take official notice of the *Puerto Rico-Virgin Islands Trade Study*[2] which sets forth density ranges, expressed in cubic feet per short ton, for particular commodities including cardboard boxes. After comparing the volumes contained in the carrier waybills here in evidence with the density ranges set forth in the study, the Settlement Officer determined that 15 of the carrier waybills show volumes outside the ranges contained in the study. The Settlement Officer found that this disparity indicates that the volumes contained in the bills of lading are

[1] By consent of the parties the proceeding was conducted under the Commission's informal docket procedure [46 C.F.R. §502.301 *et seq.*].

[2] *Puerto Rico-Virgin Islands Trade Study, A Regulatory Staff Analysis,* G.P.O., Washington, D.C. 1970.

incorrect. On this basis, the Settlement Officer concluded, as a matter of construction, that the measurements alleged in Poirette's complaint are correct.

Upon review, the Commission concludes that the *Puerto Rico-Virgin Islands Trade Study,* upon which the Settlement Officer's decision heavily relies, does not have sufficient probative value to establish the actual cubic measurement of the commodity here in question. Assuming, *arguendo,* that the density ranges set forth in the trade study are sufficiently precise to rely upon in concluding that the cubes shown in the carrier's waybills are incorrect, it does not necessarily follow that the complainant's allegations are true. Here the Settlement Officer has confused a question of fact with a question of construction by accepting as fact the allegations of the complainant solely upon the finding that the respondent's calculations were incorrect. A finding that one calculation is wrong does not, *a fortiori,* make another calculation correct. Here, the complainant has not satisfied its burden of proving the facts essential to an award of reparations, *i.e.,* the actual measurements of the commodity shipped.

THEREFORE, IT IS ORDERED, That the decision of the Settlement Officer is reversed and the complaint of Poirette Corsets, Inc. is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–11

IN RE: AGREEMENT NOS. 150 DR–7 AND 3103 DR–7

The Federal Maritime Commission may authorize ocean carriers to employ dual rate contracts pertaining to through intermodal transportation as well as to port-to-port transportation.

Dual rate contracts pertaining to through intermodal transportation may allow a discount calculated on the entire through rate paid by the shipper, provided that the entire amount of this discount is absorbed by the ocean carrier from its revenue share.

Proponents of dual rate agreements have the burden of justifying such agreements under the *Svenska* doctrine, but this burden can ordinarily be met by a lesser showing of need, benefit or purpose than would be required for the use of anticompetitive arrangements which were not expressly contemplated by statute.

A conference which lacks authority to establish intermodal rates may not employ an intermodal dual rate contract.

A conference which does possess authority to establish intermodal rates, which regularly provides intermodal transportation services, and which is faced with existing intermodal competition has justified the use of a dual rate contract for intermodal shipments.

The use of a single dual rate contract applicable to all (both port-to-port and intermodal) shipments of the Trans-Pacific Freight Conference of Japan/Korea is unjustified.

A dual rate contract covering intermodal shipments may not purport to bind shippers using different inland modes of transportation than those offered by the conference.

Charles F. Warren, George A. Quadrino, and *John E. Ormond, Jr.,* for Trans-Pacific Freight Conference of Japan/Korea and Japan/Korea-Atlantic Gulf Freight Conference, and their member lines.

Neal M. Mayer, Charles L. Haslup, III, Paul D. Coleman and *Robin T. Waxman,* for Seatrain International, S.A.

Elkan Turk, Jr., for the Far East Conference and its member lines.

Howard A. Levy, for ten North Atlantic trade steamship conferences and their member lines (excluding Seatrain International, S.A.).

Stanley O. Sher and *David C. Shonka,* for the Iberian/U.S. North Atlantic Westbound Freight Conference, Marseilles/North Atlantic U.S.A. Freight Conference, U.S. Atlantic & Gulf/Australia-New Zealand Conferences, and their member lines.

David C. Nolan, for the Pacific Coast European Conference and its member lines.

Donald L. Flexner, Elliott M. Seiden, Stanley M. Gorinson, Paul A. Mapes and *Janice M. Reece,* for the United States Department of Justice.

John Robert Ewers, Martin F. McAlwee, C. Douglass Miller and *Charna Jaye Swedarsky,* for the Bureau of Hearing Counsel.

REPORT AND ORDER

December 31, 1979

BY THE COMMISSION:

The Commission instituted this proceeding to investigate the approvability of amendments to the respective dual rate or "merchant's" contracts currently utilized by ocean carriers belonging to the Trans-Pacific Freight Conference of Japan/Korea (TPFC) and the Japan/Korea-Atlantic and Gulf Freight Conference (JKAG).[1] The subject agreements, 150 DR-7 and 3103 DR-7, would add intermodal shipments to U.S. inland points to the port-to-port shipments currently covered by both conferences' merchant's contracts.[2] Agreement No. 150 DR-7 would establish a single TPFC contract covering all shipments entering the United States via West Coast ports and Agreement No. 3103 DR-7 would establish a single conference contract covering all shipments entering the United States via Atlantic and Gulf Coast ports. Each Agreement would permit a 9.5 percent discount from the intermodal through rate to be granted to shippers which agree to commit their business exclusively to the conference. Provision of this discount would be the sole responsibility of the participating ocean carriers.

Seatrain International, S.A., a nonconference carrier in the subject trades, the U.S. Department of Justice, and the Commission's Bureau of Hearing Counsel oppose approval of the Agreements.[3] Carriers from several steamship conferences intervened in support of the Agreements.[4]

Administrative Law Judge Charles E. Morgan conducted evidentiary proceedings and issued an Initial Decision on October 30, 1978. The decision held that the Agreements were properly subject to the Commission's jurisdiction under section 14b of the Shipping Act, 1916 (46 U.S.C. §813a) and that the anticompetitive aspects of both Agreements had been sufficiently justified to warrant approval.

Separate Exceptions to the Initial Decision were filed by Seatrain, DOJ and Hearing Counsel. Proponents and two of the four groups of intervenors submitted replies in which they fully supported the Initial Decision.[5] Oral argument was held before the Commission on February 27, 1979.

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[1] The proposed amendments to the respective dual rate contracts are hereafter referred to as the "Agreements." The member lines of TPFC and JKAG are referred to as the "Proponents."

[2] The JKAG Agreement also includes shipments from inland points in Japan and Korea.

[3] Seatrain, Hearing Counsel and DOJ are collectively referred to as "Protestants." Several shippers originally filing protests to the Agreements were designated as parties to this proceeding but were later dismissed when they failed to participate. DOJ was granted special leave to intervene on December 15, 1978, after the issuance of the Initial Decision.

[4] The intervenors include the members of: (1) the Far East Conference; (2) nine North Atlantic/Europe conferences; (3) the Iberian/U.S. North Atlantic Westbound Freight Conference, Marseilles/North Atlantic U.S.A. Freight Conference, and U.S. Atlantic & Gulf/Australia-New Zealand Conference; and (4) the Pacific Coast European Conference. The lattermost group of carriers and the Department of Justice were granted leave to intervene for the limited purpose of arguing the jurisdictional issues raised by the Initial Decision.

[5] The carriers belonging to the Iberian/U.S. North Atlantic, Marseilles/North Atlantic U.S.A., and U.S. Atlantic and Gulf/Australia-New Zeland conferences did not file a reply to exceptions.

POSITION OF THE PARTIES

Protestants

Protestants argue that the Initial Decision is erroneous for the following reasons:

1. A merchant's contract discount which applies to through intermodal traffic is unapprovable under section 14b as a matter of law because the Commission's jurisdiction is limited to port-to-port transportation.
2. Dual rate contract systems approved by the Commission are immune from antitrust law prosecution, and any exemptions from the antitrust laws should be narrowly construed.
3. Joint through intermodal transportation is an *indivisible* undertaking by both inland and ocean carriers, not an offering of the water carrier alone. The Commission lacks authority to approve a merchant's contract discount which is *computed* as a percentage of the through rate because such a practice would improperly subject the inland portion of the rate to substantive regulation under the Shipping Act.
4. Section 14b requires that a merchant's contract discount applicable to joint through intermodal transportation be absorbed entirely from the ocean carrier's "division" and that the amount of the discount should not exceed 15 percent of that "division."
5. The Agreements are inconsistent with the Commission's tariff filing and dual rate contract regulations because maintenance of a constant 9½ percent discount from the ordinary through rate requires the percentage discount absorbed from the ocean carrier's share to vary from commodity to commodity, and even from shipment to shipment, depending on the exact amount received by the inland carrier.[6]
6. The Agreements violate policies of the Interstate Commerce Commission by permitting railroads to tie shippers to a particular inland routing. Section 33 of the Shipping Act prohibits the Commission from authorizing conduct which the ICC has disapproved.
7. The Presiding Officer erroneously concluded that the Agreements are best viewed as supplementing Proponents' existing ratemaking authority and dual rate contract system and that the Agreement could therefore be justified by a lesser degree of proof than would otherwise be the case.
8. The evidence offered by Proponents is insufficient to justify the Agreements. This is particularly true of the JKAG Agreement, which the Presiding Officer failed to analyze separately from the TPFC Agreement, but additional details concerning the implementation and practical effect of both Agreements are necessary.
9. The Presiding Officer made findings of fact relating to competitive conditions which were either erroneous or unsupported by the record, and he

[6] Inland carrier shares may vary with the inland routing chosen to reach a given interior point. Moreover, the Commission accepts intermodal tariffs which state the inland "division" on a per container basis subject to annual volume discounts and therefore prevent exact calculation of the ocean "division" until cargo has actually been transported, *See Report in Docket No. 72-19*, 40 *Fed. Reg.* 47770, 47775-6 (1975); *Report on Reconsideration of Docket No. 72-19*, 42 *Fed. Reg.* 59265-59266 (1977).

also failed to make findings of fact which were clearly established by Protestants.[7]

10. The Initial Decision reveals an unsupportable bias in favor of intermodal transportation by conference rather than independent carriers.
11. The Presiding Officer failed to delineate the specific evidence used to support each conference's Agreement and did not make a rational connection between the facts found and his ultimate decision.
12. The Presiding Officer improperly allowed Proponents to modify the Agreements during the proceeding. The modifications should have been published in the *Federal Register.*

Proponents and Intervening Conferences

The "Replies to Exceptions" raise the following arguments in opposition to the various positions taken by Protestants:

1. Section 14b applies to all "rates" paid by shippers. The statute contains no explicit exclusions, and there is nothing in the legislative history of the Shipping Act which requires a narrow construction. The Commission may properly exercise jurisdiction over a ratemaking practice without exercising substantive authority over all aspects of the transportation reflected by the rate in question.
2. Section 14b does not forbid ocean carriers from applying a dual rate discount to the entire joint through rate. This provision does not conflict with the Commission's regulations because the same amount is paid and the same discount is received by all similarly situated shippers using Proponents' service.
3. The Agreements would not authorize ICC carriers to tie shippers to their services but would merely establish an arrangement whereby ICC carriers may concur in rates established by ocean carriers. The proposed dual rate contracts are between the shipper and the ocean carrier *only.*
4. The *Svenska* doctrine requires that anticompetitive arrangements be justified by legitimate transportation objectives, which Proponents have accomplished by demonstrating that the Agreements will add a useful element of stability to their trades.
5. Details regarding the commodities and localities to be affected by Proponents' intermodal service are irrelevant, in light of Proponents' statements that shippers will not be bound until a particular service begins. The level of Proponents' intermodal rates is also irrelevant; only the reasonableness of the proposed 9.5 percent spread is in issue.
6. The Presiding Officer properly gave minimal weight to the testimony of the nine shippers which opposed the Agreements. Their testimony simply reflects dissatisfaction with Shipping Act policy reflected in section 14b.
7. There is no reliable evidence that the Agreements will deprive Seatrain or any other nonconference carriers of a demonstrable portion of their present intermodal cargo carryings.

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[7] The factual matters in question and the Commission's disposition of each are set forth as an Appendix.

8. A single contract for both port-to-port and intermodal cargo is consistent with the findings in *Pacific Westbound Conference*, 18 F.M.C. 308 (1975), which holds that OCP cargo and local cargo moving in the same geographical trade may be subject to a single dual rate contract once a need for extending the dual rate system to OCP cargo is established.
9. The Presiding Officer's statement concerning the burden of proof was merely dictum; the full measure of justification was provided by proponents.
10. The disputed amendments to the Agreements were prompted by Protestants' objections to the "natural routing clause" originally submitted. These amendments raised no new issues, and were introduced into the proceeding in a manner which afforded all parties an adequate opportunity to be heard.
11. It is unnecessary for an Initial Decision to substantiate every finding of fact with references to the record. It is sufficient that there be a record basis for each finding and that there be a rational connection between the findings made and the ultimate conclusions reached.

The issues presented can be placed into three categories—jurisdictional matters, sufficiency of justification, and procedural matters, each of which will be discussed in turn.

DISCUSSION

Jurisdictional Matters

Joint through intermodal transportation in foreign commerce is a recent commercial development, primarily attributable to the containerized cargo technology which has grown to dominate ocean liner shipping since the late 1960's.[8] Because this type of transportation involves both FMC and ICC-regulated carriers operating under a single through bill of lading, it is not susceptible to the application of traditional regulatory labels.[9] Participation in intermodal transportation is an activity closely and naturally related to the performance of ocean common carriage, and the Federal Maritime Commission's authority to regulate activities reasonably ancillary to ocean transportation service is clear.[10]

[8] Through transportation arrangements involving ocean and inland carriers have existed for many years, *see* House Committee on Merchant Marine and Fisheries, *Investigation of Shipping Combinations*, 63d Cong., 2d Sess. (1941), at 419, but joint through rate tariffs and ocean/inland bills of lading were not developed until early in 1972, when Seatrain, a Protestant in the instant proceeding, filed the first intermodal tariff with the FMC.

[9] This problem was recognized by the Court of Appeals in *Commonwealth of Pennsylvania v. Interstate Commerce Commission*, 561 F.2d 278 (D.C. Cir. 1977), when it affirmed the ICC's international through route tariff regulations and stated that:

> Petitioners are unduly concerned with the labels employed . . . . The use . . . of the word "division" . . . does not mean that an inland "division" of a joint international rate means the same thing or produces the same legal consequences as a "division" of a purely inland joint rate.

561 F.2d at 292

The arrangement affirmed by the Court recognizes that neither the FMC nor ICC has exclusive authority over through intermodal transportation and calls for each agency to regulate those aspects of the through movement which appropriately fall within its established jurisdiction.

[10] This authority does not extend, of course, to situations where a particular Commission action would conflict with other federal statutes such as the Interstate Commerce Act or the National Labor Relations Act. *See generally, Pacific Maritime Association v. Federal Maritime Commission*, 435 U.S. 40 (1978).

nduct which is not itself a matter for Shipping Act regulation may mately come within the Commission's jurisdiction when performed by a to whom the statute does directly apply.[11] It has been established for years that the Commission may order ocean carriers to adjust their ices with regard to the payment or absorption of shippers' inland transtion costs, even though the transportation in question is fully subject to regulation. *E.g., Pacific Far East Line, Inc. v. United States*, 246 F.2d 711 . Cir. 1957); *Sea-Land Service, Inc. v. S. Atlantic & Caribbean Line, Inc.*, M.C. 338 (1966). The regulatory scope of sections 14b and 15 of the ing Act (46 U.S.C. §§813a and 814) is no less broad than other provi of that statute, except where specific limitations are explicitly stated. Two ore ocean carriers must therefore obtain Commission approval if they rtedly agree to any one of a broad range of activities *in connection with transportation* which is directly regulated under the Shipping Act.

hough sections 14b and 15 operate to exempt certain concerted activities the antitrust laws, the Shipping Act also requires the Commission to der the antitrust implications of these activities. Any policy favoring w construction of antitrust exemptions provides no blanket basis for ing the intended remedial objectives of the Shipping Act. *Volksnwerk A.G. v. Federal Maritime Commission*, 390 U.S. 261, 273–274).

e one occasion when the Supreme Court did adhere to the "narrow ruction of antitrust exemptions" policy in construing section 15 is clearly guishable from Protestants' present allegations relating to intermodal . In *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 1973), the Court held that agreements to merge or acquire specific assets not among the types of agreements enumerated in section 15, and cited l indicia of a legislative intention to limit section 15 to matters requiring ng Commission supervision. By contrast, there is no indication Congress d to preclude Commission regulation of ongoing agreements which relate rticipation in through transportation.

terms of FMC jurisdiction, an agreement by ocean carriers to set rates or e to a dual rate system for all-water transportation is not substantively ent from an agreement to perform the same activities with regard to nodal transportation. Both directly relate to the terms and conditions which steamship lines will perform ocean transportation services.

rrier's use of this simplified technique for marketing their through transtion movements does not improperly "extend" the Commission's jurisdico inland carriage or exclude the intermodal pricing activities of ocean rs from Shipping Act regulation. *Atlantic and Gulf/West Coast of South rica Conference Agreement No. 2744–30,* 13 F.M.C. 121, 129–131

Pacific Far East Line, Inc. v. Federal Maritime Commission, 410 F.2d 257 (D.C. Cir. 1969), where an ocean carrier was d from awarding profitable bunker fuel contracts to a dairy products shipper not otherwise in the oil business.

(1969). It is therefore concluded that section 14b, like section 15, is applicable to through intermodal transportation.[12]

The novel question presented by the instant case is whether the Commission's jurisdiction over international ocean/rail transportation is broad enough to permit Proponents to publish merchant's contract rates containing discounts expressed in terms of a percentage of the *through rate* paid by the shipper rather than the ocean carrier's "division." it is argued that such a practice would conflict with the ICC's regulation of inland carriers and exceed express limitations in the scope of section 14b.

The first contention has little merit. Although the proposed 9½ percent spread is calculated on the through rate, this amount would be absorbed solely from the ocean carrier's "division." The ICC regulated "division" would remain constant and unaffected by this method of computation. Inland carriers would neither be parties to the exclusive patronage contract signed by intermodal shippers, nor would they be subject to FMC regulation by virtue of their association with ocean carriers using such contracts.[13] The Federal Maritime Commission's approval of an intermodal dual rate contract system is not intended to preclude appropriate regulation by the ICC.

Inland carriers negotiate the terms of their participation in intermodal through ratemaking established by ocean conference carriers in the same manner they negotiate with nonconference carriers such as Seatrain. This process would not be altered by the Agreements.

Because the Commission has disavowed Shipping Act authority over the entirety of joint intermodal transportation, Protestants claim the term "rates," as it appears in section 14b(7), must be construed as the amounts received by ocean carriers for port-to-port segments of through intermodal transportation and cannot include the through rates paid by shippers.[14] However, a determination of whether section 14b was intended to preclude an ocean carrier from absorbing more than 15 percent of the revenues it receives for participating in intermodal through transportation requires consideration of more than the parties' extended arguments regarding whether the ocean carrier's share of

[12] Over the past ten years, the Commission has approved two dual rate systems and over 50 section 15 agreements pertaining to through intermodal transportation. *E.g., Agreement No. 7100 DR-4,* served October 31, 1972; *Agreement No. 57-96,* 16 S.R.R. 159 (1975); *Agreement No. 57-109,* served March 16, 1978. The courts have implicitly recognized FMC jurisdiction over agreements concerning transportation by both FMC and ICC carriers. *E.g., Seatrain International, S.A. v. Federal Maritime Commission,* 584 F.2d 546, 548 (D.C. Cir. 1978); *Investigation of Overland and OCP Rates,* 12 F.M.C. 184, 215-217 (1969), *aff'd sub. nom, Port of New York Authority v. Federal Maritime Commission,* 429 F.2d 663, 667-668 (5th Cir. 1970), *cert. den.* 401 U.S. 909 (1971).

[13] Through intermodal transportation is not an indivisible joint undertaking from a practical or commercial viewpoint. Regardless of the tariff format employed, the shipper deals primarily with the ocean carrier and the ocean carrier views the inland carrier's "division" as an expense. The specially stated inland carrier "divisions" employed in most mini-landbridge tariffs (see note 6, *supra*) are further evidence of this fact.

[14] Section 14b(7) provides, in pertinent part, that:

[T]he spread between ordinary rates and rates charged contract shippers . . . shall in no event be more than 15 per centum of the ordinary rates.

The Commission's tariff regulations state that the ocean carrier's "[d]ivision, rate or charge *shall be treated as a proportional rate* subject to the provisions of the Shipping Act, 1916." 46 C.F.R. §536.8, adopted as Amendment No. 4 to Part 536, 35 *Fed. Reg.* 6397 (1970). (Emphasis supplied). *Accord Commonwealth of Pennsylvania, supra,* at 292.

ntermodal through rate is best categorized as a "division" or a "propor-
ıl rate."

ection 14b predates the technological advances associated with containeriz-
ı that made joint intermodal transportation economically practical.[15] Con-
s' failure to address the applicability of dual rate systems to intermodal
ıc simply reflects the fact that intermodal traffic had not yet developed in
. It does not represent a deliberate exclusion of intermodal movements.
ough the legislative history of the Dual Rate Law is silent concerning
modal transportation, section 14b was written to apply to any arrangement
hich shippers commit "all or any fixed portion" of their patronage to a
erence. The use of the word "all" is sufficient to include *joint through*
ments as well as local shipments within a dual rate system, particularly
: the other provisions of the Dual Rate Law expressly provided for the
lation of joint through rates.[16]

int through rates may be established between ocean carriers alone or
een ocean carriers and inland carriers. *Commonwealth of Pennsylvania,*
a. Neither the statute nor the Commission's rules address the question of
her two *ocean* carriers participating in a joint through movement must
rb from their individual revenue shares the same percentage discount that
fered to the dual rate shipper.[17] Unequal absorptions are not prohibited.[18]
e is no reason to treat intermodal transportation differently. Most confer-
shippers readily become dual rate contract signatories. Conferences use
lual rate percent discount as a tying device to ensure stability, but rarely
it necessary to use it as a competitive device against other carriers.

ongress unquestionably intended to prescribe a maximum "rate spread" of
ercent,[19] but did not give any indication that "divisions" received under
through arrangements are also subject to this limitation. Thus the dual
spread may be greater than 15 percent of one carrier's portion of the
ıgh rate under such an arrangement. Because the statute and its legislative
ry focus on the uniformity and fairness of the contract rates *offered to*
pers, it is concluded that a merchant's contract discount based upon a
entage of the through rate paid by the shipper is consistent with the
oses of section 14b.

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ction 14b was enacted as section 1 of the Dual Rate Law Amendments to the Shipping Act, P.L. 87-346, 75 Stat. 762,
l October 3, 1961, referred to hereafter as the "Dual Rate Law."

ction 4 of the Dual Rate Law contained the tariff filing requirements for foreign commerce carriers now found at 46 U.S.C.
). These simultaneously enacted provisions call for the filing of all rates

ansportation to and from United States ports and foreign ports *between all points on [a carrier's] route and on any through*
hich has been established. (Emphasis supplied).

s of the same statute are construed consistently with each other whenever possible. *Clark v. Ubersee Finanz-Korporation,*
S. 480 (1947); *see Erlenbaugh v. United States,* 409 U.S. 239, 243-244 (1972).

, when shippers are offered a through rate discount of 15 percent, there is no requirement that participating ocean carriers
this discount by uniformly absorbing 15 percent from *each* carrier's noncontract "division."

e generally Part 524 of the Commission's Rules which authorizes nonexclusive transshipment agreements without requiring
ntee of proportional reductions when the through rate is subject to a dual rate discount. 46 C.F.R. § 524.

e Index at 20-21 (1962), which chronicles the rejection of a proposal authorizing the Commission to fix a reasonable rate
on a case-by-case basis.

Sufficiency of Justification

Dual rate contract systems have traditionally been employed by steamship conferences. When a 1958 decision of the Supreme Court rendered the lawfulness of dual rate contracts doubtful under the Shipping Act as written at that time,[20] Congress promptly took protective steps to permit continuation of a system it found essential to a stable foreign commerce culminating in the adoption of section 14b in 1961.[21]

However, under section 14b, conferences and individual carriers may only use dual rate contract systems which meet specified conditions and are not found to be otherwise unlawful or "contrary to the public interest."[22] Because this "public interest" standard requires consideration of U.S. antitrust policy and because concerted methods of tying shippers to common carriers by means of discriminatory pricing devices is a *per se* violation of the antitrust laws, conference dual rate systems cannot be approved unless appropriately justified under the *Svenska* doctrine.[23]

Under this doctrine an anticompetitive agreement will be disapproved unless its proponents produce evidence revealing its probable impact upon competition and demonstrating that any practical anticompetitive effects will be outweighed by positive public interest factors. *Agreement No. 10116-1 (Extension of Pooling Arrangement),* 19 S.R.R. 1, 2 (1979). The public interest factors recognized by the Commission are described as "transportation needs," "public benefits" and "regulatory purposes." The nature and extent of the offsetting need, benefit or purpose sufficient to obtain approval of a given agreement will vary from case to case. Because dual rate systems have been found presumptively acceptable by Congress, a less stringent justification is required to secure their approval.[24]

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[20] *Federal Maritime Board v. Isbrandtsen Co.,* 356 U.S. 481 (1958).

[21] The Dual Rate Law replaced the Moratorium Act of 1958, P.L. 85-626, 72 Stat. 574, as amended. The legislative history of the bill which became the Dual Rate Law reveals that Congress acted in response to the following findings:

1. *Conferences need the right to use dual rate contracts.* If ocean common carriers and conferences are to serve the United States' foreign commerce on a regular, dependable, and nondiscriminatory basis, they must be allowed, as they are throughout the rest of the maritime world, to enter into dual rate contracts with shippers and consignees. Otherwise, the economics of ocean shipping will force competing lines into rate wars that might result in the destruction of ocean common carriage. If that happens, the high-cost U.S.-flag lines will be the hardest hit.
2. *Primary parties in interest strongly favor legalization of dual rate contracts.* The great majority of United States importers and exporters who use ocean common carriers, all United States-flag ocean common carriers, all foreign-flag conference lines, all interested foreign governments, and the U.S. Departments of State and Commerce favor legalization of dual rate contracts.
3. *A 15 percent difference in rates is fair and reasonable.* A contract-noncontract spread of 15 percent will assure a nucleus of cargo for established carriers without imposing a penalty on or discriminating against the nonsigner.

See Index, at 119, 209-210.

[22] Among the conditions for approval of a merchant's contract under section 14b are the availability of the contract to all shippers on equal terms and conditions and the maintenance of a spread between ordinary rates and contract rates that does not exceed 15 percent of the noncontract rate.

[23] *See Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238 (1968); *Agreement No. 8660,* 12 F.M.C. 149, 160 (1969), *aff'd sub nom. Latin America/Pacific Coast Steamship Conference v. Federal Maritime Commission,* 465 F.2d 542 (D.C. Cir. 1972), *cert. den.* 409 U.S. 967 (1972).

[24] The Senate Committee Report on H.R. 6775 states that:

Your committee believes that if the eight specific requirements [of section 14b] are met by [a] proposed contract, it should be entitled to Commission approval unless the Commission finds that the contract would be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair. We believe that any contract which contains the right safeguards expressly required by the amended bill makes out a prima facie case that the contract is not detrimental to our commerce, or contrary to our public interest, or unjustly discriminatory or unfair. *Index,* at 222.

ecause of the Congressional intent underscoring the public benefits of dual contract systems, it is usually sufficient for a conference to demonstrate it is actually offering the service to which the proposed merchant's contract apply and that significant nonconference competition exists with regard to service.[25] An important distinction is recognized, however, between the lication of a dual rate system to a particular service and the inclusion of erent services under a single merchant's contract. *Agreement No. 8660, ra* at note 9, 14 F.M.C. 172, 179–180, 184–185 (1970). When shipments ifferent geographic or economic trades are to be included under a single ract, the burden of justification on the carrier is increased.[26]

pplication of these standards to the present case quickly reveals that JKAG ld be unable to meet its burden of justification in this instance. That ference's authority to set intermodal rates expired on November 24, 1978, out any of its member lines ever having carried an intermodal shipment.[27] ough JKAG did publish an intermodal tariff in late 1977, this tariff offered ice to four inland points at rates which combined existing local railroad and mship rates. These rates did not achieve commercial acceptance. The vailability of a commercially reasonable JKAG intermodal service in itself ents the approval of an intermodal merchant's contract for that conference matter of law, and Agreement No. 3130 DR-7 will therefore be dismissed oot. Even if JKAG were actively engaged in the provision of intermodal ice, it is not faced with existing intermodal competition through Atlantic Gulf Coast ports.

he TPFC Agreement presents a considerably different situation. That Conference has a well established mini-landbridge service to U.S. East and Gulf st port cities and is faced with vigorous intermodal competition from sev- of the nonconference container cargo carriers serving the trade, including rain, the Far East Shipping Company (FESCO) and Evergreen Marine poration. *E.g.,* Ex. 1 Apps. 16–17; Ex. 22, Ex. 30, Ex. 33 App. 2, Ex. 48. eatrain claims the TPFC Agreement will negatively affect competition by nneling substantial quantities of intermodal cargo away from independent iers and by tying shippers to an indefinite, overly broad range of conference ices.

he availability of an intermodal dual rate contract has been portrayed as itical factor in TPFC's ability to participate effectively in the trade gener- and the intermodal cargo market in particular. Seatrain claims that the *-availability* of such a contract is an equally critical factor in its own

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e first version of P.L. 87–346 was H.R. 4299. This bill authorized dual rates upon a finding that the contract "is not d, and will not be reasonably likely, to cause the exclusion of other carriers from the trade." The same provisions were ed in the "clean" bill passed by the House (H.R. 6775). The Senate Commerce Committee deleted this language from the owing statements by Senator Engle favoring the conference system's natural tendency to reduce competition. *See Index* 2, 399–400. The Commission may nonetheless disapprove a dual rate system if opposing parties establish that the intent ely effect of the proposed contract is to directly and unreasonably eliminate competition.

g., Pacific Westbound Conference (Agreement No. 57 DR–4), supra, at 319, 323, where the proponent carriers successfully l a proposal to place OCP and local cargoes under a single merchant's contract.

AG first received intermodal ratemaking authority on January 18, 1973. On December 8, 1978, the Commission issued er advising JKAG that its fifth request to extend this authority (Agreement No. 3103–67) could not be approved without ng. JKAG subsequently requested that a hearing be held. An earlier Commission Order extending JKAG's intermodal ty on an interim basis was reversed by the Court of Appeals in *Seatrain International, S.A. v. Federal Maritime ssion,* 598 F.2d 289 (D.C. Cir. 1979), a decision which stressed that the conference's intermodal offerings to date had not able, particularly in comparison with the rates of TPFC.

effective participation. Both parties allege that the Commission's decision in this matter will have a major impact on the degree of their commercial success. The evidence does not support these allegations.

Seatrain and the TPFC carriers both operate modern containerships with high levels of container space utilization.[28] Over half of Seatrain's carryings are mini-landbridge cargoes. A majority of TPFC's carryings ultimately move to inland destinations and are subject to carriage under intermodal rates.[29] Since it commenced intermodal operations in mid-1974, TPFC's OCP carryings, which are subject to its present port-to-port dual rate contract have declined but its mini-landbridge carryings have increased. Several shippers testified that they had abandoned or curtailed their use of conference merchant's rate services to obtain the more favorable rates offered by nonconference intermodal carriers, yet overall TPFC carryings increased between 1974 and 1976.

Seatrain commenced the first Far East mini-landbridge service in 1972 and has since become the major intermodal carrier in the trade. Seatrain withdrew from TPFC in 1974 and doubled its intermodal carryings between 1974 and 1975 even though 1975 was a depressed year for ocean shipping. During 1977, Seatrain introduced a fourth vessel into the TPFC trade and made other modifications in its Far East operations which effectively doubled its 1975 container capacity. Ex. 40; Tr. at 636. Seatrain's port-to-port carryings have increased significantly since 1974 (Ex. 22) despite TPFC's implementation of a port-to-port merchant's contract in August, 1973 which attracted over 6,200 signatories by 1976 (Ex. 1 at 4–5). During 1975, TPFC's total revenue tonnage decreased by 23 percent while Seatrain's increased by 100 percent. Ex. 1 App. 27; *see also* Ex. 30 at 7–8.

These facts indicate that the independent and conference carriers alike have established strong commercial positions in the trade. Neither Seatrain nor TPFC has demonstrated that the availability of an intermodal dual rate contract would have a critical impact on their respective commercial operations,[30] as they have alleged, or would undermine their relatively strong position in the trade. There is, however, sufficient unused container capacity to conclude that the trade is somewhat overtonnaged, subject to vigorous nonconference competition, and vulnerable to malpractices prejudicial to shippers and carriers alike.[31] A TPFC intermodal dual rate contract would therefore diminish the trade's potential for rate instability.

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[28] Approximately 85 percent of TPFC's and JKAG's combined container capacity was engaged in 1977. Separate figures for TPFC were not provided, but because TPFC is the conference offering the wider range of service, its figures are unlikely to be lower than the combined results. *See* Ex. 1 App. 12 and 15. Seatrain has enjoyed over 95 percent container cargo utilization in recent years (Ex. 30 at 11).

[29] Mini-landbridge cargo represented about 22 percent of TPFC's carryings in 1975 and approximately 25 percent in 1976. OCP cargo carried under special proportional rates to destinations east of the Rocky Mountains represents another 25 percent. In addition, much of TPFC's loal cargo moves beyond port terminal areas. Ex. 1 at Apps. 7, 10, 13, 14; Ex. 30 App. 1.

[30] The number of TPFC signatories regularly shipping with Seatrain, the revenues derived from their business, and their intentions as to signing TPFC's proposed intermodal contract is not known. The shipper testimony presented does not support the conclusion that Seatrain will lose any particular number or type of accounts.

[31] The large capital outlays and high fixed costs associated with containership operations can result in uprofitable voyages even with utilization levels in excess of 80 percent. Ex. 33 at 2, Ex. 40 at 12–13. The 15 percent excess capacity reported by TPFC is therefore a matter of legitimate competitive concern. In recent years the Commission has frequently had occasion to recognize the presence of unstable and unlawful conditions in the Far East trade. *E.g., Agreement No. 10016–1, supra,* and 18 S.R.R. 1285 (1978).

eatrain vigorously opposes the proposition that TPFC should be allowed to an intermodal merchant's contract simply to assure itself a "stable cargo ." Seatrain alleges that public policy favoring competition requires that onference carriers be given a preference when it comes to the development "stable cargo base." This notion is contrary to the purpose of section 14b.

ie unsubstantiated *possibility* that TPFC's use of an intermodal dual rate ract may adversely affect Seatrain's operations is not a sufficient basis for pproving the Agreement. Congress was aware that dual rate contracts *tend* xclude independent carriers, and, by adopting section 14b, determined theless that conferences should be free to employ conforming contracts pt when a more specific detriment to the public interest is shown. Further-, it cannot be assumed that merchant's contracts *invariably* weaken the etitive posture of nonconference carriers, since independent carriers have l rights under section 14b to employ loyalty devices.

atrain's objections concerning the indefinite scope of TPFC's proposed ract and its potential for tying shippers to inefficient or even nonexistent ces are less readily dismissed.

FC has stated that it does not intend to bind shippers unless the confer- offers an intermodal service covering a particular intermodal movement,[32] the Agreement, as orally amended, expressly allows signatories to use ces involving vessel calls at U.S. Atlantic or Gulf Coast ports. However, le 6 fails to indicate that shippers may select alternate *inland* routes or portation modes between ports of entry and points of destination whenever a route or mode is not provided by the conference. In fact, Article 6 fails ention service to inland points at all.

FC does not presently serve interior points, although it is authorized by Commission to do so.[33] Intermodal shippers located at places such as ago or St. Louis should therefore not be bound by the Agreement. Other- the conference could refuse to serve an interior area and, by using a ry (port-to-port and intermodal) dual rate contract, effectively preclude etitors from establishing a foothold in that area as well. The conference's et power over port-to-port shipments could thereby be employed to stifle portation innovations and efficiencies, a result contrary to the public est and detrimental to the commerce of the United States. A similar ompetitive effect could be achieved if TPFC were to offer an interior point e at rates too high to achieve commercial acceptance. TPFC has not yet ed a rate structure for interior point services (Ex. 37 at 5–7, Tr. 878–80), hippers testified that the conference should be required to offer separate nodal and port-to-port dual rate contracts. Exs. 16–19, Tr. 468.

ini-landbridge service attracts cargo which either did or could have moved J.S. Atlantic and Gulf ports, and is therefore most appropriately viewed as ce to a new TPFC trade area, rather than an integral part of the same

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eptions at 46.

FC's mini-landbridge service is a true intermodal service from ports in Japan and Korea to *points* on the U.S. East and asts. As used here, the word "interior" describes those inland points not served by mini-landbridge.

trade.[34] This "East Coast" cargo should not be tied to "West Coast" cargoes in the absence of a clear showing of transportation need, public benefit or regulatory purpose.

Agreement No. 150 DR-7 will therefore be disapproved unless it is modified to allow shippers the choice of signing either an intermodal contract or a port-to-port contract (or both), and to release shippers employing different inland modes of transportation or different inland routes than those offered by TPFC.[35] Article 6 of the intermodal merchant's contract must also be formally amended to refer to the term "points" and to exclude carriage via U.S. Atlantic or Gulf ports.[36]

Procedural Matters

Seatrain claims the Presiding Officer should not have accepted into evidence the January 31, 1977 direct testimony of TPFC's Conference Chairman which states that Article 6 of Agreement No. 150 DR-7 has been modified to exclude transportation via Atlantic and Gulf Coast ports from TPFC's proposed merchant's contract. It is argued that an administrative law judge lacks authority to modify agreements which are under investigation unless the modification in question has been published in the *Federal Register.*

The recommendations of an administrative law judge regarding the approvability of agreements are not binding upon the Commission, and the Commission's decision in *Agreement No. 6010-14,* 11 S.R.R. 617, 737 (1970), cited by Seatrain merely confirms this fact. In most instances, agreement modifications must be consolidated with a pending investigation of the basic agreement.[37]

Federal Register notice of an amended agreement is a separate matter from the consideration of proposed modifications in an investigatory proceeding. Provision of such notice is a matter within the sound discretion of the Commission, not the administrative law judge. When a proposed modification practically and substantively affects a pending agreement, it is noticed to assure

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[34] Some 16 percent of TPFC's OCP cargo was destined for Atlantic and Gulf Coast points prior to the introduction of mini-landbridge service and TPFC now estimates that it carries no such OCP cargo. Ex. 1 at 12 and App. 9. Yet, a larger percentage of mini-landbridge cargo was previously carried by JKAG's all-water service (Ex. 1 App. 8, Tr. 123).

[35] "Inland transportation mode" refers broadly to transportation accomplished by either rail, motor, water or air, and not to the services of any particular inland carrier operating within one of these basic modes. The Commission has held that conferences with intermodal ratemaking authority may not preclude member lines from taking independent action with respect to services via a different mode of inland transport. *Agreement No. 3103-64,* Order of Conditional Approval, served May 18, 1977, and Order on Remand, served November 24, 1978, *reversed on other grounds, Seatrain International, S.A. v. Federal Maritime Commission, supra,* note 27.

[36] Protestants argue that Article 5 of Agreement No. 150 DR-7 must be amended to allow shippers to choose the inland carrier they wish to employ and to release shippers from the contract whenever the inland carrier selected does not have space available. Because the shipper contracts only with the water carrier, it is unnecessary that Article 5 release the shipper if a requested inland carrier is not provided. It is sufficient that nonperformance of agreed upon services result in liability under the through bill of lading. A different situation is presented, however, when the ocean carrier *has reason to know* at the time cargo is tendered to it that it cannot perform the through transportation held out in its tariff in timely fashion because a particular inland routing, terminal facilities, or similar critical element of the through movement is unavailable. In such case, Article 5 must be construed to release the shipper when the ocean carrier is aware that timely performance of any aspect of the through movement cannot be achieved, just as it does when steamship space is unavailable. *See* 46 U.S.C. §813a(1).

[37] *See generally* the Commission's February 3, 1978 order entitled "Modification of Order of Investigation and Hearing" in Docket No. 77-4, reconsideration denied, June 19, 1978, where proposed amendments to a joint service agreement were incorporated into a pending evidentiary proceeding.

that any additional interested parties are furnished an appropriate opportunity to express their views. When, as in the instant case, the amendment offered is plainly of a clarifying or technical nature, supplemental *Federal Register* notice is unnecessary. Further notice was required by the Commission in *Agreement No. 6010–14, supra,* because an investigatory proceeding had been resolved by private settlement negotiations, the terms of which had not been included in the public record or the hearing process.[38]

The amendment to Article 6, however, was introduced early in the present proceeding as a clarifying measure and was offered in direct response to arguments raised by Seatrain concerning the allowable scope of that provision. All parties were provided ample opportunity to raise arguments concerning the amendment and its effect. The Presiding Officer's acceptance and consideration of evidence concerning the Article 6 amendment is fair and reasonable. It is also analogous to the procedures affirmed by the United States Court of Appeals in *States Marine Lines, Inc. v. Federal Maritime Commission,* 376 F.2d 230, 234, note 6 (D.C. Cir. 1967).[39]

Finally, Seatrain contends that the Initial Decision must be reversed because the Presiding Officer failed to accompany his findings of fact with specific citations to the record—including citations to conflicting facts.[40] This argument appears intended more for the purpose of emphasizing objections to particular findings than to express a *bona fide* belief that existing Commission practices are invalid in this regard.[41]

The Commission's regulations echo the Administrative Procedure Act by requiring that all decisions "include a statement of findings and conlcusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 46 C.F.R. § 502.225; 5 U.S.C. § 557(c). This provision has not been interpreted as mandating a recitation of all conflicting evidence regarding material questions of fact accompanied by a statement explaining which evidence was found to be probative and which was not. It is sufficient that the decision reveal all factors considered by the agency in making its choice and that there be articulated a rational basis between the facts found and the result reached. The Commission believes the instant Report achieves these accepted standards and would not thwart meaningful judicial review within the meaning of *United States Lines, Inc. v. Federal Maritime Commission,* 584 F.2d 519 (D.C. Cir. 1978).

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[38] *See also Pierpoint Management Co. and Retla Steamship Co. v. Holt Hauling and Warehousing Systems, Inc.,* 19 S.R.R. 435 (1979).

[39] Although the Presiding Officer's consideration of Proponents' testimony that Article 6 had been "modified" was proper, Agreement No. 150 DR-7 can only be amended by submitting a signed agreement to the Commission. It would have therefore been more appropriate for the Initial Decision to have recommended that the Agreement be approved on the condition that Proponents submit an amendment clarifying Article 6. The Presiding Officer could also have conditioned his acceptance of evidence concerning Article 6 upon Proponents' submitting a formal amendment to their Agreement.

[40] Exceptions at 4, note 1.

[41] Section 502.221 of the Commission's Rules requires parties to include record citations with their proposed findings of fact, but does not impose the same obligation on the Presiding Officer. Factual errors in an Initial Decision may be addressed by the persons most familiar with the record in the form of exceptions filed pursuant to section 502.227(a), which also requires record citations.

In any event, by not adopting the Initial Decision and by variously granting or denying Seatrain's exceptions to the findings of the Presiding Officer, the Commission has effectively provided Seatrain with the relief it sought.

THEREFORE, IT IS ORDERED, That the Exceptions of the Department of Justice are denied; and

IT IS FURTHER ORDERED, That the Exceptions of the Bureau of Hearing Counsel and Seatrain International, S.A., are granted to the extent indicated above and denied in all other respects; and

IT IS FURTHER ORDERED, That Agreement No. 3103 DR-7 is dismissed as moot; and

IT IS FURTHER ORDERED, That Agreement No. 150 DR-7 is disapproved pursuant to section 14b of the Shipping Act, 1916, effective , unless the Commission receives at its offices in Washington, D.C., on or before , a modified version of that Agreement, complete in all respects, signed by all parties thereto, and appropriately modified to:

1. Clearly allow shippers the choice of binding only their port-to-port shipments or only their joint through intermodal shipments to the conference; and

2. Amend Article 6 of the TPFC intermodal merchant's contract to read as follows:

6. This Agreement does not require the Merchant to divert shipments of goods from natural transportation routes not served by the Conference where direct carriage is available. *Provided, however,* that where the Carriers provide service between ports or point within the scope of this contract which constitute a natural transportation route between the origin and destination of such shipment, the Merchant shall be obligated to select the Carrier's service. A natural transportation route is a traffic path reasonably warranted by economic criteria such as costs, time, available facilities, the nature of the shipment and any other economic criteria appropriate in the circumstances. Whenever Merchant intends to assert its rights under this Article, to use a carrier which is not a party hereto, and the port or point through which Merchant intends to ship or receive his goods is not within the scope of this Agreement, Merchant shall first so notify the Conference in accordance with the provisions of Article 5 hereof. *Provided further, however,* that notwithstanding any language herein to the contrary, this contract will not be violated if the Merchant: (1) ships to destinations within the scope of this Agreement via U.S. Atlantic or Gulf Coast ports; or (2) ships via a through intermodal route or utilizes a major inland transportation mode (*i.e.,* rail, motor, water or air) not offered by the Conference. No notification to the Conference of such shipments shall be required.

IT IS FURTHER ORDERED, That upon full and timely compliance with the conditions set forth in the above ordering clause, Agreement No. 150 DR-7 shall be approved.

By Order of the Commission.

(S) FRANCIS C. HURNEY
Secretary

APPENDIX

DISPOSITION OF SEATRAIN'S EXCEPTIONS RELATING TO FINDINGS OF THE PRESIDING OFFICER

1. The Presiding Officer erroneously found that the port-to-port services of independent carriers have flourished in the TPFC trade since 1973, despite the presence of a TPFC dual rate contract.

   Granted in part. There is no evidence that nonconference carrier port-to-port services have "flourished" in an economic sense and no evidence measuring the exact competitive impact of TPFC's present dual rate contract on these services. The record does clearly show, however, that over ten independent container carriers compete in the trade and several of them have increased their capacity since 1973. Moreover, there is no basis for finding that these independent container services have persisted only because TPFC's merchant's contract is inapplicable to intermodal cargo. Although this fact *may* have been beneficial to Seatrain, only a minority of the nonconference container operators in the TPFC trade presently offer intermodal service.
2. The Presiding Officer erroneously found that a "division" is not usually found in a tariff.

   Denied. The Presiding Officer clearly stated that present joint through intermodal tariffs separate the ocean and inland carriers' revenue shares and the discussion of Interstate Commerce Act divisions found in *Commonwealth of Pennsylvania v. Interstate Commerce Commission, supra,* at 281–282 and 291–292, supports his statements concerning "usual" (*i.e.,* nonintermodal) joint through rate procedures.
3. The Presiding Officer erroneously found that the ocean carrier collecting the freight charges from the merchant will arrange to pay a fee or division to the railroad or railroads utilized for inland movement.

   Denied. The Presiding Officer accurately described the procedures ordinarily followed, although an agent of the inland carrier may also collect the through freight and distribute the "divisions". Seatrain claims this practice is inconsistent with the theory that joint rates are an indivisible offering of more than one carrier. As explained in this Report, joint through intermodal transportation is more realistically viewed as an offering of the ocean carrier despite the tariff filing procedures employed by the FMC and ICC to accommodate their enabling statutes.
4. The Presiding Officer erroneously found that a "division" is not a charge to the merchant.

   Denied. As is the case with Item 3, above, Seatrain disagrees with the theoretical framework of the statement and not with the accuracy of the facts recited. Shippers are billed only for the through rate and receive no separate invoice or breakout of intermodal transportation "division", although such a breakout is published in the carriers' tariff.

5. The Presiding Officer erroneously found that the shipper is primarily interested in the through rate or cost.

   Denied. Although the record does not contain shipper testimony on the general topic of joint through rates, the challenged statement does accurately express the philosophy upon which joint through rate pricing has historically been based and reflects the opinion of Seatrain's principal witness. Ex. 40 at 9–10; Tr. 655, 660–661.

6. The Presiding Officer erroneously found that the Commission regulates conference authority over joint through rate arrangements with inland carriers under section 15.

   Granted in part. To the extent the statement implies that steamship conferences concertedly establish rates with inland carriers, it is incorrect. The Commission approves intermodal rate agreements which allow conference member lines to concertedly set through rates and the ocean portions of those rates. Each member line then negotiates its own inland carriage arrangements with ICC carriers. This fact is correctly noted elsewhere in the Initial Decision (at 44).

7. The Presiding Officer erroneously found that the Commission has exercised jurisdiction over conference intermodal rates under sections 16 and 17 of the Shipping Act.

   Denied. Section 16 and 17 complaints based on intermodal service have been adjudicated by the Commission (*e.g.*, Docket Nos. 73–38, 73–42, 77–50). The reasonableness of such *services* cannot be determined without reference to the rates charged. The Commission therefore exercises jurisdiction over through intermodal rates in this Report and Order. *See Canada Packers, Ltd. v. Atchison T.S.F. Ry.*, 385 U.S. 182 (1966); *Porter Co. v. Central Vermont R. Co.*, 366 U.S. 272 (1961).

8. The Presiding Officer failed to recognize that Agreement No. 150 DR–7 would injure Lykes Bros. because Lykes competes with TPFC, albeit via Atlantic and Gulf ports, as well as with JKAG.

   Denied. Lykes Bros. did not establish that it would be directly or immediately harmed by competition from TPFC carriers, expecially since the Agreement, as conditionally approved, does not bind shippers using Atlantic and Gulf Coast ports. Moreover, Lykes Bros. is now a member of TPFC.

9. The Presiding Officer erroneously found that Proponents are pressing their applications to include intermodal cargo in their dual rate contracts.

   Granted in part. TPFC is clearly "pressing" its instant application for approval of Agreement No. 150 DR–7. However, Proponents have not yet applied for similar authority from the Japanese Fair Trade Commission.

10. The Presiding Officer erroneously found that if TPFC institutes an interior point intermodal service, further cargo subject to the conference's present contract will move outside the contract.

    Denied. The statement is correct because the present TPFC contract does not apply to intermodal carriage of any kind. The Presiding Officer did not find that interior point cargo would necessarily move on nonconference carriers.

11. The Presiding Officer erroneously found that there is no reason to believe merchant shippers and consignees will be harmed by the Agreements.

    Granted in part. Several shippers testified that they *did not wish to be faced* with the choice of signing a single TPFC merchant's contract for port-to-port and intermodal service, and that they *believed* they would pay higher intermodal cargo rates if they did sign such a contract. A loss of flexibility does not in itself constitute "injury," especially in light of the legislative history of section 14b. Seatrain did not establish that particular shippers would be unfairly *compelled* to sign an expanded TPFC contract or that such signatories would necessarily be charged higher intermodal rates or otherwise be injured if they did. Shippers which did not favor dual rate contracts need not sign them (*e.g.,* Associated Merchandising Corporation). The instant decision only approves TPFC's use of separate port-to-port and intermodal dual rate contracts.

12. The Presiding Officer erroneously found that Evergreen Marine Line does not feel threatened by potential conference intermodal competition.

    Granted in part. There is no evidence as to whether Evergreen's management does or does not feel "threatened" by the proposed Agreements. The record does show that Evergreen has expanded its operations in the TPFC trade since 1973.

13. The Presiding Officer failed to make complete findings concerning the status of conference and nonconference carriers in the trade.

    Granted in part. Although the nonconference carriers were listed, the Presiding Officer did not list the members of TPFC. There are currently twenty conference members.

14. The Presiding Officer erroneously concluded that approval of Agreement No. 150 DR–7 would foster competition between ocean carriers.

    Granted. The instant proceeding does not compel a finding that approval of Agreement No. 150 DR–7 would "foster" short run competition between ocean carriers, and the record was not developed to permit such a finding, since it is not essential to the determination at hand. The Presiding Officer's statement correctly reflects the Congressional policy that the employment of *reasonable* dual rate systems by conferences will best preserve competition in the long run in the ocean shipping industry.

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-27

MERCK SHARP & DOHME INTERNATIONAL

v.

KAWASAKI KISEN KAISHA, LTD. A/K/A "K" LINE

DOCKET NO. 79-42

MERCK SHARP & DOHME INTERNATIONAL

v.

MITSUI O.S.K. LINES, LTD.

DOCKET NO. 79-43

MERCK SHARP & DOHME INTERNATIONAL

v.

JAPAN LINE, LTD.

Shipments of feed supplements were properly rated as pharmaceuticals rather than as animal feed. Reparation denied.

William Levenstein for Merck Sharp & Dohme International.
F. Conger Fawcett and *Charles Lagrange Coleman III* for Kawasaki Kisen Kaisha, Ltd.
K. Aizaki and *Charles Lagrange Coleman III* for Mitsui O.S.K. Lines, Ltd.
David Snow and *Charles Lagrange Coleman III* for Japan Line, Ltd.

REPORT AND ORDER

December 31, 1979

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

These proceedings were instituted by complaints filed by Merck Sharp & Dohme International against three carriers, Kawasaki Kisen Kaisha ("K" Line), Mitsui O.S.K. Lines, and Japan Line, all of whom assessed charges for various shipments of Nicrazin 25% and/or Vitamin B12 Mixture under rates for medicinal pharmaceuticals or chemicals. Complainant alleges that the carriers violated section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817), in that the shipments should have been charged under the lower rates for "Animal Feed, Prepared." In his Initial Decisions, Administrative Law Judge John E. Cograve awarded reparation in all three proceedings. The proceedings are now before the Commission on the carriers' Joint Exceptions to the Initial Decisions.[1]

BACKGROUND

Docket No. 78-27 involves Complainant's shipments of Nicrazin 25% and Vitamin B12 Mixture which moved by "K" Line from Oakland, California to Kobe, Japan. The shipment was rated under the "Medicinal and Pharmaceutical Preparations, Compounds or Mixtures of two or more products, Bulk Form, N.O.S." classification in Pacific Westbound Conference Overland Freight Tariff No. 6, F.M.C. No. 13.[2]

In Docket No. 79-42, another shipment of Complainant's Nicrazin 25% moved from Oakland to Kobe on Mitsui O.S.K. Lines pursuant to a bill of lading dated April 21, 1977. This shipment was rated under Pacific Westbound Conference Local and Overland Freight Tariff No. 5, F.M.C. No. 13, as "Synthetic Organic Medicinal Chemicals, In Bulk Form, N.O.S."

In Docket No. 79-43, a third shipment of Nicrazin 25% moved from Oakland to Kobe and Osaka, Japan on Japan Line, pursuant to a bill of lading dated January 20, 1978. This shipment was rated under Pacific Westbound Conference Local and Overland Freight Tariff No. 5, F.M.C. No. 13, as "Chemicals, N.O.S."

INITIAL DECISIONS AND POSITIONS OF THE PARTIES

In his Initial Decision in Docket No. 78-27, served July 20, 1979, the Presiding Officer found that "K" Line had improperly classified both Nicrazin 25% and Vitamin B12 Mixture. He stated that the classification "Animal Feed, Prepared" is broad enough to include "almost any preparation which is feed

[1] Because all three proceedings involve the same Complainant and identical issues, the proceedings are consolidated.

[2] All three carriers are members of the Pacific Westbound Conference.

(sic) to animals," and concluded that because the commodities could be classified under two tariff items, Complainant was entitled to the tariff item with the lower rate. Accordingly, reparation in the amount of $8,304.51 was awarded. The Initial Decisions in Docket Nos. 79–42 and 79–43, served July 25 and 26, 1979, respectively, cited the Initial Decision in Docket No. 78–27 as precedent and awarded reparations in those cases as well, in the amount of $9,199.46 from Mitsui O.S.K. Lines and $8,661.25 from Japan Line.

In their Joint Exceptions to the Initial Decision, the carriers argue that the commodities were properly classified as pharmaceuticals or chemicals. They claim support for their position from Complainant's sales literature, which identifies Nicrazin 25% and Vitamin B12 Mixture as feed additives and feed supplements. The carriers point out that an additive or supplement to animal feed is distinct from feed itself. They note that the purpose of the commodities as indicated by the literature is not to feed or provide nutrients to animals, but rather to prevent the disease coccidiosis in chickens, in the case of Nicrazin 25%, and to aid in "fast, healthy growth and reproduction" of poultry and pigs in the case of Vitamin B12 Mixture. The carriers also point out that the literature identifies Nicrazin 25% as a "drug" and "medication," and that Nicrazin 25% and Vitamin B12 Mixture are to be administered only after being mixed into animal feed in very small ratios.[3] Purchasers are also instructed not to administer Nicrazin 25% to "laying birds" or to birds within four days of marketing for human consumption.

The Joint Exceptions raise these specific points:

(1) The value of the commodities in issue is considerably (allegedly 10 to 25 times) higher than that of animal feed.

(2) Complainant's literature refers to the commodities as a drug, not animal feed, and gives instructions for dosage, dilution, and discontinuation of use.

(3) The purpose of the commodities is to control disease, not to feed animals.

(4) The recipient indicated on each of the bills of lading was either another affiliate of Complainant's or a pharmaceutical company, not a feed and grain dealer or consumer.

(5) Complainant's Export Declarations classify the goods as chemicals or pharmaceuticals under the Department of Commerce "Schedule B" classification system.

(6) The Pacific Westbound Conference tariff states that the Department of Commerce "Schedule B" numerical classification system is the basis for the tariff classification.

(7) The bills of lading classify the goods as chemicals or pharmaceuticals, not as animal feed.

(8) Complainant bears the heavy burden of proof.

(9) These products have never been classified as animal feed by a common carrier and Complainant has twice previously been unsuccessful in Commission proceedings in obtaining lower commodity rates for its chemical products.

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[3] The maximum recommended ratio of Nicrazin 25% to chicken feed is 1.6 pounds of Nicrazin 25% to one ton of feed. Vitamin B-12 Mixture is to be combined in amounts of 7.6 grams for chickens, to 45.5 grams for baby pigs, per one million grams of feed.

In its Reply to Exceptions, Complainant states that the tariff description "Animal Feed, Prepared" applies to any preparation fed to animals, including feed additives and supplements, and that therefore it is broad enough to cover the commodities in question. Complainant emphasizes that Nicrazin 25% contains its active ingredient, the drug nicarbazin, at only a 25% intensity level, and that the product contains wheat middlings and soybean oil as well. Similarly, Complainant notes, the literature indicates that Vitamin B12 Mixture contains ground rice hulls and soybean oil. The presence of these added materials in the products, Complainant argues, establishes that the products are not medicines or pharmaceuticals, as they might be were they in an undiluted state.

Complainant argues that the ambiguity created by the breadth of the tariff description should be resolved in Complainant's favor. Complainant challenges the carriers' emphasis on the value of the articles shipped by noting that the tariff contains no value restrictions. It also argues that arguments regarding "Schedule B" are inappropriate because "Schedule B is not a tariff and is not at issue."

Discussion And Conclusion

Where a tariff is ambiguous or doubtful it should be construed against the carrier who prepared it. *United States v. Hellenic Lines, Ltd.,* 14 F.M.C. 255, 260 (1971). In the instant proceeding, the question of ambiguity in the tariffs turns on whether the category "Animal Feed, Prepared" is so broad as to include medications not in a 100% active ingredient form. If so, there would be more than one reasonably applicable tariff description, and the resulting ambiguity should be resolved by application of the tariff description with the lowest rates. The Presiding Officer's awards of reparations were based on his findings that the commodities at issue could reasonably be described as "Animal Feed, Prepared," as well as by the tariff descriptions applied by the carriers. We conclude that these findings are contrary to the weight of the record evidence.

The parties appear to agree that shipments of nicarbazin and of Vitamin B12, undiluted, would properly be considered "pharmaceuticals" and could not reasonably be classified as "Animal Feed, Prepared." Complainant contends, however, that the addition of soybean oil, wheat middlings and ground rice hulls to those products converts them to mere animal feed. The record does not support Complainant's argument. The sales literature for Nicrazin 25% describes it as "for use *in* poultry feeds as an aid in prevention of coccidiosis." (Emphasis added.) It goes on to explain that the purpose of its being supplied as a premix (that is, the nicarbazin is already mixed with soybean oil and wheat middlings) is "for convenience in handling and uniform incorporation in feed." The soybean oil and wheat middlings are described as the "carrier and/or diluent" for the nicarbazin, the active ingredient in Nicrazin 25%. Both Nicrazin 25% and Vitamin B12 Mixture are to be administered to poultry and pigs only after being mixed into extremely larger quantities of animal feed.

Moreover, the sales literature describes the products as feed supplement, feed additive, drug, and medication. They are never referred to as "feed"; the term "feed" is used exclusively as that into which the products are to be mixed.

The literature makes it clear that Nicrazin 25%'s purpose is not to provide nutrients to animals, but to prevent a particular disease. Vitamin B12 Mixture is to improve weight gains, feed conversion, carcass yield, egg production and hatchability, growth rates, and to increase number of pigs per litter. The warnings not to administer Nicrazin 25% to laying birds or to birds within four days of marketing for human consumption further indicate the pharmaceutical nature of the products and belie Complainant's contention that they can be considered animal feed. In short, Complainant's interpretation of the tariff item "Animal Feed, Prepared" to include the products at issue requires a strained and unnatural construction of the tariff language which will not support an award of reparations. *See Thomas G. Crowe v. Southern Steamship Co.*, 1 U.S.S.B. 145, 147 (1929).

It is further concluded that the appropriate tariff description for the commodities at issue is "Medicinal and Pharmaceutical Preparations, Compounds or Mixtures of two or more products, Bulk Form N.O.S."[4] This is the commodity description applied by "K" Line in Docket No. 78-27. Although not applied by Mitsui O.S.K. Lines and by Japan Line in the other two proceedings, the "Medicinal and Pharmaceutical . . ." commodity description was also appropriate for those shipments.[5] As the rates for "Medicinal and Pharmaceutical . . ." were higher than the rates actually charged Complainant for the two latter shipments, reparations in all three proceedings are denied.

THEREFORE, IT IS ORDERED, That the Complaints of Merck, Sharp & Dohme International in Docket Nos. 78-27, 79-42, and 79-43 are dismissed; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.

(S) FRANCIS C. HURNEY
Secretary

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[4] Complainant argues that the word "products" in this commodity description refers to medicines or pharmaceuticals, and excludes soybean oil, wheat middlings and ground rice hulls, The Commission rejects this restrictive interpretation of the commodity description's language.

[5] Pacific Westbound Conference Overland Tariff No. 6—F.M.C. 13, in which appeared the "Medicinal and Pharmaceutical . . ." description at the time of the shipment in Docket No. 78-27, was cancelled on January 1, 1977. That same commodity description appeared in Pacific Westbound Conference Local and Overland Freight Tariff No. 5—F.M.C. 13 at the time of the subsequent shipments in Docket Nos. 79-42 and 79-43, however.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–56

WEST GULF MARITIME ASSOCIATION

v.

CITY OF GALVESTON (BOARD OF TRUSTEES OF THE GALVESTON WHARVES)

ORDER ON RECONSIDERATION

January 8, 1980

The City of Galveston (the Port) has filed a Petition for Reconsideration of the Commission's September 14, 1979 Order, 19 S.R.R. 779, finding unlawful certain of the Port's terminal tariff provisions.[1] For the reasons set forth below, the Petition is denied.

The Port challenges the Commission's conclusion regarding one tariff item, Item No. 98.1, which the Commission found unreasonable. The Port contends that the portion of Item No. 98.1 requiring waiver of insured claims and waiver of subrogation is reasonable.[2] Specifically, it alleges error in the Commision's finding that:

[T]he indemnity requirement and the waiver of claims and subrogation provisions of the Port's tariff are unreasonable for precisely the reasons enunciated in *Bisso, Truck and Lighter*, and *Lucidi*, and conclude that Item No. 98.1 is violative of section 17.[3]

The Port cites two cases from the Fifth Circuit Court of Appeals and a district court in that Circuit, in which *Bisso* was not applied to waiver of subrogation clauses.[4] It argues that consequently, the Commission's citation of *Bisso* invalidates its finding that the waiver of subrogation and insured claims provisions violate the Shipping Act.

[1] Of nine tariff items alleged to violate the Shipping Act, 1916, the Commission found three, and portions of two others, violative of section 17.

[2] The Petition relates only to the second sentence of item No. 98.1 which reads:

Each User of the facilities of the Board of Trustees of the Galveston Wharves waives all claims such User may have against the Board of Tustees of the Galveston Wharves and/or The City of Galveston for loss or damage covered by any insurance policy or policies covering in whole or in part such User's doing business on or in connection with the facilities of the Galveston Wharves, and each such User shall cause its insurance carrier or carriers to waive any right of subrogation with respect thereto and to so notify the Board of Trustees of the Galveston Wharves of such waiver.

[3] The cases cited are *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955); *Truck and Lighter Loading and Unloading Practices at New York Harbor*, 9 F.M.C. 505 (1966); and *Lucidi v. Stockton Port District*, 19 S.R.R. 441 (1979).

[4] The Court in *Bisso* invalidated a towing contract provision which would have released a towboat from liability for its own negligence.

Bisso is not, of course, controlling as to the lawfulness of the waiver of claims and subrogation provisions under the Shipping Act. However, a regulatory agency may look to court decisions regarding common or judicial law even though those decisions are not controlling on the issues before the agency.[5] To this end, the Commission cited *Bisso*, and applied its rationale to both the indemnification and waiver issues.[6] The Commission concluded that the tariff provisions are unreasonable under section 17 of the Act in that they impose restrictions on and require expenses of users irrespective of those users' actual culpability for an occurance, and benefit a potentially negligent port. Also, the requirements on the users are unilateral, and are not imposed upon the Port itself.[7]

The Commission is not barred from applying the *Bisso* rationale in its consideration of Shipping Act issues simply because of the Fifth Circuit Court of Appeals' interpretation of *Bisso*. Moreover, the Commission's ruling on the waiver issues is consistent with its decisions in *Trucker and Lighter* and *Lucidi*, neither of which is commented upon in the Port's Petition.

Furthermore, the two Court of Appeals decisions cited by the Port are distinguishable from the instant proceeding. In *Fluor Western, Inc. v. G & H Offshore Towing, Co.*, 447 F.2d 35 (5th Cir. 1971), the cargo owner did not waive its right to proceed against a wrongdoer in the event the cargo owner's insurance underwriters had failed for whatever reason to reimburse it for any loss caused by the wrongdoer. The Port's Item No. 98.1 would require a waiver of any claim covered by insurance regardless of whether the insured actually received payment. No rights were actually waived in the towage contract in *Fluor Western;* the court emphasized that rights were waived only by a subsequent, independent agreement between the cargo owner and its underwriters. 447 F.2d 39–40. The Port's Item No. 98.1 states: "Each User . . . waives all claims such User may have" for losses covered in its insurance policy.

In *Twenty Grand Offshore, Inc. v. West India Carriers, Inc.*, 492 F.2d 679 (5th Cir. 1974), the waiver of subrogation requirement was a reciprocal one, in which both tug and tow were required to obtain waiver of subrogation clauses in their respective insurance policies and to designate each other as an additional insured. This mutuality is not present in Item No. 98.1.

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration filed by the City of Galveston is denied; and

IT IS FURTHER ORDERED, That the Commission's Report and Order is affirmed in all respects.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

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[5] *See Klicker v. Northwest Arilines, Inc.*, 563 F.2d 1310, 1313 (9th Cir. 1977), in which the court cited a *Bisso* line of cases as not directly applicable in the case of tariffs in a regulated industry, but approved of an agency's referral to those decisions for the standard of reasonability employed by the courts.

[6] The Court in *Bisso* stated:

> The two main reasons for the creation and application of the rule [invalidating contracts releasing towers from liability for their own negligence] have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. 349 U.S. at 91.

These considerations are useful with regard to the terminal tariff items in this proceeding.

[7] *See* the Commission's comments in this proceeding regarding one-sided requirements and obligations in terminal tariffs, at 19 S.R.R. 785.

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[GENERAL ORDER 42, DOCKET NO. 78-46]

PART 514. FINANCIAL EXHIBITS AND SCHEDULES NON-VESSEL OPERATING COMMON CARRIERS IN THE DOMESTIC OFFSHORE TRADES

January 14, 1980

ACTION: Final Rules

SUMMARY: The Federal Maritime Commission hereby adds a new Part 514 of Title 46, Code of Federal Regulations, in order to publish substantive guidelines for determining what constitutes a just and reasonable rate of return or profit for non-vessel operating common carriers in the domestic offshore trades and to provide for the orderly acquisition of data in the event the Commission institutes a formal investigation and hearing. The annual reporting requirement has been eliminated as have the reports which are submitted concurrently with every general rate change. The methodology adopted by the Commission, as reflected in the final rules, includes the utilization of operating ratio as the comparative test of reasonableness. "Normalized" tax accounting, cargo cube allocation (using outside dimensions of containers) and other substantive methods of data reporting have also been adopted to conform with the Commission's regulations concerning financial reports by vessel operating common carriers in the domestic offshore trades (Part 512 of Title 46), issued concurrently with these final rules.

EFFECTIVE DATE:

March 28, 1980

SUPPLEMENTARY INFORMATION:

In November 1978, the Federal Maritime Commission's regulatory responsibilities in the domestic offshore trades were substantially altered by the enactment of Public Law 95-475. The amendments to the Intercoastal Shipping Act, 1933, impose strict time limits on Commission investigations of rate changes. The Commission is required by P.L. 95-475 to:

> [W]ithin one year after the effective date of this sentence, by regulation prescribe guidelines for the determination of what constitutes a just and reasonable rate of return or profit for common carriers by water in intercoastal commerce.

On November 15, 1978, the Federal Maritime Commission served an Advance Notice of Proposed Rulemaking which sought comments from governmental bodies, shippers and carriers regarding the nature, scope and feasibility of substantive guidelines for determining just and reasonable rates of return or profits for common carriers by water in the domestic offshore trades. In addition to this request for written comments, the Commission convened a series of informal hearings at various cities throughout the country. Commenting parties were requested to address fourteen specific issues as well as any additional matters considered to be relevant.

Proposed rules governing financial requirements and standards for evaluating proposed rate changes by non-vessel operating common carriers (NVO's) in the domestic offshore commerce were published for comment on November 6, 1979.

The proposed rules (a) require NVOs subject to the Intercoastal Shipping Act, 1933, to submit standard-format financial data and (b) establish procedures by which the Commission will evaluate proposed rate changes. The annual report has been eliminated as has the justification which is submitted concurrently with every general rate change. General rate changes filed by NVO's rarely become the subject of a docketed proceeding. Competition among NVO's and competition with vessel operating common carriers offering a less-than-containerload service tend to place a ceiling on the rates of an NVO. The freight-all-kinds rate of the underlying carrier generally provides a floor. It is felt that the current reporting requirements are too burdensome in view of these market constraints on the NVO's ability to raise or lower rates at will.

The proposed rules would only require an NVO to submit standard-form financial data in the event the Commission instituted a formal investigation and hearing. In such proceedings the burden of proof is on the NVO to establish that its proposed general rate change is just and reasonable. The exhibits and schedules required by the proposed rules would be an essential element of the NVO's justification in support of the general rate change. In determining whether or not the NVO had met its burden of proof, the Commission would give great weight to the material submitted in compliance with the proposed rule.

The proposed rules adopt the operating ratio as the primary method to be used in evaluating NVO rate changes. This approach is consistent with past practice and reflects the Commission's view that the nature of NVO operations is in many ways distinct from the operations of vessel operators.

Comments to the proposed NVO rules were submitted by the following parties:

Dependable Trucking
Guam Freight Forwarders and Consolidators
Hawaiian Distribution System
Pacific Coast Tariff Bureau
PRF Express Corporation

Additionally, all FMC Bureaus were requested to submit comments to the Secretary and such comments were received from the Commission's Pacific District and Puerto Rico District Offices as well as the Office of General Counsel. These documents have been made a part of the official record of this rulemaking proceeding.

All comments received from private parties, except for the comment of Guam Freight Forwarders and Consolidators, generally supported the rule as proposed, and especially supported the reduced level of reporting proposed in the rule. Guam Freight Forwarders and Consolidators opposed the reduced reporting requirements on the basis that the annual reports "had the tendency to weed out some of the more marginal operators that have given the bad reputation to the NVOCC industry." The Commission rejects this reason as a justification to retain the burdensome and unnecessary annual reporting requirements for NVOCC's. Free market competition is viewed by the Commission as the proper mechanism to eliminate marginal operators from the industry.

PRF Express Corp. also submitted supplementary comments asking that NVO's be allowed to file a company balance sheet as of a date not more than three months prior to the date of filing proposed rates as opposed to the proposed two month requirement of section 514.2(b)(1), or, alternatively, that the rule provide a procedure for a waiver of strict compliance with the reporting requirements as exists in the VOCC rule. This suggestion is intended to accommodate NVO's who prepare balance sheets on a quarterly basis and the Commission agrees that such a change would further reduce the regulatory burden on the NVO industry. Accordingly, section 514.2(b)(1) has been changed to incorporate PRF's suggestion.

In considering the VOCC rule in this proceeding, the Commission made certain policy determinations which altered some substantive reporting requirements in that rule, and has decided to make similar changes to the NVO rule to the extent these policy determinations affect the NVO industry. Accordingly, substantive conforming amendments have been made to sections 514.3, 514.4(b), 514.4(d), 514.5(e), 514.6(c)(2), 514.6(c)(9), 514.6(c)(11) and 514.6(d)(2). The bases for these changes are fully explained in the supplementary information accompanying the VOCC rule and need not be repeated herein. Any other changes from the proposed rule are stylistic.

The Commission recognizes that, from time to time, an NVO may submit schedules and exhibits which deviate in minor respects from the requirements of these rules. While we will require compliance with these rules in all material respects, we have no intention of penalizing NVOs for minor deviations which are not material. Section 514.2(d) has been amended accordingly.

Pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. § 553), sections 18, 21, and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 817, 820, and 841(a)), and sections 1, 2, 3(a), 3(b), 4, and 7 of the Intercoastal Shipping Act, 1933, the Federal Maritime Commission amends Title 46, C.F.R. by deleting Subpart B of Part 512 and by adding a new Part 514, Financial Exhibits and Schedules, Non-Vessel Operating Common Carriers In The Domestic Offshore Trades as follows:

PART 514—FINANCIAL EXHIBITS AND SCHEDULES NON-VESSEL OPERATING COMMON CARRIERS IN THE DOMESTIC OFFSHORE TRADES

Sec.
514.1 Purpose
514.2 General requirements
514.3 Certification
514.4 Access to and audit of records
514.5 Definitions
514.6 Forms

AUTHORITY: Sections 514.1 to 514.6 issued pursuant to sections 18, 21 and 43 of the Shipping Act, 1916 (46 U.S.C. 817, 820 and 841(a)) and sections 1, 2, 3,(a), 3(b), 4 and 7 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 843, 844, 845, 845(a) and 847).

§514.1 Purpose

The purpose of this Part is (a) to establish the methodology that the Federal Maritime Commission (Commission) intends to follow in evaluating proposed rate changes in the domestic offshore trades submitted by non-vessel operating common carriers (NVO's) subject to the provisions of the Intercoastal Shipping Act, 1933, and (b) to provide for the orderly acquisition of the data required for the methodology so established. The Commission will employ the operating ratio methodology when evaluating proposed rate changes by NVO's, except in any instance where, in its opinion, the application of the operating ratio creates an unreasonable result.

§514.2 General requirements

(a) The rules contained herein are those issued by the Commission to meet the specific requirements of the Intercoastal Shipping Act, 1933, as amended, and will be used to evaluate proposed rate changes in the domestic offshore trades. However, the Commission reserves to itself the right to employ other bases for allocation and calculation in any instances where, in its opinion, the application of the rules and regulations prescribed herein create unreasonable results.

(b) Whenever the Commission institutes an investigation and hearing to determine whether or not an increase or decrease in rates which would affect not less than 50 percent of the *tariff items* of that NVO in a particular Trade, or which would result in an increase or decrease of not less than 3 percent in its gross revenues in that particular Trade, is just and reasonable, the NVO shall file in duplicate, within 30 days of the publication in the *Federal Register* of the order instituting the investigation and hearing, the following:

(1) An *actual* company wide balance sheet (Exhibit A-a) as of a date not more than three months prior to the date of filing the proposed rates.

(2) An *actual* statement of income (Exhibit B-a) and supporting schedules covering a 12 month period ending the same date as the balance sheet required in subparagraph (1) above.

(3) A *projected* statement of income (Exhibit B-p) and supporting schedules for the 12 month period commencing on the first day of the month following the date on which the changed rates are proposed to become effective (taking into account the effect of the proposed rate changes); and

(4) *Actual* and *projected* operating ratios described in section 514.6(d) coinciding with the time periods covered by the statement of income required in subparagraphs (2) and (3) above.

(5) A supplementary data exhibit (Exhibit C) described in section 514.6(e) corresponding to the date of the balance sheet furnished in response to section 514.2(b)(1).

(6) The work papers described in section 514.4(b).

(c) Revenue (except Other Revenue) and costs shall be assigned directly whenever possible, otherwise allocation shall be made in the manner prescribed in section 514.6 of this part. However, if the gross revenue from Other Operations does not exceed 5 percent of the total company gross revenue, no segregation of revenue and expenses between Other Operations and the Trade (see definitions, sections 514.5(b) and (c)) is required by this part.

(d) All NVO's subject to these requirements must comply in all material respects with the instructions outlined herein, both as to the submission of the specified exhibits and schedules and as to compliance with the methods prescribed for their preparation. If an NVO has nothing to report on a required schedule, it must submit the schedule with the word "NONE" printed across its face.

(e) All percentage calculations required by allocations herein shall be carried to two places beyond the decimal point, e.g., 97.54 percent.

§514.3 Certification

The data required by this part shall be accompanied by a certification by the corporate officer responsible for the maintenance and accuracy of the books, accounts and financial records of the NVO, stating that:

(a) The books and accounts have been maintained in accordance with an appropriate system of accounts;

(b) The exhibits and schedules have been prepared from the regularly maintained books and records of the NVO;

(c) The records so maintained conform to, are reconciled to, or represent the actual financial data subject to the annual independent financial audit;

(d) The allocations have been made in accordance with the rules promulgated in this part; and,

(e) The financial and statistical data used are supported by an appropriate information gathering system having proper internal controls which have been tested for accuracy.

§514.4 Access to and audit of records

(a) Every NVO shall maintain its records and books of account in an orderly and systematic manner. These records must be kept in such manner as to permit the timely preparation of the exhibits and schedules described in section 514.6(a). As a minimum requirement, every NVO shall retain those records necessary to prepare the documents described in section 514.6(a) for a period of 3 years.

(b) Exhibits and schedules submitted as part of this requirement are to include: (1) all work papers, properly cross-referenced and indexed, which were prepared in support of the exhibits and schedules, and (2) a detailed description of the methods employed in projecting revenues.

(c) In addition, the books and records of the NVO and those of any related company whose financial data is included in any of the exhibits or schedules shall be made available upon request for examination by appropriate Commission personnel. Commission personnel shall be permitted to make copies of these records to the extent they deem necessary.

(d) All exhibits and schedules submitted as part of the filing requirements are to include the work paper reference numbers so that amounts shown can be readily traced to the appropriate work paper.

§514.5 Definitions

For the purpose of this part the following terms are expressly limited to the definitions listed below:

(a) *The Service*—All activities and operations of the NVO, including those regulated by the Commission.

(b) *Other Operations*—That part of the Service not subject to the Commission's jurisdiction under 46 CFR 531, such as cargoes moving in the foreign commerce of the United States or those regulated by the Interstate Commerce Commission.

(c) *The Trade*—That part of the Service subject to the Commission's jurisdiction under 46 CFR 531, and as defined under "Domestic Offshore Trade" (below).

(d) *Domestic Offshore Trade*—The transportation and handling of common carrier cargo under the terms of a tariff(s) on file with and regulated by the Commission between any one of the five areas of the Continental United States listed in subparagraph (1) and one non-contiguous area of the United States listed in subparagraph (2) or between two non-contiguous areas of the United States. Where service is offered to or from two or more areas at the same rates (e.g., Atlantic Coast to Puerto Rico and the Virgin Islands) and listed as such in a single tariff, the carriage of cargo to or from those two or more areas may be treated as one domestic offshore trade for the purposes of this part.

(1) The five areas of the Continental United States are:

(i) North Atlantic (Maine to, but not including Hatteras, North Carolina);

(ii) South Atlantic (Hatteras, North Carolina to, but not including, Key West, Florida);

(iii) Gulf (Key West, Florida to and including Brownsville, Texas);

(iv) West Coast; and

(v) Great Lakes.

(2) The non-contiguous areas of the United States (including, but not limited to those) to which service is offered under the terms of tariffs on file with the Commission as of December 31, 1979 are:

(i) American Samoa;

(ii) Commonwealth of the Northern Marianas;

(iii) Guam;

(iv) Johnston Island;

(v) Midway Island;

(vi) Puerto Rico;

(vii) State of Alaska;

(viii) State of Hawaii;

(ix) U.S. Virgin Islands; and

(x) Wake Island.

(e) *Cargo Cube*—The product of the outside dimensions of a unit of cargo expressed in cubic feet. In computing cargo cube for containerized cargo, the outside dimensions of the container, trailer or other equipment shall be used. The height of equipment moving on wheels shall be measured from the ground to the highest point on the equipment. Empty equipment, such as containers, shall be included in the computation of cargo cube only if they are revenue-producing units of cargo. Where a NVO finds it more convenient to accumulate such data in terms of twenty-foot equivalent units (TEU's) or metric quantities, these units may be used instead of cargo cube in all instances where cargo cube is cited in this part. Where any of these options are exercised, the NVO shall modify the headings on the prescribed reporting forms to indicate the units in which the data is being reported. For purposes of this part, NVOs are not required to tape measure each unit (e.g., container, trailer, box, carton). However, the computation of cargo cube must be developed after careful consideration of all evidence available to the NVO, including loading documents, the opinions of experienced operating personnel, and sample measurements. In calculating the cube of containers, trailers, or other similar equipment, the NVO may assign a standard length, width and height to a given class of equipment, provided that the actual dimensions of each piece of equipment in the class vary no more than a foot from the standard dimensions.

(f) *Measurement Ton*—Equals forty (40) cubic feet.

(g) *Metric Measurement Ton*—Equals 35.31 cubic feet or 1 cubic meter.

(h) *Twenty-foot Equivalent Unit (TEU)*—Equals 1,280 cubic feet, based on the standard 20′ × 8′ × 8′ container.

(i) *Cargo Cube Relationship*—The ratio of total cargo cube for all cargo carried in the Trade to total cargo cube for all cargo carried in the Service.

(j) *Line-Haul Transportation*—All transportation of freight on land other than pickup and delivery and local terminal operations. An example of this would be substituted service, i.e., charging the water rates but moving the cargo part of the way by land.

(k) *Pickup and Delivery*—The service provided by the NVO, or its agent, of picking up and delivering cargo from or to a shipper's or consignee's place of business or other location designated by the shipper or consignee pursuant to the NVO's tariff(s) on file with the Commission and not subject to regulation by any other regulatory body.

(l) *Related Company*—Companies or persons that directly or indirectly (through one or more intermediaries) control, or are controlled by, or are under common control with, the reporting NVO. The term "control" shall include actual as well as legal control, whether maintained or exercised through (or by reason of) the circumstances surrounding organizational structure or operation, through (or by) common directors, officers, stockholders, a voting trust(s), a holding or investment company or companies, or through (or by) any other direct or indirect means, including the power to exercise control.

(m) *Total Trade Operating Expenses*—The total amount allocated to the Trade for the following expenses: Ocean Transportation, Line-Haul Transportation, Pickup and Delivery and Terminal.

(n) *Total Company Operating Expenses*—The company-wide total of the following expenses: Ocean Transportation, Line-Haul Transportation, Pickup and Delivery and Terminal.

(o) *Operating Expense Relationship*—The ratio of total Trade operating expenses to total Company operating expenses.

§514.6 Forms

(a) *General:*

(1) The information required by this part shall be submitted in the prescribed format and shall include:

Exhibit A—Balance Sheet
Exhibit B—Statement of Income and Supporting Schedules
Exhibit C—Supplementary Data

(2) The required exhibits and schedules are described in sections 514.6(b), (c), (d) and (e).

(b) *Balance Sheet* (*Exhibit A*):

The balance sheet shall be prepared from the NVO's books and records in accordance with generally accepted accounting principles and shall be accompanied by the appropriate footnotes.

(c) *Statement of Income* (*Exhibit B*):

(1) A statement of income shall be prepared showing operating results of the Total Company, Other Operations and the Trade.

(2) *Operating Revenue* (*Schedule B-I*):

(i) Revenue allocated to the Trade shall only be revenue earned from the common carriage of cargo in the domestic offshore trade during the period and other revenue as shown on Schedule B-I, except that minor amounts of other cargo may be considered Trade cargo in accordance with section 514.2(c). Revenue figures shall be reported in total for the Trade and separately for each of the 15 inbound commodities (listed by tariff descriptions) producing the highest revenues for the inbound portion of the Trade, and for each of the 15 outbound portion of the Trade. Where fewer than 15 commodities account for at least 90 percent of the total revenue for either the inbound or outbound portion of the Trade, only those commodities need be separately reported. Where the same commodity is carried under several tariff designations having different rates (e.g., potatoes refrigerated, potatoes non-refrigerated, potatoes in bags, potatoes in containers), each of these tariff designations shall be considered as an individual commodity.

(ii) Where the applicable tariff establishes a single freight-all-kinds (FAK) rate for containers that may hold more than one commodity, individual commodity designations shall be disregarded in considering that tariff item for purposes of subparagraph (i) above.

(3) *Ocean Transportation Expenses* (*Schedule B-II*):

This schedule shall set forth the number of containers, cubic feet of cargo shipped and amounts paid or owed to each underlying ocean carrier for ocean transportation purchased for the carriage of cargo in Total, for Other Operations and for the Trade.

(4) *Line-Haul Transportation Expenses* (*Schedule B-III*):

This schedule shall set forth the number of cubic feet of cargo carried and amounts paid or owed to motor carriers, railroads or other land carriers for the line-haul transportation of cargo in Total, for Other Operations and for the Trade.

(5) *Pickup and Delivery Expenses* (*Schedule B-IV*):

This schedule shall set forth expenses incurred in the pickup and delivery of cargo in Total, for Other Operations and for the Trade. Assignments to the Trade shall be direct where possible; otherwise, on the cargo cube relationship by location. This schedule shall also set forth the basis under which pickup and delivery charges are assessed for the Trade (e.g., included in base rate or separate charge) and the amount of any charges paid to a related company for pickup and delivery services.

(6) *Terminal Expenses* (*Schedule B-V*):

This schedule shall set forth in detail all expenses incurred in terminal operations for the loading and unloading of containers, the switching and transfer of cargo within the terminal area and any local trucking operations not included in line-haul or pickup and delivery expenses (e.g., between underlying carrier's terminal and the NVO's terminal) in Total, for Other Operations and for the Trade. Assignments to the Trade shall be direct where possible; otherwise, on the cargo cube relationship by location.

(7) *Administrative and General Expenses* (*Schedule B-VI*):

This schedule shall set forth all administrative and general expenses, including advertising and miscellaneous taxes. Depreciation of equipment and amortization of leasehold improvements not assignable to pickup and delivery or terminal expenses shall be included in this schedule. Expenses not directly assigned to the Trade or Other Operations shall be allocated to the Trade on the operating expense relationship. Charitable contributions shall not be allocated to the Trade.

(8) *Other Income or Expense* (*Schedule B-VII*):

Any other elements of income or expense shall be fully explained and supported by schedule Schedule B-VII "Other Income or Expense." Assignments to the Trade shall be direct where possible; otherwise, on the operating expense relationship. Should this type of assignment appear to be inequitable to either the Trade or Other Operations, a more equitable method shall be employed and the reasons fully explained.

(9) *Provisions for Income Taxes:*

Federal, State, and other income taxes shall be listed separately. If the company is organized outside the United States, it shall indicate the entity to which it pays income taxes and the rate of tax applicable to its taxable income for the subject year. Federal, State and other income taxes shall be calculated at the statutory rate.

(10) *Extraordinary Items:*

Income or losses of an extraordinary nature shall be set forth and described in an appropriate schedule which is reconcilable to the statement of income. Classification as an extraordinary item shall be in accordance with generally accepted accounting principles. In general, these amounts shall not be assigned or allocated to the Trade.

(11) *Related Company Transactions* (*Schedule B-VIII*):

The net income (loss) after Federal income taxes from transactions in the Service with related companies shall be allocated to the Trade. Such allocations shall be made on the same basis as the specific expense was allocated to the Trade. Income taxes should be assigned to related company transactions based on the statutory tax rate. The methods employed shall be fully explained in Schedule B-VIII, "Related Company Transactions."

(d) *Operating Ratio:*

(1) The operating ratio will be computed by *dividing* total Trade expenses (adjusted for related company transactions) *by* total Trade revenue.

(2) The reasonableness of an NVO's operating ratio will be determined by comparing it to the operating ratios of other regulated and non-regulated companies, adjusted for relative risk. In conjunction with the operating ratio, the staff may also consider other financial ratios, such as (1) current, (2) leverage and (3) turnover. The NVO's stability in earnings as compared to that of other firms will also be considered.

(e) *Supplementary Data* (*Exhibit C*):

The supplementary data shcedule shall set forth information concerning the identity of and services offered by the NVO. Specific details are set forth in Exhibit D.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-90

ERNEST R. LEVINE D/B/A GERALD EXPORT & IMPORT COMPANY

v.

HAPAG-LLOYD, A.G.

ORDER

January 18, 1980

On November 7, 1979, Administrative Law Judge Charles E. Morgan dismissed the complaint of Ernest R. Levine d/b/a Gerald Export & Import Company (Levine) against Hapag-Lloyd, A.G. No appeals were taken from this action, but the Commission determined to review the matter on its own motion.

Levine is a shipper of carpets located in Chicago, Illinois. The instant complaint arose out of a legal action by Hapag-Lloyd, a common carrier by water in the foreign commerce of the United States, to collect freight charges from Mr. Levine. *Hapag-Lloyd, A.G. v. Levine*, 473 F.Supp. 991 (N.D. Ill. 1979). In that proceeding, Levine alleged that the freight charges owing Levine were based upon rates unlawful under the Shipping Act, 1916 (46 U.S.C. §801 *et seq.*) The United States District Court entered immediate judgment for Hapag-Lloyd on its freight collection claim on June 14, 1979. The court found that Levine's counterclaim raised separable matters within the primary jurisdiction of the Federal Maritime Commission, which would be deferred until Levine's allegations could be considered by the Commission.

Levine subsequently filed a Shipping Act complaint, alleging violations of sections 15, 16, and 18(b) of the Shipping Act by Hapag-Lloyd and unnamed co-conspirators, based upon discriminatory pricing and failure to adhere to published tariffs. Although the complaint was unclear as to the exact conduct alleged to be discriminatory, the complained of activities were not necessarily limited to the use of a Commission approved dual rate merchant's contract. The complaint also include references to rebating and failure to adhere to published tariffs.

Upon receiving Levine's complaint, Hapag-Lloyd filed a "Motion to Dismiss" stressing the lawfulness of the dual rate system employed by it and the

North Atlantic United Kingdom Freight Conference to which it belongs. Levine did not respond to this motion. Under such circumstances, it was not improper for the Presiding Officer to construe the complaint against Levine and dismiss it for failing to adequately state a cause of action. The November 7, 1979 "Order of Dismissal" is essentially a default judgment in favor of the respondent from which no appeal has been taken.

THEREFORE, IT IS ORDERED, That, consistent with the above discussion of the Complainant's failure to prosecute its claim, the November 7, 1979 "Order of Dismissal" is 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

46 C.F.R.; CHAPTER IV, DOCKET NO. 79-36

SELF-POLICING OF INDEPENDENT LINER OPERATORS

January 21, 1980

ACTION: Discontinuance of Proceeding

SUMMARY: This proceeding was instituted by advance notice of proposed rulemaking published April 16, 1979 (44 Fed. Reg. 22487). Public comment was requested on whether to adopt rules requiring independent ocean carriers to participate in self-policing programs and if so the appropriate nature, scope and feasibility of a policing requirement. Upon consideration of comments received we have determined not to promulgate a proposed rule at this time. Accordingly, proceedings in this matter are hereby discontinued.

SUPPLEMENTARY INFORMATION: None

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79–15

WESTINGHOUSE ELECTRIC CORPORATION

v.

SEA-LAND SERVICE, INC.

NOTICE

January 23, 1980

Notice is given that no appeal has been taken to the December 10, 1979 dismissal of the complaint in 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. 79–15

WESTINGHOUSE ELECTRIC CORPORATION

v.

SEA-LAND SERVICES, INC.

NOTICE OF (1) DISMISSAL OF COMPLAINT (2) DISCONTINUANCE OF PROCEEDING

Finalized January 23, 1980

By notice served November 21, 1979, the parties in this proceeding were directed to submit on or before Monday, December 3, 1979, a prehearing statement pursuant to Rule 95 of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.95. To the date of this notice, no party has submitted the requested prehearing statement, nor has the Presiding Administrative Law Judge granted waiver of the filing thereof. Consequently, under the circumstances, the failure to file is deemed a failure of prosecution of the complaint, as well as a dismissal of the parties to the proceeding, pursuant to said Rule 95.

Whereupon, upon consideration of the above, it is *ordered* that,

(A) The complaint is dismissed;

(B) The parties are dismissed from this proceeding;

(C) The proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

December 10, 1979

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 693(I)

DORF INTERNATIONAL LIMITED

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

ORDER ON RECONSIDERATION

January 24, 1980

This proceeding is before the Commission on petition from Respondent Flota Mercante Grancolombiana requesting that the Commission reconsider its determination not to review the decision of the Settlement Officer granting reparation to Complainant Dorf International Limited for alleged freight overcharges on a shipment of cardboard paper carried by Respondent from New York, New York to Cristobal, Panama.

The Commission decided to grant the Petition for Reconsideration in this instance because of the clearly erroneous allegation in the Settlement Officer's decision that the Respondent had not disputed the merits of the claim.

The complaint alleges that Respondent assessed freight on a measurement basis of 337 cft whereas according to the shipper's packing list the 43 cartons of cardboard measured 131.38 cft. The Settlement Officer found that the evidence supported Complainant's claim and on that basis awarded reparation.

It appears, however, that the Settlement Officer overlooked the fact that the 43 cartons which measured 131.38 cft when delivered to Complainant were subsequently placed in five pallets for delivery to the terminal and the carrier. As shown by the dock receipt and the bill of lading the five pallets measured 377 cft. The applicable tariff provided that freight must be assessed on the over-all measurement of each package. Consequently, by assessing freight on the measurement basis of 377 cft, Respondent properly rated the shipment.

Therefore, the decision of the Settlement Officer must be and is hereby reversed, reparation denied and the complaint dismissed.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-15

WEST GULF MARITIME ASSOCIATION

v.

PORT OF HOUSTON AUTHORITY, ET AL.

ORDER ADOPTING INITIAL DECISION

January 28, 1980

This proceeding was initiated upon the complaint of West Gulf Maritime Association (WGMA),[1] filed April 15, 1974, alleging that several terminal tariff provisions published by Respondents, seven ports on the Texas Gulf Coast,[2] violated sections 15 and 17 of the Shipping Act, 1916 (46 U.S.C. §§814, 816). The Port of New Orleans, the California Association of Port Authorities, the Virginia Port Authority, the Maryland Port Administration, and the Commission's Bureau of Hearing Counsel intervened. Administrative Law Judge Seymour Glanzer issued an Initial Decision,[3] served September 26, 1979, which is before the Commission on WGMA's Exceptions. Respondents filed a Joint Reply to Exceptions, and Hearing Counsel also replied.

TARIFF PROVISIONS

The text of the tariff provisions in issue is attached as Appendix A to the Initial Decision. The tariff provisions are largely duplicative, with many of the ports' tariffs using identical language. Although approximately 35 tariff provisions are challenged in this proceeding, they may be categorized into four major groups:

1. Each of Respondents' tariffs provides that use constitutes consent to the terms and conditions of the tariffs, and that vessel agents are "users" of the

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[1] WGMA is a trade association composed of steamship agents and owners and stevedore companies, using port facilities along the Gulf of Mexico.

[2] Respondents are the Port of Houston Authority, the City of Galveston, the Port of Beaumont, the Port of Port Arthur, the Port of Corpus Christi, the Brownsville Navigation District of Cameron County, and the Orange County Navigation and Port District.

[3] 19 S.R.R. 859 (1979).

ports' facilities. The ports bill the vessel agents and hold them liable for dockage, wharfage, and outbound cargo demurrage charges.

2. A tariff provision published only by Galveston provides that when cargo cannot be removed from piers or transit sheds because of strike interference, cargo already in penalty or compensatory demurrage status will be subject to compensatory rates.

3. Six of the Respondent ports publish tariff provisions stating that the ports are the "interpreter," "sole interpreter," or "sole judge" of the tariffs.

4. Three ports publish tariff items requiring stevedores who rent port-owned cranes to assume liability for the negligent actions of the port-provided crane operators, while under the control and supervision of the stevedores.

DISCUSSION AND CONCLUSIONS

The Presiding Officer found that the provisions stating that the ports were the sole interpreter of the tariffs were unjust and unreasonable under section 17. No exceptions to this finding were filed. The Commission concludes that this finding of the Presiding Officer is correct, and it is therefore adopted.

The Presiding Officer also found that the remaining tariff provisions complained of by WGMA were lawful and reasonable. To these findings WGMA filed 59 exceptions, 54 of which were unaccompanied by references to the record, as required by the Commission's Rules of Practice and Procedure, 46 C.F.R. section 502.227(a). WGMA's Exceptions consist of a list of general disagreements with the findings of fact and conclusions of law made by the Presiding Officer. For the reasons stated below, the Commission finds that the exceptions are without merit and that the findings and conclusions of the Initial Decision are proper and well-founded. Accordingly, the Commission adopts the Initial Decision as its own.

The "use equals consent" provisions merely inform users of their responsibilities and impose no disadvantage or unreasonable practice upon them. The Commission has previously found that "consent" language adds no independent validity to provisions imposing liability. *West Gulf Maritime Association v. Port of Houston Authority*, 18 S.R.R. 783, 789 (1978),[4] *aff'd mem. sub nom., West Gulf Maritime Association v. Federal Maritime Commission*, No. 78-2021 (D.C. Cir., Dec. 31, 1979). That finding applies to the instant tariff provisions as well.

Similarly, the issue whether vessel agents can be held responsible for various port charges was already decided in the affirmative in *WGMA v. PHA*. Additionally, in *West Gulf Maritime Association v. City of Galveston*, 19 S.R.R. 779 (1979), the Commission found that tariff provisions defining "users" to include steamship agents were reasonable and lawful. Accordingly, the Commission concurs with the Presiding Officer's conclusion that the port charges for which the vessel agents are made liable are reasonably related to the vessel interests' use of the ports, and are therefore reasonably borne by the vessel agents.[5]

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[4] Hereinafter cited as *WGMA v. PHA.*

[5] The Commission also concurs with the finding in the Initial Decision that the statute of frauds issue raised by WGMA is

The application of compensatory rates to cargo in a penalty or compensatory demurrage status at the time of strike interference, is consistent with the principles enunciated in *Free Time and Demurrage Charges at New York*, 3 U.S.M.C. 89 (1948).[6] The Commission concludes, therefore, as did the United States District Court for the Southern District of Texas,[7] that this demurrage practice is reasonable and nondiscriminatory.[8]

Finally, the Commission finds that the tariff items involving liability for the negligence of crane operators are reasonable. WGMA's contention that the tariff items violate the principle of *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) is unfounded.[9] The record indicates that the monopolistic conditions which were present in the towing industry at the time of *Bisso* and were crucial to the Court's decision, are not present with respect to the instant crane rental operations. Port users can and do obtain crane services other than from the ports. Both a federal and a state court found similar crane rental operations not to offend state and common law principles,[10] and the Commission affirms the lawfulness of the provisions under the Shipping Act.[11]

In conclusion, the findings of the Presiding Officer, contrary to the allegations in WGMA's exceptions, are amply supported by the evidence of record.[12]

THEREFORE, IT IS ORDERED, That the Exceptions of the West Gulf Maritime Authority are denied; and

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is adopted by the Commission; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

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[6] The Commission there stated: "When property lies at rest on a pier after free time has expired, and consignees, through reasons beyond their control, are unable to remove it, . . . [penal charges] are a useless, and consequently unjust burden upon consignees, and a source of unearned revenue to carriers . . . . The carrier is entitled, however, to fair compensation for sheltering and protecting a consignee's property during the period of involuntary bailment after expiration of free time." 3 U.S.M.C. 107–108.

[7] *City of Galveston v. Kerr Steamship Co., Inc.*, 362 F. Supp. 289 (S.D. Tex. 1973), *aff'd*, 503 F.2d 1401 (5th Cir. 1974), *cert. dened*, 420 U.S. 975 (1975).

[8] Galveston's practice is also consistent with that mandated by the Commission for import cargo at the Port of New York (46 U.S.C. section 526.1(d), (f)), and for export cargo at the Ports of New York and Philadelphia (46 U.S.C. section 541.1(f)).

[9] In *Bisso*, the Court dealt with the general rule forbidding common carriers and utilities from stipulating for immunity from their own negligence. The Court explained the justifications for the rule as being:

(1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains.

349 U.S. at 91.

[10] *Southern Steamship Company v. Meyners*, 110 F.2d 376 (5th Cir.), *cert. denied*, 311 U.S. 674 (1940), and *Rorie v. City of Galveston*, 471 S.W. 2d 789 (Tex. 1971), *cert. denied*, 405 U.S. 988 (1972).

[11] The Commission notes that users of the crane services benefit financially from the use of the ports' cranes; that the users are in operational control of the crane operators; that stevedores may and do choose specific operators; and that the tariff items' terms are similar to those offered by competing private crane rental companies.

[12] All exceptions of WGMA have been carefully reviewed and considered, and found to be without merit.

FEDERAL MARITIME COMMISSION

No. 74-15

West Gulf Maritime Association

v.

Port of Houston Authority, et al.

Adopted January 28, 1980

Tariff provisions which charge vessels agents with liability for payment of vessel charges, including wharfage, dockage, wharf demurrage and strike demurrage do not violate sections 15, 16 First or 17 of the Shipping Act, 1916. Galveston Wharves strike demurrage tariff provision does not unduly or unreasonably prefer or discriminate against types of cargo, shippers, carriers or their agents in violation of sections 16 First or 17 of the Shipping Act, 1916.

Tariff provisions which purport to allow the ports to interpret provisions of their tariffs are unjust and unreasonable practices relating to or connected with the receiving, handling, storing or delivering of property in violation of section 17 of the Shipping Act, 1916.

Tariff provisions which make crane operators the borrowed servant of the crane user and make the crane user liable for the negligence of the crane operator while under the supervision, direction and control of the user are not unjust and unreasonable and do not violate sections 15 or 17 of the Shipping Act, 1916.

Robert Eikel and *J. T. Davey* for complainant, West Gulf Maritime Association.

F. William Colburn for respondent, Port of Houston Authority.

Benjamin R. Powel for respondent, City of Galveston (Galveston Wharves).

M. Harvey Weil for respondents, Nueces County Navigation District No. 1 (Port of Corpus Christi) and Brownsville Navigation District.

Tom Moore Featherston for respondent, Port of Port Arthur Navigation District of Jefferson County.

Malcolm M. Dorman for respondent, Orange County Navigation District and Port Administration.

Dan Rentfro for respondent, Port of Brownsville.

Doyle G. Owens for respondent, Port of Beaumont.

Burt Pines, Jack L. Wells and *Frank Wagner* for intervenor, California Association of Port Authorities.

Edward Schmeltzer, Edward J. Sheppard and *George Weiner* for intervenor, The Board of Commissioners of the Port of New Orleans.

J. Robert Bray and *Arthur W. Jacocks* for intervenor, Virginia Ports Authority.

Gary Koecheler for intervenor, Maryland Port Administration.

John Robert Ewers, Lizann Malleson Longstreet, and *Aaron W. Reese* as Hearing Counsel.

Sam H. Lloyd for Georgia Ports Authority, appearing specially.

Milton A. Mowat and *Robert L. Henry* for intervenors, Port of Portland and Northwest Marine Terminals Association, Inc.

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

This is a complaint proceeding, filed April 15, 1974, pursuant to the provisions of section 22 of the Shipping Act, 1916,[2] by West Gulf Maritime Association (WGMA), complainant, alleging violations of sections 15 and 17 of the Shipping Act, 1916,[3] by Port of Houston Authority (PHA), the City of Galveston (Galveston Wharves), Port of Beaumont, Texas (Beaumont), Port of Port Arthur, Texas (Port Arthur), Port of Corpus Christi (Nueces County Navigation District No. 1) (Corpus Christi), Brownsville Navigation District of Cameron County, Texas (Brownsville), and the Orange County Navigation and Port District, Texas (Orange), respondents, and requesting that specified tariff matter published by the respondents[4] be declared unjust, unreasonable, discriminatory and unlawful and further requesting that the tariff matter be ordered null and void and that the respondents be ordered to cease and desist from acting in accordance with and from seeking to enforce the tariff matter against complainant's members and requesting still further the issuance of such orders as may be necessary to secure compliance with the law by respondents. Reparation is not requested.

The answers of all respondents allege that the tariff matter appearing in each of their tariffs is just and reasonable and not discriminatory and not violative of any provisions of law.

WGMA is a trade association composed of (1) almost all the steamship agents representing operators of deep sea cargo vessels using the ports of the Gulf of Mexico from Lake Charles, Louisiana, to Brownsville, Texas, inclusive, (2) the owners of some of those vessels and (3) stevedoring firms whose employees load and unload those vessels.

All respondents operate port and terminal facilities in the State of Texas pursuant to provisions of the Constitution and other laws of the State. Each respondent, except Galveston Wharves, does so as a navigation district, which is a government agency, body politic and political subdivision of the State. Galveston Wharves derives its authority from the charter of the City of Galveston, a home rule city, which conducts the business of Galveston Wharves through a separate Board of Trustees.

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

[2] 46 U.S.C. § 821.

[3] 46 U.S.C. §§ 814 and 816.

[4] After post hearing briefs were served and filed it became apparent that there was a need to clarify which of the tariff provisions placed in issue by the complainant by way of the complaint or by way of evidence introduced at the hearing remained in issue and under attack by the complainant at the close of the hearing. Therefore, at a post hearing conference on September 12, 1978, I distributed copies of a compilation, then entitled Appendix, containing the identification and text of those tariff provisions which, preliminarily, seemed to fall in that category. The parties were directed to advise me on the correctness of the Appendix. The complainant and all respondents, except Beaumont, responded. Generally, the respondents stated that the Appendix correctly reflected their understanding of the tariff provisions in issue at the close of the hearing, but several advised that some tariff changes occurring either prior to or during the hearing or subsequent to the close of the record should be noted. However, by latter dated September 12, 1978, the complainant adopted the Appendix as a correct statement of those tariff provisions which it contends violate the Shipping Act, 1916, advising, "The tariff provisions set forth in the Appendix presented at the conference on September 12 it is agreed by complainant are those at issue." WGMA's views of what is under attack will be accepted for the purposes of this decision.

The Appendix has been incorporated in the initial decision as Appendix A. Pertinent respondent comments appear as footnotes to the text of Appendix A.

Under appropriate provisions of Texas law—i.e., the Texas Water Code, special statutes creating some of the navigation districts or the City of Galveston's charter and applicable statutes—the respondents are authorized, among other things, to acquire and own land and purchase, construct, enlarge, extend, repair, maintain, operate and develop wharves, docks and other facilities or aids incidental to or useful in the operation or development of ports or waterways or in aid of navigation and commerce in the ports and waterways. In addition, the respondents are empowered to prescribe fees and charges to be collected for use of their land improvements and facilities. The fees and charges must be reasonable, equitable and sufficient to produce revenue adequate to pay expenses.[5]

Several persons intervened. They are the Port of New Orleans (New Orleans), an agency of the State of Louisiana created for the purpose of regulating and promoting the commerce and traffic at that port and administering and maintaining its public wharves and other terminal facilities; California Association of Port Authorities (California); Virginia Port Authority (Virginia); Maryland Port Administration (Maryland), and Hearing Counsel.[6] The Georgia Ports Authority appeared specially, but did not participate in the proceeding. All parties, except those who withdrew, participated in the proceeding and submitted briefs.[7]

There were 13 days of hearing in the proceeding. The record consists of 1962 pages of transcript and 65 numbered exhibits.

CONTENTIONS OF THE PARTIES

The text of the points of arguments made by WGMA and respondents appears as Appendix B of this decision. WGMA focuses on three distinct categories of provisions published in respondents' tariffs, together with the port practices which implement those provisions, as being violative of the Shipping Act, 1916.

The first category is comprised, usually, of a single tariff provision containing two components and providing: (a) that use of the port's facilities shall constitute consent to and agreement to comply with the regulations and provisions contained in the port's tariff;[8] (b) that vessel agents are users of the port's facilities.[9] Flowing from those provisions is the practice, of each of the respondents, of billing the vessel agent for certain tariff charges acknowledged by WGMA to be proper charges against the vessel (dockage, shed and pier use charges) and other tariff charges (wharfage and outbound cargo demurrage)

[5] See, e.g., Texas Water Code Ch. 60.101 ad 60.103 and Art. 1187f, V.T.C. S.

[6] Two intervenors, Port of Portland and Northwest Marine Terminals Association, Inc., withdrew before the conclusion of the hearing.

[7] In accordance with my request, a single joint brief was submitted on behalf of the seven respondents.

[8] The consent provisions are as follows: PHA—Item 2; Galveston Wharves—Item 30; Beaumont—Item 165; Port Arthur—Item 175; Corpus Christi—Item 1552; Brownsville—Item 105; Orange—Item 195.

[9] The user provisions are generally the same as those in n. 8, *supra*, except that there is a definition of "user" in PHA's tariff, which does not appear in Appendix A and there is no user provision in the portions of Brownsville's tariff appearing in Appendix A.

which WGMA claims are not proper charges against the vessel but are obligations of the cargo interests.

Also in this first category is a tariff provision published only by Galveston Wharves. It is Item 187 "Interference Due to Strikes." It deals with wharf demurrage and provides, in effect, that when cargo cannot be removed from piers or transit sheds because of strikes: (1) any cargo within the free time period will remain on free time i.e.: no demurrage charges will accrue during the strike, and (2) any cargo already in a compensatory or penalty demurrage status will remain in demurrage status, but at compensatory rates and not penalty demurrage rates. It is Galveston Wharves' practice to charge the using vessel interest (owner or agent, if the owner is not physically located at Galveston) for outbound demurrage of the second kind.

In the second category are tariff provisions published by six of the respondents[10] containing terms which, in substance, state that the port is the interpreter or sole interpreter of the meaning of the terms and conditions of the tariff.

The third category is concerned with tariff provisions, published by PHA, Galveston Wharves and Corpus Christi, involving the rental of cranes. The rental includes the services of a crane operator employed by the port and the rental charges include the crane operator's salary. In addition the tariffs provide that the stevedore renting the crane from the port assumes responsibility and liability for the negligent acts of the operator. The practice of transferring liability for employee negligence from the employer to the user of the equipment is known in the law as the "borrowed servant doctrine." See *Rorie v. The City of Galveston,* 471 S.W. 2d 789 (Tex. 1971), 8 SRR 20, 713.

Respondents, of course, urge that neither their tariffs nor their practices are violative of law.

Intervenor, New Orleans, argues that the tariff provisions at issue in this proceeding are necessary for efficient port operation and that they are not contrary to State or Federal Law, including the Shipping Act, 1916. Generally, the other intervenors, Hearing Counsel, California, Maryland and Virginia, take the same position as New Orleans.

THE POST HEARING CONFERENCE

Earlier, the post hearing conference of September 12, 1978, was mentioned.[11] Its primary purpose was to ascertain whether there was any desire to reopen the record for the taking of additional evidence or to submit supplemental briefs in the light of the Commission's Report and Order Adopting Initial Decision in Docket No. 75–21, *West Gulf Maritime Association v. Port of Houston Authority of the Port of Houston, Texas.*[12]

[10] WGMA has not cited any Galveston Wharves Tariff provision governing interpretation of its tariff.

[11] N. 4, *supra.*

[12] The Report and Order was served August 16, 1978. The Initial Decision was served April 12, 1978. Subsequent to the post hearing conference, WGMA sought judicial review of the Commission's decision. The case is now pending in the United States Court of Appeals for the District of Columbia Circuit under title of *West Gulf Maritime Association v. Federal Maritime Commission and United States of America,* No. 78-2021. The Initial Decision is published at 18 SRR 291. The Commission's decision is published at 18 SRR 783. Hereafter, that case will be identified as *WGMA v. PHA.*

A further purpose was to rectify certain deficiencies in the post hearing briefs.

Under the Commission's Rules of Practice and Procedure, post hearing briefs are required to have a separately captioned section containing proposed findings of fact in serially numbered paragraphs with reference to exhibit numbers and pages of transcript. Rule 221, 46 C.F.R. § 502.221.[13]

For the most part, initial briefs contained sections entitled proposed findings of fact. Yet, the proffered material was as much conclusionary as factual, but, even when factual, there was little or no reference to the portions of the record relied on. In view of the sizeable record and the breadth of the arguments these omissions presented palpable drawbacks to informed decision making and to the best interests of the litigants.

To remedy the problem a two round procedural schedule was developed. It was made applicable to the primary litigants but was optional for intervenors. The first round called for simultaneous submissions of proposed findings of fact, in accordance with Rule 221, by WGMA and by respondents jointly. In the second round, the parties were instructed to indicate whether and how they differed with the other side's proposed findings.[14]

In their first and second round submissions, the respondents complied with the directions given. In the second round they also observed, generally, that many of complainant's first round proposed findings were not cited to the record. The complainant did not file any second round comments.[15]

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[13] Rule 221 provides in pertinent part:

Briefs; requests for findings.

The presiding officer shall fix the time and manner of filing briefs and any enlargement of time. The period of time allowed shall be the same for all parties unless the presiding officer, for good cause shown, directs otherwise. Briefs shall be served upon all parties pursuant to Subpart H of this part. . . . In investigations instituted on the Commission's own motions, the presiding officer may require Hearing Counsel to file a request for findings of fact and conclusions within a reasonable time prior to the filing of briefs. Service of the request shall be in accordance with the provisions of Subpart H of this part (Rule 8). Unless otherwise ordered by the presiding officer, opening or initial briefs shall contain the following matters in separately captioned sections: introductory section describing the nature and background of the case, proposed findings of fact in serially numbered paragraphs with reference to exhibit numbers and pages of the transcript, argument based upon principles of law with appropriate citations of the authorities relied upon, and conclusions. The Presiding Officer may limit the number of pages to be contained in a brief. All briefs shall contain a subject index or table of contents with page references and a list [of] authorities cited. . . .

[14] For a summary of the procedural schedule, see Notice of Order Fixing Time for Certain Filings, served September 14, 1978. Most intervenors stood on their opening briefs. New Orleans opted to file in the opening round. Hearing Counsel participated in both rounds, generally concurring with respondents in the first, but it added some other proposals. On the second, Hearing Counsel limited its response to taking issue with certain of complainants's proposals relating to the Port of Houston's wharfage practices on the grounds that those practices were found lawful in *WGMA v. PHA, supra.*

[15] By letter of December 18, 1978, complainant wrote:

The complainants do not feel it necessary to file a rejoinder to the Respondents' Reply to the Complainants' Requested Findings of Facts, because many of the separate replies where in disagreement with the complainants' requests are argumentative in character and no good purpose would be served in replying argumentatively.

Taken literally, this cryptic passage would appear to mean that complainant declined an opportunity for a third round submission. However, I understand it differently. I read it to mean that complainant would not be participating in the second round. I reach this conclusion because of a telephone conversation with complainant's counsel after the time to file the second round expired. I inquired if, perhaps, complainant's second round might have gone astray inasmuch as I could not locate it in the official docket. I was informed that complainant did not regard my ruling to mandatorily require a second round comment. I asked for written confirmation of that remark. The only writing which followed was the letter of December 18th.

FACTS

Preliminarily, it is noted that the burden of proof is on the "party proposing to halt existing tariff practices."[16] Here, then, the burden lies with WGMA. For convenience, the findings will generally follow the sequence suggested by WGMA's proposed findings of fact.

AGENT LIABILITY FOR DOCKAGE, SHED AND PIER (WHARF)[17] USE CHARGES

1. Certain things are undisputed by WGMA. Respondent's tariffs define "dockage," "shed hire" and "pier or wharf use hire" as charges against the vessel;[18] these are appropriate charges against the vessel or vessel interests insofar as vessel interests mean vessel owner or operator. In some tariffs, in addition to the "user" and "consent" provisions previously mentioned, some of those vessel interest charges are specifically, albeit redundantly, made the responsibility of the vessel agent.[19] The complaint, in part, concerns the practice of making steamship agents responsible for payment of these admittedly proper vessel charges.

Although the complaint alleges and WGMA argues in brief that the tariff provisions and port practices which make the vessel agent liable for these admittedly proper vessel charges are unjust, unreasonable and unfair, this view is not shared by all WGMA members. Of those WGMA members whose representatives testified, three, speaking as steamship agents, Lykes Bros. Steamship Company,[20] E. S. Binnings[21] and Kerr Steamship Company,[22] do not consider it to be unjust, unreasonable or unfair for agents to be held liable for these charges.

[16] *WGMA v. PHA, supra,* 18 SRR at 787–788.

[17] Wharf use and wharfage charges are separate charges. Generally, as its name implies, the former is based on the use of the facility for loading or unloading and assembly or distribution of cargo. The latter is measured by the cargo passing or conveyed over the wharves.

[18] PHA Tariff No. 8 at 7, 9; Galveston Wharves Tariff No. 4-D at 4, 5; Beaumont Tariff No. 4-H at 5, 24; Port Arthur Tariff No. 11-A at 4, 31; Corpus Christi Tariff No. I-J at 3A; Brownsville Tariff No. 2 at 503; Orange Tariff No. 1-J at 4, 22.

[19] See, e.g., Galveston Wharves Tariff, *supra,* at 4; Brownsville Tariff, *supra,* at 22. Respondents object to the tariff references relating to the definitions of dockage, shed and wharf use hire in WGMA's proposed findings of fact because those provisions were not included in Appendix A. Whatever technical merit may attach to the objection, it simply is not well taken because the complaint assails all vessel charges for which the agent is made liable.

[20] Lykes' position was stated by a senior vice-president, who distinguished between charges conceded to be those of the vessel (i.e., dockage) and what he considered to be "cargo" charges (i.e., wharfage). His view was emphatic and was reiterated and adhered to despite suggestions from WGMA's counsel that the witness was confused. All of this occurred before a lunch recess. Transcript, TR. 416, 457–461, 466–468. After the recess the witness recanted, indicating he was confused in his earlier responses, after all. Tr. 475–482. However, as noted in the record, I commented at the time on the witness' demeanor (Tr. 482) and based upon his testimony and my observations during the entire time the witness was on the stand, scant credence can be given to the disclaimer.

[21] Tr. 151.

[22] Tr. 356–357. Kerr, however, limits its position to those circumstances in which it has secured an advance or is otherwise put in funds by the vessel interests. Curiously, even though it is Kerr which decides whether or not to seek advances, Kerr believes the ports should share, with the agent, the risk of nonpayment.

2. Under their tariffs the respondent ports bill the agents and insist upon payment from the agent for the vessel's port charges.[23] This is a common practice throughout the ports of the United States.[24]

Agents play a vital role in water transportation. Vessel owners and operators must be represented at local ports for obviously they cannot accompany their vessels throughout each voyage. Among other things, owners and operators rely upon the agent's experience and expertise in dealing with local businessmen and ports to attend to the vessel's needs. Precisely because agents are local, the ports rely upon the agents and the agents' credit for payment of vessel charges. Under their tariffs and in accordance with custom ports deal with the agents as principals in assigning berths and cargo space and providing service for it is essential to good port operations that a well accepted local agent be present to assume financial responsibility for payment of port charges.[25]

Agents recognize their value to vessel owners and operators. Although agents solicit as much representation as they can handle or is prudent, they do so selectively. One of the criteria for choosing to represent a particular principal is that principal's creditworthiness. As put by one agent "A steamship company's creditworthiness fluctuates violently with the charter market and cargo market."[26] The principal's creditworthiness is important to agents not only because they are liable for port charges but because their agency fees are also dependent upon the principal's ability to pay.

Unless assured by the principal's financial strength, and often times even then, agents seek to be put in funds by their principals. This is accomplished by written or oral agreement, as circumstances warrant or permit, and most frequently takes the form of advances or authorization to make disbursements from freight revenues.[27]

An agent explained that for the most part it is not necessary to obtain advances from liners because of their frequent port calls, but some liners might have a bad reputation, in which cases advances are required; from tramps, advances are essential.[28] However, advances are not sought when the agent collects freight revenues on behalf of its principals (usually liners) and has authorization to deduct disbursements for vessel expenses before remitting the revenues to the principals.[29]

In particular, WGMA singles out PHA for the "pressures" it applies to collect vessel expenses from agents. PHA does not prefer that characterization but it does admit it has engaged in certain practices to insure the integrity of its tariff but it denies it has engaged in others. The details follow.

It is the general practice in all Texas ports for agents to make advance arrangements with the port for vessel facilities and services, e.g., berth space,

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[23] It should be borne in mind that wharfage is treated as a vessel's port charge by ports whose tariff provisions make wharfage a liability of the vessel.

[24] Ex. 65; Tr. 1386, 1640, 1690.

[25] Exs. 50, 58, 62.

[26] Tr. 59.

[27] See, e.g., Tr. 65, 130, 317, 413–414, 606, 682, 770.

[28] Tr. 130.

[29] Tr. 318, 413–414.

shed hire, water and other port services.[30] From time to time, in accordance with its tariffs and practices, PHA refused to assign berths to some agents for inbound vessels until they (the agents) paid their delinquent accounts—accounts which were more than 30 days overdue; pursuant to Item 3(a) of PHA's tariff some agents have been threatened with berth denial until their accounts were paid, but no vessel was ever denied a berth;[31] occasionally, PHA placed or threatened to place some agents on a cash basis and required deposits against anticipated port charges from agents who failed and refused to timely pay port charges.

All agents active at Texas ports are aware of the tariffs, customs and practices which make them liable as principals for vessel expenses. They know that the ports rely on their credit and not that of the vessel when berthing arrangements are made and port services are furnished. Consequently, an agent may be subject to some or all of the foregoing admitted practices, even to the extent of possible denial of berth space (to the agent) for a particular vessel because the agent's PHA account is overdue for a different vessel.

But, as seen, no vessel was ever denied a berth for the reason that the agent's account was overdue for a different vessel. Moreover, WGMA has neither cited nor placed in issue any provision of PHA's tariff which conceivably would allow or result in allowing PHA to apply an agent's payment of the debt of one principal to the account of another. Rather, it has been established that PHA aggressively sought payment of delinquent accounts. In pursuing that program, pursuant to Item 3(a) of its tariff, PHA did require that a delinquent prospective user of a berth for a second vessel, in advance, to guarantee payment or make arrangements for a cash payment of the second vessel's port charges. There is here no evidence that PHA reserved the right, under a tariff provision, "to apply any payment received against the oldest bills rendered against vessels, their owners and/or agents, or other users of the facilities"—a type of tariff provision found to be in violation of section 17. *West Gulf Maritime Association v. The City of Galveston (Board of Trustees of the Galveston Wharves)*, 19 SRR 779, Report and Order of the Commission served September 14, 1979, at 13.

There is no reliable evidence to support WGMA's proposed finding that PHA ever rendered an unfavorable credit report concerning an agent.[32]

WGMA proposes a finding that "One agent, Fowler & McVitie, refused point-blank to acknowledge personal liability for vessel port charges, and it was forced out of business as an agent for cargo vessels by [PHA] for such refusal."

It is true that Fowler & McVitie refused to accept liability for port charges of vessels and continues in that refusal. It is not a fact that Fowler & McVitie was forced out of business or, as implied, that it no longer functions as an agent.

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[30] Tr. 618, 851, 973, 1088.

[31] *Id.* One agent, Fowler & McVitie, Inc., was denied berth space because it refused to pay vessel expenses for port charges incurred in 1966. This agent still refuses to be held responsible for a vessel's port charges. More on Fowler & McVitie will appear in the text, *infra*.

[32] On cross-examination by WGMA's counsel, a PHA witness was asked if he ever informed Dun & Bradstreet that some agents were "not trustworthy with respect to granting of credit." The witness responded in the negative. On further cross questioning the witness added that he did answer a specific question posed by D&B concerning ageing of accounts, but that no opinion concerning the agent was given. Tr. 1605-1606.

The record shows this unequivocally. This appears at Tr. 517 on WGMA's direct examination of its own Fowler & McVitie witness:

Q: So, *in substance*, the port's refusal has driven you out of the agency business for tramp vessels?
A: It hasn't driven me out because there are other ways of doing these things.

The "other ways" consist of arranging for berthing of vessels at PHA through another agent acting as Fowler & McVitie's sub-agent.[33] Because Fowler & McVitie is the only agent which persists in its refusal to accept liability, there is no dearth of sub-agents. These "other ways" are really a charade because Fowler & McVitie insists that the sub-agents and PHA recognize that the vessels are Fowler & McVitie's.

PHA is generally familiar with the identity of the owners or operators of liner vessels that call at that port, but PHA is not knowledgeable about ownership or operation of tramp vessels. There is no reliable evidence to show the extent to which other ports know the identity of liners frequenting their ports. Normally, agents do not inform the ports of the identity of the vessel interest when making berth arrangements.[34] As a result ports are generally unaware of such matters.[35] Moreover, agents sometimes act for undisclosed principles[36] or encounter difficulty in determining who the responsible vessel interest might be. Yet, at least at PHA, the port could readily ascertain ownership identity information by asking it of the agent arranging the berth, provided the agent had accurate information to impart. Thus, even though learning the vessel owner's or operator's identity is not without its problems, PHA's billing practices were not predicated on ignorance of ownership.[37] As found, the billing practices are based upon the tariff provisions which, in turn, have their foundation in the ports' need to rely upon the credit of a locally responsible entity to pay the fees for port facilities and services.

3. In addition, the foregoing findings demonstrate that agents have many means available to them, whether by agreement, advances, freight revenues or merely by determining creditworthiness of the vessel interest, to ensure that they have sufficient funds available timely to pay the port's tariff charges or to be reimbursed for such timely payments, without undue or unfair burden on them.[38] Nevertheless, they are often required to pay port charges out of their own funds when vessel operators delay in approval of accounts or delay in putting agents in funds.[39] Aside from some instances of vessel or principal default or disallowance of invoices for inadequate documentation,[40] there is little, if anything, to indicate that the agents failed to recoup those outlays.

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[33] Tr. 529, 553, 557.

[34] Tr. 163, 261.

[35] Tr. 260-270.

[36] Tr. 356-357. Cf. *WGMA v. PHA, supra*, 18 SRR at 308-309.

[37] Tr. 345-346.

[38] This should not be construed to mean that agents are never inconvenienced or never suffer losses. Agents are not always able to secure sufficient advances, Tr. 153, 323, 602, 605, 691-692, 769; sometimes there are losses of unspecified amounts because the vessel interest defaults, Tr. 974, 974A. For one agent there were losses of $16,000 due to a rash of 5 defaults from late 1972 through early 1974. But, this same agent had no defaults from 1962 through 1972. Tr. 108. Another agent lost $3,500 due to default in 1975, Tr. 1086.

[39] Ex. 14, 38; Tr. 23, 30, 576, 772.

[40] Tr. 573-577.

4. Corpus Christi agrees that its practice of holding agents accountable for the vessels' port charges is the same as that of PHA. In fact, to remove any doubt about its position in regard to agent liability to the port, Corpus Christi amended its tariff to provide that its port charges must be paid "regardless of when the . . . agents, are reimbursed."[41]

Certain events seem to have triggered that tariff amendment. Shortly before, Dix Shipping Company of Corpus Christi, an agent at that port, lost monies due to the default of several of its vessel accounts, even though Dix had obtained advances or other assurances (including a guarantee) of payment. Some advances were insufficient, another was paid by "hot check."[42] As a result Dix sent out letters to all its vendors and the port instructing them to make out their invoices to the vessel and not Dix and indicating that Dix would not be responsible for vessel expenses.

Dix's letter prompted action from Corpus Christi which both wrote and telephoned Dix, asking the agent to withdraw its letter insofar as it concerned the port. Initially, Dix did withdraw the first letter by a second letter, guaranteeing vessels' port charges. It later withdrew the second letter and sent a third, containing language provided by its counsel, which said, "Dix . . . agrees to be liable for debts incurred by the vessels under our agency to the extent of our liability under presently existing law." Consequently, Corpus Christi sent another letter advising Dix that unless it agreed to be responsible for facilities and services provided by the port to vessels represented by Dix, the port would expect someone else to make credit arrangements with the port prior to any vessel's use of the port's facilities or services.[43] The tariff amendment followed. Although it changed none of the existing tariff provisions or the practices thereunder, it made the port's position unmistakeable.

AGENT LIABILITY FOR WHARFAGE AND WHARF DEMURRAGE CHARGES

5. Essentially, wharfage is a charge which may be levied against the cargo or vessel interests. The charge is measured by the cargo crossing over a wharf.[44] Wharf demurrage is a charge imposed when cargo remains in or on terminal facilities after the expiration of free time. Free time for outbound cargo means that there is a period of time when cargo may remain on the wharf without incurring expense, the theory being that "The vessel is required, as part of the obligation of carriage, to provide terminal facilities for the receipt of outbound cargo and to afford a reasonable free time period for the shipper to assemble the cargo prior to loading aboard ship."[45]

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[41] Corpus Christi Tariff, *supra*, First Revised Page 4, Item 15, effective May 10, 1974.

[42] Under Texas law, a "hot check" is one not honored because of insufficient funds.

[43] Exs. 1, 2; Tr. 78–80. Item 15 of the Corpus Christi Tariff expressly provides for credit arrangements.

[44] The Commission's Regulations for Filing of Tariffs by Terminal Operators define Wharfage as follows, 46 C.F.R. §533.6(d)(2):

> A charge assessed against the cargo or vessel on all cargo passing or conveyed over, on, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service.

[45] *WGMA v. PHA, supra*, 18 SRR at 304.

It is a common practice at ports in the United States to place responsibility for payment of wharfage and outbound wharf demurrage charges on the vessel interests and, thereby, the agent, under the user, consent or other tariff provisions designed to achieve that result.[46] Although the common practice generally prevails at respondents' ports, it does vary. Thus, on some cargoes or in some circumstances the responsibility for payment may be imposed on the cargo interest.[47]

In general and in particular, WGMA assails the practices and tariffs which make steamship agents responsible for wharfage and wharf demurrage charges. The attack is general in the sense that WGMA opposes any tariff provision or port practice which makes those charges the liability of the vessel interests. It is particular in that WGMA disputes the tariffs and practices which make the vessel interests liable for payment of those charges if there is present in tariffs terminology which WGMA opts to construe to mean that the cargo interest is liable for payment. Its specific complaint lies "against the respondents' practices and tariff provisions which impose upon steamship agents the responsibility for collecting and paying to the respondent ports charges which under their tariffs are liabilities of cargo interests—shippers, consignees and owners of cargo."[48]

First, WGMA turns its attention to the particular. The tariffs of Galveston Wharves, Corpus Christi and Orange define wharfage as "a charge assessed against the cargo or vessel."[49] However, it is other provisions of those tariffs which delineate responsibility for payment. WGMA asks for an overall finding as to these three ports that "but by other of their tariff provisions the wharfage charge is one imposed on cargo interests alone rather than on vessels (with the exception of Corpus Christi)." As to Orange, WGMA asks for an additional finding that "in the face of the tariff language making wharfage a charge against cargo, the tariffs of some of the respondents[50] impose responsibility for payment of this cargo charge on the vessel and its agent."

(a) Orange. It is correct to say that at this port wharfage charges are made the liability of the cargo owner or cargo agent.[51] However, I find no support for the statement that in the face of that kind of tariff provision, Orange imposes liability for this cargo charge on the vessel and its agent. Orange Tariff Item 120, cited by WGMA for support, does not convert liability from cargo interest to vessel interest. It deals with payment of charges by the person billed and does not attempt to change liability or responsibility for payment of wharfage charges.[52]

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[46] Ex. 65; Tr. 1386, 1640, 1690.

[47] Ex. 65; Tr. 1397, 179 1794.

[48] WGMA's proposed finding No. 5.

[49] Each of those ports utilizes the 46 C.F.R. §533.6(d)(2) definition of wharfage, *supra*, verbatim. The definition of wharfage in Galveston Wharves Tariff, *supra*, Item 5(t) at 5 and Corpus Christi Tariff, *supra*, paragraph 3 at 3A, appear in Appendix A, hereto. The definition in Orange Tariff, *supra*, Item 10 at 4, does not appear in Appendix A.

[50] WGMA includes Beaumont and Port Arthur in this statement.

[51] Orange Tariff, *supra*, Item 130 at 4.

[52] The proposed findings submitted by WGMA do not cite any portion of the record as proof that Orange does, in fact, seek payment of wharfage from vessel interests under Item 120. The same charge is made by WGMA in its opening brief, but here,

(b) Corpus Christi. At this port, although wharfage is "due" from the cargo interests, the vessel interests, including agents, "guarantee" and are "liable" to pay those charges whether or not collected by the vessel interests from the cargo interests. These tariff provisions reflect a long standing custom and practice by which steamship agents assure the port that they will be responsible for charges for port facilities and services furnished to vessels they represent.

(c) Galveston Wharves. The meaning to be attributed to WGMA's proposed finding that at this port the wharfage charge is one imposed "on cargo interests alone rather than on vessels" does not ring clear.[53] If the inference to be drawn is that all wharfage charges are made the liability of the cargo interest but that the port somehow converts the attachment of liability to the vessel interest, this is not a rational view of the evidence. Neither would it be a correct statement if it meant that some wharfage charges are made the liability of the cargo interest but are then converted into the liability of the vessel interests.

Briefly, with regard to wharfage at Galveston Wharves, these are the facts:

From at least 1911 until 1974, the payment of wharfage on all cargo was the responsibility of the vessel interests.[54]

Until 1969, the railroads serving the port absorbed wharfage charges. In accordance with its tariff, the port billed the steamship agents for wharfage. In turn, the agents collected the wharfage from the railroads and remitted to the port. This procedure proved satisfactory until the railroads cancelled wharfage absorption, "unlawfully," in 1969, the, "lawfully," effective May 1, 1971. Difficulties and delays in the collection of wharfage (by steamship agents from cargo interests and by the port from the agents) resulted from the termination of wharfage absorption by the railroads.[55]

A series of meetings were held in 1973 and 1974 between representatives of Galveston Wharves, steamship agents, freight forwarders and customhouse brokers. The purpose of these meetings was to develop a more workable system for the collection of wharfage.[56]

The meetings between the Galveston port interests resulted in the adoption of a new procedure for collection of wharfage which became effective on October 15, 1974, by an amendment to the Galveston Wharves' tariff.[57] The amendment reads:

> Vessel owners and their agents whose vessels receive or discharge cargo while moored to a pier, dock, or wharf, thereby contract to pay the applicable wharfage charges thereon, except as provided in Notes A, B, and C. [[58]]

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too, WGMA fails to cite the portion of the record it relies on. If, in fact, Orange does hold vessel agents liable for wharfage under Item 120 the evidence adduced by WGMA would seem insufficient to have warranted a defense which might have included such matters as custom and practice or other tariff provisions but which, under the circumstances of the proof proffered by WGMA, Orange chose not to offer.

[53] WGMA cites Ex. 62 and Tr. 1760 as support for the statement. Ex. 62 is the direct testimony of the Deputy Executive Director of Galveston Wharves. At Tr. 1760 that witness was being cross examined by WGMA counsel. Neither of those two references nor any other evidence of record supports the proposed finding in its entirety.

[54] Ex. 42, Tr. 1157–1158.

[55] Ex. 62.

[56] *Id.*

[57] Ex. 43: Local Tariff No. 27-E, Item 170(c) at Ninth Revised p. 12.

[58] Exs. 43 and 43a. Both Notes A and B relate to special situations not here involved. Note A dealt with Pier 38 cargo, only, and was later canceled. Note B deals with transshipped cargo, only.

Note C reads:

Outbound wharfage on cargo other than cotton and cargo in containers will be invoiced to shipper or owner of cargo or his agent and are due and payable by that party responsible for forwarding of cargo through this port.

The procedure adopted in 1974 took into consideration the fact that the port booked and unloaded the majority of outbound cargo, except cotton and containerized cargo. The longstanding practice of holding vessel interests, including agents, liable for outbound cotton and containerized cargo, as well as all inbound cargo, was continued.[59]

(d) Beaumont and Port Arthur. Earlier in n. 50, *supra*, I pointed out that WGMA charged Beaumont and Port Arthur, as well as Orange, as ports which make vessel agents liable for payment of wharfage "in the face of tariff language making wharfage a charge against cargo."

At Beaumont, "'Wharfage' is a charge on cargo passing over, under, or through a wharf; . . ."[60] The definition at Port Arthur is substantially the same—"'Wharfage' is a charge on cargo passing over a wharf or discharged into water over shipside while vessel occupies berth at wharf. . . ."[61]

Thus, WGMA is correct in saying that these tariffs, like so many of those previously examined, make wharfage a charge assessed on (or against) cargo. However, WGMA is definitely not on the right track in implying or saying that there is a conflict or contradiction in terminology or result, if a charge against cargo is made the economic responsibility of the vessel interests.[62] It is well settled law that no such conflict exists and that no ambiguity exists in a tariff which by one tariff provision defines a terminal facility or service charge as a charge assessed against cargo and which by another tariff provision makes that charge the liability of the vessel agent. In a case in which one of the issues was whether the steamship agent could be held liable under a consent provision in the tariff for pier demurrage which was defined as a charge assessed against the cargo but which charge was made the liability of the vessel interests under another tariff privision, the court held, *The City of Galveston v. Kerr Steamship Co., Inc.,* 362 F. Supp. 289, 293–294 (S.D. Tex. 1973), aff'd 503 F.2d 1401 (5th Cir. 1974), *cert. denied* 420 U.S. 975 (1975):

Defendants refer to the Item #5 definition of pier demurrage as "a charge assessed against cargo remaining in or on the terminal facilities after the expiration of free time unless arrangements have been made for storage." Defendants also point to other charges which are charged against the vessel. Defendants conclude that these definitions preclude plaintiff from charging vessels or vessel agents with pier demurrage.

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[59] Ex. 62. As users, steamship agents consent to the wharfage provisions of the tariffs and agree to pay all charges specified in the tariffs as vessel interest charges. See notes 8 and 9, *supra*. Similar or identical consent provisions are common at United States ports. Cf. tariffs of Brunswick, Georgia; Wilmington, North Carolina; Jacksonville, Miami, Palm Beach, Port Everglades, Tampa, Panama City and Pensacola, Florida; Mobile, Alabama; Pascagoula, Mississippi; New Orleans and Baton Rouge, Louisiana; Bay City and Port Lavaca, Texas; Boston, Massachusetts; Anchorage and Kodiak, Alaska; San Diego, Redwood City, and Sacramento, California; Astoria, Bandon and Portland, Oregon; Anacortes, Kalama, Longview, Olympia, Port Angeles, Seattle, Tacoma, Vancouver, Bellingham and Everett, Washington. Ex. 41.

[60] Beaumont Tariff, *supra*, Item 15-A at 5 (not shown in Appendix A).

[61] Port Arthur Tariff, *supra*, Item 15 at 4 (not shown in Appendix A).

[62] At Beaumont, wharfage charges are payable by the steamship agents under Item 115-c, at 7 of Beaumont's Tariff, *supra*. At Port Arthur, with certain exceptions, wharfage on inbound cargo is the liability of the steamship agents and on outbound cargo it is the liability of the cargo interests under Item 120 at 7–8 of Port Arthur's Tariff, *supra*.

The definitions only deal with the manner in which charges are accrued. They do not purport to establish which parties are liable for the charge. Liability for the various charges is fixed by Item #30 of the Tariff, quoted in Finding of Fact 1. Items #5 and #30 are neither conflicting nor ambiguous.

(e) Brownsville. The definition of wharfage at Brownsville is the same as the definition at Port Arthur. Therefore, it is a charge on cargo. However, the tariff provision defining wharfage does not appear in Appendix A. Consequently it is not considered as having been placed in issue by WGMA. Therefore, on the premise that Brownsville was not being called upon to defend its wharfage tariff provisions or practices no findings concerning liability for wharfage or wharfage payment practices at that port should be made.[63]

6. Next, WGMA singles out PHA for proposed findings concerning that port's wharfage practices. It asks that there be findings that at PHA wharfage is clearly the liability of the cargo interests and, that while PHA's billing practices varied over the years, prior to July 1, 1975, the port billed wharfage to cargo agents.[64] WGMA also asks for some specific findings concerning the degree of difficulty and delay encountered by PHA in billing the cargo interests.

WGMA's purpose in requesting those findings is not clear because it is by no means certain whether WGMA intends the specific findings to relate to circumstances before July 1, 1975, or afterwards. Also, neither is the request precise as to the time period envisioned by WGMA.

Nevertheless, it would be inappropriate to make any findings in this proceeding concerning wharfage at PHA, for two reasons. One, it was not placed in issue by the complaint.[65] Two, PHA Tariff Amendments effective July 1, 1975, which made collection and payment of wharfage charges the liability of vessel interests, including agents, were the subject of a separate complaint proceeding, brought by WGMA, alleging that the amendments violated sections 15 and 17 of the Shipping Act. It was decided in that case that the amendment did not violate sections 15, 16 First or 17. *WGMA v. PHA, supra.*

7. Conceding that the evidence of wharfage billing practices at the other ports is less detailed than the testimony about those practices at PHA, WGMA proposes no such findings for Beaumont, Brownsville or Orange, and only sketchy findings for Corpus Christi, Galveston Wharves and Port Arthur.

(a) Corpus Christi. Based upon testimony of the Dix witness,[66] WGMA proposes a finding that "the port bills agents for wharfage and seeks to hold them liable, Tr. 28, even though it knows the representative of cargo interests at the port know their principals and therefore have the ability to collect the cargo charges, whereas the steamship agents do not have such knowledge or

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[63] All that WGMA says in its proposed findings on liability is that Item 110 at 100, of Brownsville's Tariff is ambiguous. WGMA then cites the language it believes to be ambiguous. The language cited, however, does not refer to vessel charges—only cargo interest charges. Moreover, neither in brief nor in proposed findings does WGMA cite any portion of the record to show whether Brownsville seeks payment for wharfage from the vessel agents.

[64] On outbound shipments the cargo representative is usually a freight forwarder, a person licensed by the Commission pursuant to section 44 of the Shipping Act, 1916, 46 U.S.C. §841b. On inbound shipments the representative is usually a customs broker, who is not subject to regulation by the Commission. Licensed freight forwarders may, under specified conditions, be compensated by vessel and cargo interests, both, for the same shipment. See unnumbered section preceding section 2 of the Shipping Act, 1916, 46 U.S.C. §801 and section 44(e).

[65] The PHA tariff provisions placed in issue appear at Appendix A at i-iii. Wharfage provisions are not included.

[66] The Dix witness was on the stand from Tr. 20 through Tr. 119.

access. Tr. 28–29." While the meaning and implication of that part of the sentence after "Tr. 28" is somewhat obscure, opinion testimony of the Dix witness suggests that it means that ports are in a "better position [than vessel agents] to know the forwarders and brokers."[67]

It is not disputed that Corpus Christi bills steamship agents and seeks to hold them liable for wharfage, but the port objects to the rest of the sentence in part because it is unsupported by the record and, in other part, for inaccuracy.

There is no reliable evidence to support a finding that the port knows what the cargo interests know, but even if it were assumed to be a fact, the presumption would not lead to a finding that ports are better positioned than steamship agents to know the cargo representative for a particular shipment at Corpus Christi.[68] On the other hand there is evidence that Dix books cargo for its vessels with the cargo representatives,[69] and, of course, Dix also collects freight revenues for a liner principal from cargo interests. However, the overriding fact according to WGMA's own witness, is that it is the contractual arrangement between the cargo and the ship which is the "determining factor in the assessment of [wharfage] charges" and there is no evidence that this contract, which even the agent must obtain from one of the two contracting parties,[70] is ever made available to the port.

(b) Galveston Wharves. After again noting that the practice of billing for wharfage at this port has varied, WGMA seeks a finding that "the port has on occasion sued steamship agents for wharfage, *as well as suing cargo interests (and railroads)*" (emphasis supplied), without further explanation of the time or circumstances involved.

It is difficult to understand the relevance or materiality of this proposed finding unless WGMA means that an inference be drawn that despite tariff provisions making the steamshjip agent liable for wharfage, Galveston Wharves indiscriminately sought to collect from the cargo interests as well. In any event, neither on its face nor by way of inference is the italicized portion a correct reflection of the record.

WGMA cites the following portions of the record to support the finding: Tr. 1762–1763, 1858; Exs. 36 and 62.

The matter of the suits was introduced first by Ex. 36, the prepared direct testimony of an officer of Strachan Shipping Company, a steamship agent and WGMA member. In the exhibit are references to two court actions brought by Galveston Wharves for unpaid outbound wharfage, which, at the time, were the responsibility of the vessel interests. The exhibit stresses that it was Strachan which was sued, as vessel agent, and that Strachan later impleaded others. Exhibit 62 confirms this fact. It is reconfirmed at Tr. 1762–1763, 1958, on cross examination by WGMA of the Galveston Wharves official who sponsored Exhibit 62. Thus, there is no validity to the statement that the port sued "cargo interests (and) railroads."

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[67] Tr. 92.

[68] Testimony by the Dix witness that Corpus Christi solicits the cargo was ordered stricken. Tr. 92.

[69] Tr. 52, 93.

[70] Tr. 67 69. Cf. *WGMA v. PHA, supra*, 18 SRR 304 n. 19.

(c) Port Arthur, This port has experienced no difficulty in collecting wharfage from cargo interests on outbound cargo. (It will be recalled that here the vessel interests are liable for inbound wharfage and the cargo interests are liable for outbound wharfage—see n. 62, *supra*).

8. In this and the next numbered paragraph of its proposed findings, WGMA moves on to the matter of wharf demurrage tariff provisions and billing practices. In this paragraph WGMA addresses the tariff provisions of all ports except Brownsville. In paragraph number 9, WGMA refers only to the ports of PHA, Galveston Wharves and Corpus Christi.

WGMA has no quarrel with the definitions of wharf demurrage in the respondents' tariffs. They are virtually identical and incorporate the authorized regulatory definition which provides, 46 C.F.R. § 533.6(d)(4):[71]

> Wharf demurrage: A charge assessed against cargo remaining in or on terminal facilities after the expiration of free time unless arrangements have been made for storage.

As with the definition of wharfage, the definition of wharf demurrage deals only "with the manner in which charges are accrued." It does "not purport to establish which parties are liable for the charge." *The City of Galveston v. Kerr Steamship Co., Inc., supra*.

However, the proposed findings do not cite or quote from any of the tariff provisions of the respondents which place responsibility on the vessel interests for payment of wharf demurrage except to quote a part of a tariff provison published by PHA.[72] The provision quoted relates to outbound wharf demurrage.[73] As pertinent, it provides (portion in italics was omitted from WGMA's proposal):

> Outbound Cargo—Wharf Demurrage Charges, *will be assessed to the cargo owner or authorized agent, except on cargo cutback or* held on the wharves for convenience of vessel's owner or agent, the charges will be assessed to the vessel or its agent.

WGMA states it has no complaint against this type of tariff provision which holds vessel interests "liable for wharf demurrage accruing by reason of actions of the vessels, such as where cargoes could not be lifted when booked by reason of the failure of vessels to meet their schedules." Its complaint is limited to holding steamship agents liable (and here WGMA's combined position statement and proposed finding becomes somewhat obfuscated) "for collection and payment of these charges owed by cargo, which should be billed to and collected by the cargo representatives, i.e., freight forwarders and custom house brokers if not collected directly from shippers and cargo consignees themselves."

Taken literally, this means that WGMA is not pursuing a claim that the Shipping Act is violated by a port which holds vessel agents responsible for payment of wharf demurrage charges incurred by acts of their principals. Thus,

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[71] Only the Galveston Wharves Tariff provision, Item 5(k)(1) at 4, appears in Appendix A. In their respective tariffs, the other respondents' wharf demurrage definitions appear at: PHA at 4; Corpus Christi, No. 5 at 3A; Beaumont, Item 20 at 5; Port Arthur, Item 20 at 4; Orange, item 20 at 4.

[72] This provision does not appear in Appendix A. In its opening brief WGMA also cited Item 185(c) at 16-A of Galveston Wharves Tariff, *supra*.

[73] PHA's tariff provision dealing with inbound demurrage appears at Item 3(c)(4) at 14. It provides "Inbound Cargo-Wharf Demurrage Charges will be assessed to the owner of the cargo or his authorized agent, to whom the invoice will be sent."

the position statement appears to mean that WGMA is assailing wharf demurrage charges imposed by tariffs on the steamship agent where the tariff places liability for payment on the cargo interest. However, WGMA neither quotes nor cites any tariffs of the latter kind. In fact, the only wharf demurrage liability provision referred to in this praragraph and appearing in Appendix A, and therefore in issue, is that of Galveston Wharves in Item 185(c) at 16-A.

At Galveston Wharves, wharf demurrage on inbound cargo is the responsibility of the cargo interests. On outbound cargo it is the responsibility of the vessel interests (without regard to fault of vessel or cargo). The difference in responsibility between inbound and outbound cargo is based upon the respective legal responsibilities for removal of cargo from the terminal. On inbound cargo the responsibility for removal after the expiration of free time is on the cargo interests. On outbound, the responsibility for removal after expiration of free time is on the vessel, even though the fault may lie with the shipper interests. (The circumstances of delay are usually matters known only to the cargo and vessel interests and the ports are not privy to those facts).[74] These responsibilities are derived from the vessel's basic obligation to provide wharfage space for shippers to assemble outbound cargo and to pick up inbound cargo, an obligation acknowledged by a WGMA witness, Tr. 915.

Even if the combined position statement and proposed finding were not taken literally, WGMA's cause is not advanced. Should WGMA's position be considered an assault on tariff provisions which make wharf demurrage the liability of steamship agents, no findings can be made with respect to the ports of Port Arthur, Orange or Beaumont (Brownsville was specifically excepted by WGMA) because their wharf demurrage liability tariff provisions were neither quoted nor cited nor do they appear in Appendix A. To make findings as to those ports would deprive them of notice and opportunity to be heard.

Corpus Christi presents a somewhat different situation. Although WGMA does not refer to this port's tariff provision concerning wharf demurrage, directly, Item 15 of Corpus Christi's tariff does appear in Appendix A. It seems to make all wharf demurrage, including inbound, the responsibility of the vessel interests. If this were the fact, there would arise a question of the propriety of a tariff provision making vessel interests liable for what is undisputably not a vessel responsibility at law. However, there is nothing to indicate that WGMA made inbound wharf demurrage an issue in this proceeding and, of course Corpus Christi was neither placed on notice nor given an opportunity to defend against that kind of allegation. Consequently Corpus Christi must be treated as occupying the same position as Port Arthur, Orange and Beaumont insofar as inbound wharf demurrage is concerned.

9. Generally, the relevance, materiality or other significance of WGMA's proposed findings about wharf demurrage billing practices at PHA, Corpus

[74] Tr. 454A, 455, 949 952, 1203, 1205; Ex. 62. The fact that PHA's tariff made outbound wharf demurrage occasioned by fault of the shipper the liability of the cargo interests does not necessarily raise questions concerning the legal liability theory, for whether the port collects from vessel or cargo interests, "The charge will be borne by the ultimate beneficiary of the services." *Cargill, Inc. v. F.M.C.*, 530 F.2d 1062, 1068-1069 (D.C. Cir. 1976). Moreover, none of the ports were called upon to defend against charges *that there might be a violation of the Shipping Act* because they made outbound wharf demurrage the liability of the cargo interests. Therefore, it is not known whether other acceptable tariff considerations might have led to provisions such as those in the PHA tariff.

Christi and Galveston Wharves is obscure. Although the purpose in having these findings made is difficult to fathom, it might be conjectured that WGMA means to have it appear that it would be as convenient to hold agents for cargo interests liable for outbound wharf demurrage as it is to make agents for vessel interests liable for those charges. If this be so, it would seem to be an implicit, but contradictory, element of WGMA's theory that agents cannot be made liable for obligations of their principals, that somehow, agents for cargo are not as immune from liability under terminal tariffs as are agents for vessels. In addition to these general defects, the accuracy of some of the proposed findings is questionable.

(a) PHA. An additional problem with the proposed findings for this party is that WGMA does not make it clear whether it is seeking findings for the pre or post July 1, 1975, period.

These findings can be made. It is not disputed that before July 1, 1975, PHA billed freight forwarders and customs brokers for wharf demurrage.[75] PHA was able to do so because, in the case of freight forwarders, their names appeared on the copy of a document from which the port prepared another document permitting the cargo to be brought to the dock. It is undisputed, too, that on inbound cargoes, PHA obtained the information needed to issue wharf demurrage bills from ship's manifests and statements of cargo furnished by steamship agents or similar documents examined by PHA's clerks at vessel agents' offices. The reason for the office examination was the agent's tardiness in furnishing the necessary documents to PHA. PHA billed the vessel interests for wharf demurrage for cargo cutback by act of the vessel. It would bill the cargo interests if the cutback was for the convenience of the shipper, but, because it was rarely advised by the vessel interests why the cutback took place, PHA perceived it to have been caused by the vessel and billed accordingly. Ex. 55.

WGMA asks that it also be found that delays in receiving wharf demurrage billings (on cargo perceived to be in a demurrage status because of the act of the vessel interests) were often very great so that it was impossible for the wharf demurrage to be collected (presumably by the agents from vessel owners, operators or charterers). While the testimony is more or less evenly balanced concerning the cause of delayed demurrage billing by PHA (sometimes the fault of the agent and other times the fault of the port), there is no showing whatsoever, for a finding "that it was impossible for the wharf demurrage to be collected" by vessel agents.[76]

(b) Corpus Christi. WGMA proposes findings virtually the same as those discussed and rejected at finding number 7(a) relating to the practice of billing agents for wharfage. The reasons for rejecting those proposals here are even

[75] Freight forwarders on outbound and customs brokers on inbound.

[76] The evidence relied on by WGMA is Ex. 33; Tr. 912–914. Ex. 33 is the prepared direct testimony of an Hellenic Lines official; the transcript references are to additional direct testimony of this witness. At PHA, Hellenic Lines is an "operator" of vessels and not an agent. Tr. 914–915. Moreover, it is very difficult to accept this witness' view that delay in billing by PHA makes collection of wharf demurrage impossible, since it is Hellenic Lines' records, alone, which form the basis for wharf demurrage billing. In other words, Hellenic knew, before PHA could find out, that wharf demurrage had accrued, but apparently failed to act promptly, if at all, to collect the demurrage from the cargo interests. The blame for this carrier's administrative inefficiency can scarcely be laid on PHA.

stronger because the Dix witness, whose testimony is again relied upon by WGMA to support wharf demurrage findings, did not testify to wharf demurrage practices at all at the record references furnished by WGMA.

(c) Galveston Wharves. Essentially WGMA proposes findings that at this port the billing practices follow the tariff provisions. The findings made at paragraph 8 are sufficient and are incorporated herein by reference.

CRANE RENTAL/STEVEDORE'S LIABILITY FOR OPERATOR'S NEGLIGENCE

10. This paragraph concerns crane rental tariff provisions for port furnished cranes at PHA, Galveston Wharves and Corpus Christi[77] and the effect of those provisions on stevedore members of WGMA which use those cranes. The tariff provisions at the three ports are not identical but they do contain essentially similar terms and conditions. Not all of the terms and conditions are under attack—only those which make the suing stevedore liable for the negligence of the crane operator, a person furnished by the port and usually a port employee.

Generally, the tariffs[78] provide: that cranes rented from the ports will include a crane operator paid by the port although the port will charge the user for the operator's services; that, in engaging the operator and paying for his services, the port acts as agent for the user; that, when using the port's crane, the operator will be under the direction and control of the user; that the operator is considered the servant of the user; that the port makes no warranties regarding competency of the operator and that the user must satisfy himself in this respect; and, that if the crane is negligently operated under the control and direction of the user, the user assumes full responsibility for the negligent operation, including the operator's negligence.

The need to rent shore based cranes arises if the ship's gear is inadequate to load or unload the vessel and if the particular stevedoring entity does not itself own suitable equipment. Cranes may be rented from the ports or from private sources, subject only to a "first call" privilege which requires "stevedores to select a [port] crane *only* if that crane is 'suitable for the job in the judgment of the stevedore in terms of size and expense as any available crane'."[79] As a practical matter, however, at Galveston Wharves the port's cranes ordinarily are rented because local private rental cranes are too small and the cost of renting and transporting larger cranes from more distant locations is more expensive than renting from Galveston Wharves.

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[77] Portions of WGMA's proposed findings concerning crane rentals at Port Arthur, Brownsville, Beaumont and Orange will not be considered because those ports' tariff provisions treating with crane rentals were not mentioned in the complaint nor were they otherwise placed in issue on the question of the crane operator's negligence. Ex. 49 at 36 of Port Arthur's tariff was received in evidence. Item 605-A on that page refers to privately owned cranes used at that port but contains no references to port cranes.

[78] PHA tariff, *supra*, Item No. 15 at 22; Galveston, Wharves tariff, *supra*, Item No. 105 at 9; Corpus Christi tariff, *supra*, Item Nos. 125, 130, 135 at 11. Corpus Christi's tariff provisions do not appear in Appendix A, but no objection was raised because of their absence therefrom. These tariff provisions are contained in Ex. 51.

[79] There is evidence of record showing that PHA imposed limitations on rental of cranes from private sources stricter than the "first call" privilege when PHA's cranes were available. These preferential practices at PHA were the subject of a separate complaint proceeding and were there found unlawful under the "first call" test enunciated by the Commission in that proceeding. PHA was ordered to cease and desist from those practices and to file appropriate tariff amendments to reflect the Commission's decision. *Perry's Crane Service v. Port of Houston Authority, of Harris County, Texas*, 16 SRR 1459 (1976) Initial Decision, ______ SRR ______ (1977) (not published) Commission Decision, partially adopting Initial Decision.

WGMA proposes a finding that in contrast to the negligence provisions of the ports' tariffs, "where cranes with operators are rented from private concerns there is no agreement that the renting stevedore will be liable for the crane operator's negligence," citing the testimony of a WGMA member operating as a stevedore at PHA and Galveston Wharves.[80]

The WGMA witness related that his firm rents cranes from some private concerns as well as from the ports but that there is no agreement between his firm and particular private rental companies regarding operator negligence when an operator is furnished. This does not mean that the private rental companies have agreed to be liable for their employees' negligence—for the real point of the testimony is that there is no meeting of the minds on the subject of responsibility for negligence. In the witness' own words, "It's an unspoken agreement, I guess."[81]

There is other and more convincing evidence to show whether private concerns rent cranes with operators under the same terms and conditions as do the ports. They do. Exhibit 63 contains 19 sample crane rental and lease agreements obtained from private concerns listed in the Houston Yellow Pages. Specimen agreements of those firms which furnish operators with cranes contain provisions similar in effect to the language contained in the ports' tariffs relating to the transfer of liability for operator negligence.

Both WGMA and the respondents agree to many facts concerning crane rentals. They agree that it is a common practice for all crane equipment owners to lease them with operators because the equipment is very expensive, highly complex and technical and requires skilled operators for the protection of the equipment and safety to others and sometimes because of labor agreements.[82] They agree that if a crane were to be rented without an operator, it would be difficult for the crane owner to be certain that the operator, unknown to him, would be skilled and competent.[83] Significantly, they agree, too, that when a crane is rented the using stevedore has supervision and control of the crane and its operator and directs the operation of both because the crane operator cannot see into the hold of a ship and must rely upon directions given by a stevedore employee when operating the crane.[84] At least one WGMA witness acknowledges that even without a lease provision requiring it he would accept responsibility for damage caused because the "gangway" man, a stevedore employee, gave bad or erroneous signals to the operator.

Last, WGMA asks for findings that "stevedores have had to pay large sums when the crane operators furnished by the port have themselves been negligent . . . And liability for the crane operators actions increases the stevedore's insurance costs."

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[80] WGMA cites Tr. 1034–1035, 1063–1064, 1074–1075. The witness stated that all rentals from private concerns were reached orally and that a search of his records showed no written leases.

[81] Tr. 1035. It was suggested to the witness that perhaps there was a "custom and tradition of the trade" which might control. His answer was another guess. *Id.*

[82] Tr. 90, 733, 980 (WGMA); Tr. 1486, 1862 (Respondents).

[83] Tr. 227 (WGMA); Tr. 1487, Ex. 53 (Respondents).

[84] Tr. 96, 227–230, 1065 (WGMA); Tr. 1331, 1480, 1743, Ex. 53 (Respondents).

For the proposition that stevedores have had to pay large sums of money because of operator negligence, WGMA relies on the testimony of one stevedore witness who, on direct testimony, offered the opinion that on two occasions he paid for cargo damage because of the operator's negligence.[85] He thought that the two claims totaled in the neighborhood of $5,500.[86] On cross examination he stated that one of the two accidents occurred because the brakes failed but he also admitted he had no way of knowing what caused the accident. Another example of the payment of money was furnished by another stevedore who testified "An instance in which such a tariff provision has been highly detrimental to my company is *Rorie v. City of Galveston, (supra)*, in which the court held that where the Galveston Wharves' tariff provided that the hoist operator was to be under the direction of the lessee and was to be considered as agent or servant of the lessee, the hoist operator was the 'borrowed servant' of the stevedore at the time of the accident." The amount of damage paid by this witness' employee was not furnished.

For the proposed finding that the tariff provision increases the stevedore's insurance costs, WGMA relies solely upon the testimony of and evidence introduced through K. S. Trostmann,[87] Comptroller of Texas Transport and Terminal Company, an agent and stevedore.[88] The proposed finding is diametrically opposed to the evidence.

In prepared direct testimony, Mr. Trostmann said that his firm rented cranes with operators on numerous occasions from PHA. The lease was subject to the negligence provisions of the tariff. He concluded, "In my opinion such arrangement is both unfair and illegal in that it enables the Port to evade liability for its own employee's negligence and substantially adds to our cost of doing business."[89] The witness meant by this that his firm's liability insurance premium is greater when cranes are rented with operators than when rented without operators furnished by the port.

However, skillful cross examination of this witness demolished the conclusions expressed on direct examination and firmly established that the stevedore's overall insurance costs were reduced rather than increased by "such arrangement."[90]

Answers to questions on cross-examination demonstrated that even though the liability premium was higher for cranes with operators than for cranes without operators, there was an overall insurance savings to Texports because the stevedore incurred no expense for workmens' compensation insurance which has a much higher rate and total premium than the rate and premium for liability insurance for cranes with operators. Moreover, the stevedore is not liable for social security payments for operators who are furnished with cranes but who remain on the ports' payroll. Thus, on this record there is nothing to warrant

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[85] Tr. 1025.

[86] Tr. 1028.

[87] WGMA cites Tr. 738 and Ex. 16 as authority for the proposed finding.

[88] Texports Stevedoring Company, an affiliate, is the stevedore.

[89] Ex. 14.

[90] Tr. 731-737; see also Appendix to Respondents' Joint Brief, Appendix D.

a finding that a stevedore's overall insurance costs or costs of doing business, for that matter, are increased because of the ports' crane rental tariff provision. On the other hand there is clear and convincing evidence that there are substantial savings to stevedores' cost of doing business in spite of (indeed, because of) the operator becoming the "borrowed servant" of the using stevedore.

One other factor should not be overlooked in this "arrangement." Because of the expense of crane rentals, stevedores do not like to keep the cranes idle during an operator's time off. Usually, then, an extra operator is provided at the request of the stevedore by the port thereby further increasing the stevedore's savings on insurance and social security.

INTERPRETATION OF TARIFF

11. For the next proposed finding of fact WGMA assails "provisions of respondents' tariffs which reserve to themselves or give to themselves, the right to interpret their tariffs and which state that use of the port facilities constitute consent to be bound by all of the tariff provisions, the two sets of provisions when taken together being allegedly oppressive, unfair, and unreasonable and therefore unlawful since by use of the facilities the agents (or their principals) would subject themselves to whatever interpretation of the tariffs the ports might make."

The language of the "use" or "consent" provisions may differ slightly from tariff to tariff, but, in effect, each respondent says the same thing—that use of the port facilities constitutes consent to all the terms and conditions of the tariff. The "consent" provisions were identified at n. 8, *supra.*[91]

The "interpretation" provisions of the respondents' tariffs are not all the same. Galveston Wharves does not have that kind of provision in the portion of its tariff appearing in Appendix A, nor was any such tariff provision referred to in the record.

Of the remaining ports, all, except PHA, have tariff provisions making the port the sole interpreter or judge of its own tariff.[92] PHA merely "reserves the right to interpret the provisions of this tariff."[93] The provisions of Beaumont's and Port Arthur's tariffs go even further than the others. They both provide that "The Port Authority is not a common carrier and is sole interpreter of its tariff rules and regulations."

WGMA seeks no finding (and refers to no part of the record to establish) that any port has used the combination of the "consent" or "use" and "interpretation" provisions of its tariff unfairly against any agent or principal. However, this finding does not mean that any port's tariff which states, or is susceptible of being understood to mean, that the port is the arbiter of an unclear or ambiguous tariff provision is fair.

[91] WGMA's proposed finding fails to cite Corpus Christi's "consent" tariff provisions. Its all inclusive "consent" appears in Item 52. A more limited "consent," applicable, as here pertinent, to wharfage and wharf demurrage appears at Item 15.

[92] Beaumont tariff, *supra,* Item 100 at 7; Port Arthur tariff, *supra,* Item 105 at 6; Corpus Christi tariff, *supra,* Item 52; Brownsville tariff, *supra,* Item 115 at 100; Orange tariff, *supra,* Item 115 at 9.

[93] PHA tariff, *supra,* Item 2 at 12.

12. For its last finding against a respondent, WGMA repeats its contention concerning the Galveston Wharves "tariff provision assessing pier demurrage during strikes according to the free time status of cargo when strike interference commences, i.e., if cargo has free time remaining, the strike interference time will not count against free time; if cargo has used its free time and penalty demurrage time is running, penalty time will continue to run but at a different rate, the complainants contending that since all cargoes are in exactly the same status on the docks where handling is prevented by a strike they should be treated in the same fashion."

I find that WGMA has stated the substance of Galveston Wharves' strike demurrage tariff provision, Item 187 "Interference Due to Strikes," *supra,* and further find that WGMA has stated its contention concerning that tariff provision as a proposed finding of fact.

WGMA also asks for a finding that Maryland has a tariff provision which grants or extends free time to all cargo during a strike period.[94] The respondents seek to distinguish the Maryland tariff provision by stating that it merely extends free time because of strikes of its own labor. Maryland Port Administration did not respond to this proposed finding. No useful purpose is served by deciding which side is correct. It is sufficient to find that the two tariffs are different.[95]

13. WGMA also requests that certain findings be made in connection with intervenors, New Orleans, California and Maryland. Except to the extent that certain findings are made herein concerning those intervenors, the proposed findings are rejected because they serve no useful purpose in determining whether the respondents' tariff provisions and practices in issue in this proceeding are lawful.

DISCUSSION AND CONCLUSIONS

Category I—Vessel Agents' Liability for Payments of Vessel Charges

A: *General*

As explained before, a post hearing conference was held for the express purpose of determining whether any party wished the opportunity to have the record reopened for additional evidence or to submit supplemental briefs. This approach was appropriate because the Commission's decision in *WGMA v. PHA* had recently been served. *WGMA v. PHA* was perceived to have had a strong influence on some of the issues in this proceeding—particularly those in Category I—because the decision upheld the validity of tariff provisions making wharfage charges the liability of the vessel and tariff provisions making vessels agents, as users, liable for payment of vessel charges. No request to reopen or to submit additional briefs was made.

[94] Maryland Port Administration Terminal Services Tariff No. 2, FMC-T No. 3, Section IV. (4) at 10, Ex. 61.

[95] WGMA calls the Maryland tariff provision "noteworthy." It is merely different.

B: *Application of* WGMA v. PHA *to This Proceeding*

In *WGMA v. PHA,* as here, the complainant charged that particular port tariff provisions and practices implementing those provisions violated sections 15 and 17.[96] WGMA focused on the respondent's newly published tariff provisions which sought to hold vessels agents liable for wharfage charges. The new tariff provisions contained the following pertinent passage:

> * * * Wharfage Charges * * * are liabilities of the owner of the cargo; however, the collection and payment of same to the Port Authority must be guaranteed by the vessel, her owners and agents, and the use of Port Authority facilities by the vessel, her owners and agents, shall be deemed an acceptance and acknowledgement of this guarantee.

In *WGMA v. PHA,* WGMA made essentially the same arguments concerning the liability of vessel interests for wharfage charges as those WGMA advances here concerning the liability of vessel interests for wharfage and wharf demurrage charges. Also, in the cited case, WGMA asserted the same contentions concerning the liability of vessel agents for payment of vessel charges as those made here with respect to wharfage, wharf demurrage and dockage charges.[97]

Among other things, the Commission rejected WGMA's theories, holding that terminal tariffs are not agreements within the meaning of section 15; that tariff provisions making the payment of wharfage charges the liability of the vessel interests were neither unjust nor unreasonable and, therefore, were not in violation of section 17 because the carrier's obligation to the shipper requires it to provide terminal (wharf) facilities; and that tariff provisions making vessel agents liable for payment of charges (deemed to be proper vessel charges) also were not unjust and unreasonable, because the vessel agents, as users of the port's facilities, had separately agreed to be liable for the wharfage charges.

The conclusions in *WGMA v. PHA* subsume: that the word "assessed," as used in definitions contained in the Commission's terminal tariff regulations, 46 C.F.R. §533, *et seq.,* deals only "with the manner in which charges are accrued"; that the word "assessed" does "not purport to establish which parties are liable for the charges"; and that whether charges are assessed against cargo or vessel, if the charge is a proper charge against the vessel it may properly be made the vessel agent's liability for payment.[98]

Patently the texts of the tariff provisions assailed in the proceeding differ in varying degrees from counterpart provisions held to be lawful in *WGMA v. PHA.* But there is no realistic substantive distinction between them.

For example, an examination of some tariffs' provisions relating to wharfage charges shows this:

a. Corpus Christi's tariff provisions placing liability for payment of wharfage charges on vessels agents (Item No. 15) are worded somewhat differently than,

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[96] The complaint in *WGMA v. PHA* did not allege a violation of section 16 First, but WGMA's post hearing briefs did. On the issues in Category I—Vessel Agents Liability for Payments of Vessel Charges—the identical circumstances pertaining to section 16 First are present here.

[97] There is one major distinction. In *WGMA v. PHA* WGMA argued that making vessel agents liable for a particular vessel charge (wharfage) constituted duress under Texas law. WGMA does not make that argument here. In its place, WGMA raises a Texas Statute of Frauds issue which it did not do in *WGMA v. PHA.*

[98] See previous text references to these passages from *The City of Galveston v. Kerr Steamship Co., Inc.,* cited with approval in *WGMA v. PHA, supra,* 18 SRR at 315.

but are nearly the same as those encountered in *WGMA v. PHA,* even to the extent that they make vessels agents guarantors of payment of charges due from the cargo interests;

b. Galveston Wharves' tariff provisions make wharfage "a charge assessed against the cargo or vessel" (Item No. 5(1)t), but also specify that vessels agents using the wharf "thereby contract to pay the applicable wharfage charges" (Item No. 170(c); see n. 57, 58, *supra,* and related text);

c. Other respondents' tariffs use variations of the "user" and "consent" provisions[99] demonstrated in Galveston Wharves' tariff.

Thus, all the wharfage tariff provisions under attack here convey the same unequivocal message that wharfage charges are the liability of vessel interests and that vessels agents, as users of the ports' facilities, will be held accountable for payment of those charges. WGMA has failed to show by a preponderance of the evidence or by force of logic why wharfage charges in this proceeding should be regarded differently by the Commission in this proceeding than they were in *WGMA v. PHA.*

Insofar as dockage (shed hire or wharf use hire) charges are concerned, all of respondents' tariffs provide for assessment of dockage charges against the vessels and make the agents liable for payment. No one questions the propriety of treating dockage, etc., as a vessel charge. The argument made by WGMA is that dockage, etc., cannot be made the liability of the vessels agents. WGMA centers its argument on the definition of dockage in the Commission's terminal tariff regulations, which provide that dockage is "the charge assessed against a vessel for berthing at a wharf . . .," 46 C.F.R. § 533.6(d)(1). Consequently, says WGMA, if dockage is defined as a charge "assessed" against the vessel, it cannot be made the liability of the agent. WGMA ignores the teaching of *WGMA v. PHA* and the many cases cited therein which uphold tariff provisions making agents liable, as users, for charges "assessed" against the interests they serve.[100]

Turning again to outbound wharf demurrage charges, as stated in the findings of fact, only the outbound wharf demurrage tariff provisions and practices at Galveston Wharves is squarely in issue, although WGMA more remotely raises questions concerning the tariff of Corpus Christi and practices of PHA.

WGMA's arguments are the same it made in respect to wharfage in *WGMA v. PHA* and those it makes concerning wharfage charges here. The only real issue to be determined, then, is whether outbound wharf demurrage is a proper vessel charge. As necessarily explained in the findings of facts (because of the way WGMA framed its proposed findings) outbound wharf demurrage is a proper charge against the vessel because of the vessel's undertaking to provide wharfage space to shippers for the assembly of outbound cargo and for removal

[99] "Consent" provisions are "probably superfluous," *State of Israel v. Metropolitan Dade County, Florida,* 431 F. 2d 925, 927 (5th Cir. 1970). See also *Chr. Salvesen & Company, Ltd. v. West Michigan Dock & Market Corporation,* 12 F.M.C. 135, 136, 141 (1968), upholding the principle that use of a port facility constitutes "acceptance of the terms of respondent's tariff." See, also, *WGMA v. PHA, passim,* to the same effect.

[100] True, WGMA's brief was submitted before *WGMA v. PHA* came down. However, as shown, WGMA declined the opportunity to submit supplemental briefs, when offered, after *WGMA v. PHA* was decided.

of cargo from the terminal. It is therefore a charge reasonably related to the vessel interests' use of the facility and it is a reasonable charge to be borne by the vessels agents. See *The City of Galveston v. Kerr Steamship Co., Inc., supra,* 362 F. Supp. at 293–294; *WGMA v. PHA, supra,* 18 SRR at 315.

Neither the tariffs of Galveston Wharves or Corpus Christi[101] nor the practices of those ports or PHA with respect to outbound wharf demurrage are significantly different than equivalent tariff provisions and practices with respect to wharfage insofar as the relevant issues are involved.

Thus, it can be seen that any differences between the tariff provisions and practices placing liability for payment of vessel charges on vessels agents in *WGMA v. PHA* and the tariff provisions and practices placing liability for payment of vessel charges on vessels agents in this proceeding are neither substantive nor substantial. Underlying the tariffs and practices one fact stands out in both *WGMA v. PHA* and here. The ports look to the agents for payment of the wharfage, dockage and outbound wharf demurrage charges and the ports rely upon the agents' credit not the credit of the absentee vessel interests.

In short, WGMA has failed to show that any of the tariff provisions and practices imposing liability for vessel charges on vessels agents are unlawful or are excessive or are not reasonably related, fit and appropriate to the ends in view. *WGMA v. PHA, supra,* 18 SRR at 790. On the other hand, respondents have affirmatively demonstrated that vessels agents are, in fact, the users of the services and facilities for which they are charged and that the tariffs and practices are just, fair and reasonable and not in violation of sections 16 First[102] or 17. "A just and reasonable allocation of charges is one which results in the user of a particular service bearing at least the cost to the terminal of providing the service." *WGMA v. PHA, supra,* 18 SRR at 790.

C: *The Statute of Frauds*

The Statute of Frauds argument made by WGMA is simple. It invokes Texas law[103] which declares unenforceable promises of one person to answer for the debts of another unless the promise is in writing and signed by the person sought to be charged. The essential weakness of this argument is that the Statute of Frauds is never brought into play. These tariffs, which make agents liable for payment of vessel charges, impose that liability directly on the agents as users[104]—and—having used the facilities provided by the ports, the

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[101] Although not referred to in WGMA's proposed findings on outbound wharf demurrage, Corpus Christi's tariff provisions in this regard (Item No. 15) are in issue.

[102] The comment made in *WGMA v. PHA, supra,* 18 SRR at 314 n. 34 is equally appropriate here:

As stated earlier, Section 16 First was not put in issue in the proceeding. Nevertheless WGMA argues that the tariff provisions are violative of its provisions, as an undue preference because the tariff shifts the burden of payment and collection of wharfage charges to vessel interests from cargo interest (payment) and PHA (collection). In essence, it is the same argument made by WGMA in regard to Section 17. Neither section has been violated.

[103] WGMA cites section 26.01 of the Texas Business and Commerce Code.

[104] The Commission's terminal tariff regulations require that the definitions of terminal services appearing in 46 C.F.R. § 533.6 be set forth in tariffs filed by the ports. Although the regulations allow for departures, it is not difficult to perceive the problems of the tariff writer in composing a definition different than prescribed. E.g.—how does one go about rephrasing a definition, such as the one for wharfage, which is set forth in the disjunctive ("cargo or vessel"), to make wharfage the liability of the vessels agents? Apparently, tariff writers have opted to achieve the result by retaining the definition and by adding other provisions, such as "consent," "user" or "guarantor" clauses to make the matter of liability clear.

agents accept the terms of the tariff. See n. 99, *supra.* Thus, none of the tariff provisions call for vessels agents to answer for the debt of another. The debt they pay is their own.

Moreover, the Commission has held that "while tenets of state and common law may be evidence of reasonableness and of local business practices, they are not alone dispositive of Shipping Act issues, absent a showing that these principles directly apply to Shipping Act considerations." *WGMA v. PHA, supra,* 18 SRR at 791. WGMA has made no such showing here.

D: *Galveston Wharves' Strike Demurrage*

Complainant has taken a rather curious stance in regard to the strike demurrage provision in Galveston Wharves' tariff (Item No. 187).[105] At the outset, in describing the contentions of the parties I expressed the view that this tariff provision and the practices thereunder were assailed because the vessels agents were held liable for and were being billed for strike demurrage chargeable to the vessel. This is the only reasonable conclusion which may be reached from a reading of the complaint which alleges that this particular provision violates sections 15 and 17 of the Shipping Act.

Nevertheless, in its post hearing opening brief: complainant seems to have abandoned the allegations of the complaint because it makes no reference to the practice of holding vessels agents liable for strike demurrage charges; instead, complainant directs its fire against those provisions of Item No. 187 which differentiate between cargo in free time and cargo in penalty time; complainant asserts sections 16 and 17 were violated because Item No. 187 discriminates between types of cargo.

In attempting to make its belated point, complainant relies upon events which occurred in 1968–1969—the identical events which led to the court action in *The City of Galveston v. Kerr Steamship Co., Inc., supra.* (The defendants in the *Kerr* case were vessel agents and members of WGMA, 362 F. Supp. at 290). Complainant states:

> As a concrete example, during the 1968–1969 180-day strike, *no* demurrage during the strike period was charged cargo on free time when the strike commenced. All cargo whose free time had at that time run out was charged demurrage for each day of the 180-day period. Yet both kinds of cargo were in exactly the same situation: Neither could be moved, all were occupying space on the wharves and whatever protective services were afforded by the port were afforded to both kinds of cargo.

Complainant may be correct in its appraisal of the "situation," but the factors it relies upon to describe the situation are not really relevant. What is important is that the cargoes did not have the same status when the strike began—one was in free time and the other in demurrage.

This was the distinction recognized by Judge Noel of the United States District Court for the Southern District of Texas and formed the basis for his Memorandum and Order awarding judgment to Galveston Wharves against

[105] At no point in this proceeding were the levels of rates in Item No. 187 placed in issue.

the defendants for strike demurrage charges for cotton shipments in a demurrage "situation" in *The City of Galveston v. Kerr Steamship Co., Inc.*

Apparently, Item No. 187 was written into Galveston Wharves' tariff as a direct consequence of the strike in 1968–1969 and the court proceedings which ensued. Before, during and after the strike many bales of cotton lay immobilized on the wharves. Under Item No. 185 of its then current tariff, Galveston Wharves allowed 15 days free time during which no charge would be made; afterwards there would be a demurrage charge at the rate of 2½ cents per bale per day for the first 5 days and 5 cents (penalty) per bale for each day thereafter until removed.

Unilaterally, Galveston Wharves took action to eliminate the penalty portion of the demurrage rate for the period of the strike and thereafter billed demurrage charges as follows:

1. Cargo on free time when the strike began remained at free time during the strike.
2. Cotton in demurrage status was charged 2½ cents during the strike.
3. Cotton in penalty demurrage status was billed at 2½ cents during the strike.

Judge Noel found the tariff provisions and practices and the action of Galveston Wharves rational, reasonable and nondiscriminatory. Item No. 187 generally reflects what Galveston Wharves did in 1968–1969. There is no evidence to show that any subsequent strike occurred since 1961 which would have caused Galveston Wharves to invoke the strike demurrage provisions of its tariff. But the passage of time has not made Galveston Wharves' actions and practices any less reasonable, rational or nondiscriminatory.

Moreover Galveston Wharves has conducted itself in a manner consistent with this Commission's policy. Since 1948, the Commission has not altered its view that, during a strike, penalty demurrage may not be charged but that compensatory demurrage shall be charged. *Free Time and Demurrage Charges—New York,* 3 U.S.M.C. 89 (1948). In that case the Commission emphasized, 2 U.S.M.C. at 107:

> The carrier is entitled, however, to fair compensation for sheltering and protecting a consignee's property during the period of involuntary bailment and after expiration of free time.

It would be unreasonable to hold that the port is entitled to less for doing the same thing for property in a demurrage status. In fact, WGMA does not urge that Galveston Wharves is not entitled to compensatory demurrage. Therefore, the only conclusion to be reached is that WGMA is urging that cargo that was in free time when the strike began should be charged at compensatory demurrage rates. But WGMA has failed to explain and, indeed, leaves it to the imagination why this should be done, except by implying that this would somehow avoid discrimination in the same "situation."

Last, for the same reasons that wharf demurrage charges may properly be made the liability of vessels agents, so too may strike demurrage charges, which are really just another variety of wharf demurrage, be considered the liability of vessels agents.

E: *Conclusion*

I find that WGMA has failed to prove that any of the ports' tariffs or practices thereunder involving the charging of vessels agents with liability for payment of vessel charges, including wharfage, wharf demurrage, dockage, etc., and strike demurrage is in violation of sections 15, 16 or 17 of the Shipping Act, 1916. I further find that Galveston Wharves' strike demurrage tariff provision, tariff Item No. 187, and the practices thereunder do not unduly or unreasonably prefer or discriminate against types of cargo, shippers, carriers, vessels or their agents in violation of sections 16 First or 17 of the Shipping Act, 1916.

Category II—Tariff Interpretation Provisions

The issue here is quite simple. Should tariffs be permitted to state explicitly or imply that only the port issuing the tariff may interpret its provisions?

The answer does not lie in the fact that there is no proof that any port has abused this provision or even that there is no evidence that any port has ever exercised the rights arrogated unto itself. Neither does the answer lie in the semantic argument made by respondents that "interpret" does not mean "construe" and that the ports were careful not to say that they reserved the right to "judicially construe" the tariffs to the exclusion of the courts or the Commission.

The answer does appear in the manifest infirmity of the provision itself. A need to interpret a tariff provision can exist only in the case of lack of clarity or ambiguity. But tariffs are required to be clear and unambiguous and if they do not meet that standard, the tariffs must be construed against the issuer—an event hardly likely to occur if the issuer is the interpreter. In his initial decision in *Matson Navigation Company v. Port Authority of Guam,* 18 SRR 45 (1978), adopted March 15, 1978, Chief Administrative Law Judge John E. Cograve explained, 18 SRR at 52:

> When dealing with the proper application of the definition of wharfage in a terminal tariff, the Commission in *Sacramento-Yolo Port Dist. v. Fred V. Noonan Co. Inc.,* 9 F.M.C. 551 (1966), laid down the following general principles:
>
> > "... It is a basic principle in the law of tariff construction that tariffs must be clear and unambiguous to avoid possible discrimination among users of tariff services. When a tariff is clear on its face, no extrinsic evidence may be used to vary its "plain meaning." Tariffs are, moreover, drawn unilaterally and must therefore be construed in the case of ambiguity against the one making and issuing the tariff, and 'it is the meaning of express language employed in the tariff and not the unexpressed intention ... which controls. ...' *Aleutian Homes, Inc. v. Coastwise Line,* 5. F.M.B. 602, 608. ..." (9 F.M.C. at 558) [*]
>
> *Although I have not found a case which specifically states that the same principles of construction apply to terminal tariffs as well as carrier tariffs, the *Sacramento* case, *supra,* and others make it clear that they do.

Conclusion

I find that the respondent ports[106] which publish tariff provisions purporting to allow the port to interpret provisions of the ports' tariffs are engaging in

[106] As found, above, Galveston Wharves does not publish a tariff provision of the kind found to be offensive.

unjust and unreasonable practices relating to or connected with the receiving, handling, storing, or delivering of property in violation of section 17 of the Shipping Act. The violation may be cured and reasonable practices restored by deleting the offending provision from the tariffs.

Category III—Crane Rental/Liability of Stevedores for Operators' Negligence

The narrow issue presented is whether it is an unjust and unreasonable practice for ports[107] to rent cranes together with crane operators, in the employ of and paid by the port, to stevedores under tariff terms and conditions which require the stevedores to control and supervise the operators and to assume responsibility and liability for the negligent acts of the operators while the operators are under the stevedores' supervision. As explained previously, the practice of transferring liability for employee negligence from the employer to the user of the equipment is known in the law as the "borrowed servant doctrine." The doctrine has survived at least two tests in Texas, one in the State courts, *Rorie v. The City of Galveston, supra,* the other in the Federal courts, *Southern S.S. Co. v. Meyners,* 110 F. 2d 376 (5th Cir. 1940), *certiorari denied,* 311 U.S. 674 (1940). Both cases involved crane operators employed by ports and borrowed by a stevedore (*Rorie*) or equivalent (*Meyners*).[108]

WGMA argues that the tariff provisions are unconstitutional and void under State law and are invalid under Federal law.

In making its argument on State law, WGMA wholly ignores the *Rorie* case in its post hearing briefs.[109] One gets the impression that WGMA is using this forum to retry the principle of *Rorie* as if the *Rorie* case never existed.

There were two major issues in *Rorie.* The first involved section 15. The second concerned the borrowed servant doctrine. On the section 15 issue, the stevedore defended on the theory that the tariff was void as it had not been approved by this Commission pursuant to section 15. On this issue the Court accepted the opinion expressed in the Commission's "Memorandum Amicus Curiae" that terminal tariffs, as such, do not need section 15 approval to be valid and enforceable. Nothing has been offered by WGMA which would warrant disturbing the principle espoused by the Commission and adopted by the Court in *Rorie.*

With respect to the borrowed servant doctrine, the Court found that under the tariff provisions for crane rental there involved (the instant tariff provisions are substantially the same) there was an effective transfer of control of the crane operator from the port to the stevedore. The Court explained the rationale, 8 SRR at 20,715:

> It is settled, of course, that a general employee of one person may become the special or borrowed employee of another employer. As we pointed out in *Producers Chemical Co. v. McKay,* Tex. Sup., 366 S.W. 2d 220:
>
> > "Whether general employees of one employer have, in a given situation, become special or borrowed employees of another employer is often a difficult question, particularly when

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[107] Only three ports ports' practices are involved—PHA, Galveston Wharves and Corpus Christi.

[108] Southern S.S. Co. used the dock facilities of PHA's predecessor, under the predecessor's tariff, to load and unload "its ships." 110 F.2d at 377.

[109] Strachan Shipping Company was the borrowing stevedore in the *Rorie* case.

employees are furnished with machinery by their general employer to accomplish part of a project or contract undertaken by another. Solution of the question rests in right of control of the manner in which the employees perform the services necessary to the accomplishment of their ultimate obligation. If the general employees of one employer are placed under control of another employer in the manner of performing their services, they become his special or borrowed employees. If the employees remain under control of their general employer in the manner of performing their services, they remain employees of the general employer and he is liable for the consequences of their negligence.

* * *

"When a contract, written or oral, between two employers expressly provides that one or the other shall have right of control, solution of the question is relatively simple. . . ."

To the extent argued by the parties in *Rorie,* the court determined that the borrowed servant doctrine did not offend Texas law. This, then, is not the proper forum to re-try the issue of the validity of the borrowed servant doctrine under the Texas constitution or Texas law.

The question to be decided here is whether the tariff provisions embodying the borrowed servant doctrine are just and reasonable under Shipping Act provisions. In this respect, WGMA makes a more interesting argument, hinted at in its opening brief and fleshed out in its reply brief. It points to a general rule of law that common carriers or public service companies [110] cannot stipulate for immunity from their own or their agents' negligence. *United States v. Atlantic Mutual Insurance Company,* 343 U.S. 236, 239 (1952). WGMA invokes *Bisso v. Inland Waterways Corporation,* 349 U.S. 85, 90–91 (1955), for the rationale that:

This rule is merely a particular application to the towage business of a general rule long used by courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships such as bailors and bailees, employers and employees, public service companies and their customers. The two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. (Footnotes omitted.)

However, I do not find the rule in *Bisso* to be apposite to the facts of this case. Finding No. 10, *supra,* clearly shows no overreaching by those who have power to drive hard bargains.[111] The ports' practices are the same as those which exist in the crane rental industry, at least in the Houston-Galveston area. Under the pervasive regulatory scheme, see *Perry's Crane Service v. Port of Houston Authority of Harris County, Texas, supra,* stevedores are free to and do shop elsewhere than at the ports for cranes. Stevedores obtain direct financial benefits (among other things, lower insurance costs) from renting ports' cranes with operators which the stevedores could not get if they directly employed crane operators.

Moreover, the arrangement under the tariff is not illusory and is not imposed for the purpose of escaping liability for one's own negligence. The crane operators do, in fact, come under the supervision and control of the stevedore and they operate the cranes only under the directions of a supervisory stevedore

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[110] "Because terminals are of vital importance to transportation, they may be deemed public utilities for purposes of regulation by this Commission." *WGMA v. PHA, supra,* 18 SRR at 309.

[111] See n. 79, *supra.*

employee. In this respect there is a vast difference between the facts in the case at bar and those in *Bisso, supra,* where the employment was a pure fiction. The Supreme Court explained the basis for its rationale in *Bisso* this way, 349 U.S. at 95:

> The rule against contractual exemption of a towboat from responsibility for its own negligence cannot be defeated by the simple expedient of providing in a contract that all employees of a towboat shall be employees of the towed vessel when the latter "employment" is purely a fiction.

Moreover, it is well established law that the rule of *Bisso* is not automatically dispositive of all exculpatory clauses of common carriers. *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.,* 360 U.S. 411, 416 (1959). *Bisso* found an exculpatory provision in private contractual arrangements between tug and tow to offend public policy. Those considerations "are [not] necessarily applicable to provisions of a tariff filed with, and subject to the pervasive regulatory authority of . . . an expert administrative body." 360 U.S. at 416–417.

Thus, the reasonableness of the tariff provision does not turn on respondents' mere status as public utilities. It does turn on the facts and circumstances peculiar to the terminal industry. " 'Cases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation' *Federal Maritime Board v. Isbrandtsen Co.,* 356 U.S. 481, 498." 360 U.S. at 421.

Here, the ports hold themselves out to provide cranes to stevedores and to have a pool of crane operators available to operate those cranes under the direction, control and supervision of the stevedores. Stevedores need not accept the operator offered by the port, but are free to choose from any qualified operator in the pool. It is not part of the ports' undertaking to operate cranes for stevedores or to retain any operational control over the cranes during the rental period. The tariff provision comports with terms of crane rental agreements offered by competing private crane rental companies. The use of borrowed servants is demonstrably more advantageous, economically, to stevedores than carrying crane operators as employees on their own payroll.

In the final analysis, WGMA has failed to prove that the tariff provision exculpates the wrongdoer from its negligent acts or that the stevedores are at the mercy of the ports who are driving hard bargains from positions of power. Indeed, the tariff provisions place liability for negligence on the party exercising direction, control and supervision over the negligent employee and are accepted by the party who is now free to choose between the respondents' rental crane and a private rental crane. Even in those circumstances where the stevedore may be required to choose a port's crane, there is no evidence that the port retains any operational control over the crane operator.

Under the foregoing circumstances, I find the application of the borrowed servant doctrine to be a reasonable practice by the respondent ports.

Conclusion

Accordingly, I find that the tariff provisions and practices at PHA, Galveston Wharves and Corpus Christi which make crane operators the borrowed servant of the crane user and make the crane user liable for the negligence of the crane operator while under the supervision, direction and control of the user are not unjust and unreasonable and do not violate section 17.[112] I further find that section 15 approval of the tariff provision is not required.

Order

It is ordered that within 30 days after this decision becomes administratively final that the respondents, Port of Houston Authority, Port of Beaumont, Texas, Port of Port Arthur, Texas, Port of Corpus Christi (Nueces County Navigation District No. 1), Brownsville Navigation District of Cameron County, Texas, and the Orange County Navigation and Port District, Texas, cease and desist and thereafter refrain from publishing tariff provisions which state or imply that those ports (or any one of them) may act as the interpretor or sole interpretor of the meaning of the terms and conditions of the tariffs published by those respondents (or any one of them).

It is further ordered that in all other respects, the complaint of West Gulf Maritime Association is denied.

It is further ordered that this proceeding be discontinued.

(S) SEYMOUR GLANZER
Administrative Law Judge

WASHINGTON, D.C.
September 21, 1979

[112] There is no showing that section 16 was violated.

APPENDIX A

The following are the texts of the tariff provisions which the complainant states were placed in issue. Unless otherwise noted, the concerned port respondent agrees with the complainant as to the text of the tariff provisions.

A: PHA

1. Portions of Item No. 2, *Application and Interpretation of Tariff,* reading as follows:

The use of the waterways and facilities under jurisdiction of the Port Authority shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities to pay all charges specified and be governed by all rules and regulations herein contained.

The Port Authority reserves the right to interpret the provisions of this tariff.

2. Portions of Item No. 3, *Liability for Charges,* reading as follows:

(a) *Responsibility For Payment*

User or person desiring or proposing the use of any Port Authority property, facility or equipment may be required to deposit, in advance, an amount sufficient to satisfy anticipated cost or expense thereof; or in the alternative, may request extension of credit, in accordance with provisions of paragraph (b) of this Item No. 3.

In absence of an affidavit a User thereby warrants to the Port Authority that he is liable and responsible for payment of charges provided in this tariff and will pay the same as herein provided. If such user desires to relieve himself of such obligations, he shall (a) deposit in cash with the Port Authority the amount of charges estimated by the Port Authority to be due, and (b) in writing state the correct name and address of the owner or party warranted to be responsible for the charges.

(c) *Invoice Procedures and Liability*

1. All vessels, their owners, agents and stevedores or others, termed User in Tariff Section Three renting or using freight handling machinery or equipment will be liable for and invoiced in accordance with Item No. 15(a).

3. Portions of Item No. 15, *Provisions Applicable to Rent of Freight Handling Equipment:* [1]

(a) *General*

All steamships, their owners, agents and stevedores, or others hereinafter called User, renting or using freight handling machinery or equipment on Navigation District's property, shall be upon

[1] By letter of September 21, 1978, PHA advised that the portions of Item No. 15 quoted in the Appendix were not in effect at the time the record was closed. Instead, at that time, the following provisions of Item No. 15, paragraphs (a), (c) and (d) appeared in the tariff (See, also, Ex. 53):

(a) *General*

All renting or use of freight handling machinery or equipment on Port Authority property by User shall be upon and subject to the following conditions and charges, the renting or use of which shall constitute an agreement with the Port Authority to pay such charges and be bound by such conditions.

(c) *Responsibility for Damages*

Charge for operators of its freight handling machinery will be made by Port Authority; but it is expressly stipulated that Port Authority acts solely as agent of User in engaging operators and paying them for their services.

Port Authority freight handling machinery as well as the operator thereof is turned over to User, is under User's supervision, direction and control; and User assumes sole responsibility and liability for injury to or death of any person whomsoever, or damage to or destruction of property of any such person, including employees or property of Port Authority, incident to, arising out of, or connected with User's possession, use or operation of such machinery, and shall protect, indemnify and save harmless the Port Authority from and against any and all liability for or in respect of the same or any part thereof.

(d) *Use of Privately-Owned Machinery and Equipment*

The use of privately-owned freight handling machinery or equipment (other than tractors, dollies, lift trucks or the like of stevedores regularly operating on Port Authority property) on Port Authority property shall not be permitted except by special permission of the Executive Director who will regulate its use and establish the conditions and charges which shall be imposed by the Port Authority for the use of its tracks, wharves or property.

and subject to the following conditions and charges, the renting or use of which shall constitute an agreement with the Navigation District to pay such charges and be bound by such conditions.

(c) *Responsibility for Damages*

Charge for operators of its freight handling machinery will be made by Navigation District; but it is expressly stipulated that Navigation District acts solely as agent of User in engaging operators and paying them for their services.

Navigation District freight handling machinery as well as the operator thereof is turned over to User, is under User's supervision, direction and control; and User assumes sole responsibility and liability for injury to or death of any person whomsoever, or damage to or destruction of property of any such person, including employees or property of Navigation District, incident to, arising out of, or connected with User's possession, use or operation of such machinery, and shall protect, indemnify and save harmless the Navigation District from and against any and all liability for or in respect of the same or any part thereof.

(d) *Use of Privately-Owned Machinery and Equipment*

The use of privately-owned freight handling machinery or equipment (other than tractors, dollies, lift trucks or the like of stevedores regularly operating on Navigation District property) on Navigation District property shall not be permitted except by special permission of the General Manager who will regulate its use and establish the conditions and charges which shall be imposed by the Navigation District for the use of its tracks, wharves or property.

B: GALVESTON

1. Portions of Item No. 5, *Application,* Definitions:

(l) *PIER DEMURRAGE OR WHARF DEMURRAGE:* A charge assessed against cargo remaining in or on terminal facilities after the expiration of free time unless arrangements have been made for storage.

(p) *USAGE:* The use of terminal facility by any rail carrier, lighter operator, trucker, shipper or consignee, their agents, servants and/or employees, when they perform their own car, lighter or truck loading or unloading, or the use of said facilities for any other gainful purpose for which a charge is not otherwise specified.

(t) *WHARFAGE:* A charge assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service.

2. Portions of Item No. 30, *Application,* Responsibility for Charges, etc.:

The use of waterways and facilities under jurisdiction of the Board of Trustees of the Galveston Wharves shall constitute consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities, to pay all charges specified, including any and all damages to property as provided in Item 75, or reissues, and to be governed by all rules and regulations contained in this tariff.

3. Portions of Item No. 105, *Application,* Lessee Responsibility:[2]

When cranes, derricks, hoists, conveyors, lift trucks, trucks, tractors, etc., are rented or leased to others, it is expressly understood that the unit will be operated under the direction and control

[2] Effective April 7, 1975, before the close of the record, the following changes were made in Item 105 per Galveston Wharves letter of October 31, 1978. Some aspects of this tariff provision are the subject of another Commission proceeding in Docket No. 77-56, *West Gulf Maritime Association v. The City of Galveston (Board of Trustees of the Galveston Wharves),* 19 SRR 779 (1979).

When cranes, derricks, hoists, conveyors, lift trucks, tractors and other equipment used in the moving or lifting of cargoes are rented (hereinafter called "Leased Equipment") or leased to others, it is expressly understood that such Leased Equipment will be operated under the direction and control of the Lessee, and the Lessee shall be responsible for the operation thereof and assume all risks for injuries or damages which may arise from or grow out of the use or operation of said Leased Equipment.

of the lessee and the lessee shall be responsible for the operation thereof, and the lessee assumes all risks for injuries or damages which may arise or grow out of the use or operation of said unit.

It is hereby understood and agreed that in the event lessee uses the operator of said unit employed by the Galveston Wharves, such operator shall be under the direction of the lessee and the operator shall be considered as the agent or servant of the lessee and lessee shall be responsible for the acts of such operator during the time of rental or lease. It is incumbent upon the lessee to make a thorough inspection and satisfy himself to the physical condition and capacity of the unit, as well as the competency of the operator, there being no representation or warranties with reference to such matters.

4. Portions of Item No. 185, Section 2, Pier Demurrage Rules and Charges:

(c) *PIER DEMURRAGE RULES:*

Inbound or outbound cargo remaining on the property of the Galveston Wharves after the expiration of free time will be subject to the following rules:

(1) Pier demurrage charges on outbound cargo will be considered as for the account and responsibility of the vessel, their owners or their agents, individually or collectively.
(2) Pier demurrage charges on inbound cargo will be considered as for the account and responsibility of the owner of the cargo, the shipper, the receiver or their agents, individually or collectively.

5. Portions of Item, 187, Section 2, Interference Due to Strikes:[3]

When it is impossible to remove cargo from Galveston Wharves' piers or transit sheds because of strike interference, cargo on piers or in transit sheds within the free time period will be allowed additional free time equal to period of such interference.

Cargo on piers or in transit sheds on which free time period has expired at beginning of such interference will be assessed pier demurrage during period of interference at rate of 5¢ per ton per day except cotton and cotton linters which will be assessed 2½¢ per bale per day.

The first and last day on which any strike interference occurred, such day will be included in the above special provisions.

C: BEAUMONT

1. Portions of Rules and Regulations as follows:

Item 100, Not Common Carrier:

The Port Authority is not a common carrier and is sole interpreter of its tariff rules and regulations.

Item 105, Payment of Charges:

All bills rendered by the Port Authority for service, claims, or for any causes whatsoever, are due and payable upon presentation, and any agents, owners, persons, firms or corporations receiving such bills and failing to make full payment within ten days after presentation shall be placed upon a Delinquent List, conditions of which are hereinafter defined.

The Port Authority does not recognize the numerous shippers or consignees and cannot attempt to collect or assist in collecting any port invoices or bills which may be passed on to shippers and

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Lessee, by acceptance of such Leased Equipment, agrees to fully protect, indemnify, reimburse and save harmless the Galveston Wharves against any and all loss or damage caused to or caused by said Leased Equipment; and should said Leased Equipment be damaged or destroyed while so leased, Lessee shall pay for all necessary repairs or replacement, and, if damaged, shall pay rental for such damaged Leased Equipment until same is returned to Galveston Wharves in the same condition as received.

It is hereby understood and agreed that in the event lessee uses the operator of said unit employed by the Galveston Wharves, such operator shall be under the direction of the Lessee and the operator shall be considered as the agent or servant of the Lessee and Lessee shall be responsible for the acts of such operator during time of rental or lease. It is incumbent upon the Lessee to make a thorough inspection and satisfy himself to the physical condition and capacity of the unit, as well as the competency of the operator, there being no representation of warranties with reference to such matters.

[3] Effective October 23, 1978, after the close of the record, Item 187 was amended. Galveston Wharves letter of October 31, 1978.

consignees by the vessel, its owner and agent. Such bills are due when presented and must be paid regardless of when the vessel, its owner and agents are reimbursed.

Bills must be paid when presented and errors, if any, will be rectified by the Port Authority. Claims in excess of $10.00 will require specific approval of the Port Authority before refund is made.

The Port Authority reserves the right to estimate and collect in advance all charges which may accrue against vessels, their owners and agents, or against cargo loaded or discharged by such vessels, or from other users of the facilities of the Port Authority, whose credit has not been properly established with the Port Authority or who are habitually on the Delinquent List. Use of such facilities may be denied until such advance payments or deposits are made.

The Port Authority reserves the right to apply any payment received against the oldest bills rendered against vessels, their owners and agents, or other users of the facilities.

Item 115-c, Wharfage Rules:

(A) Wharfage charges earned on cargo placed on Port Facilities must be paid by vessel owners (operators) or their agents or owner or forwarder of the cargo and placing of such cargo on Port Facilities shall be deemed an acceptance and acknowledgment of this responsibility. Vessel owners (operators) or their agents shall furnish Port Authority manifests on inbound and outbound cargo, as the case may be, loaded to or from Port Facilities.

EXCEPTION—Where provisions are made with owner or agent of cargo, wharfage charges must be collected direct from owner or agent of the cargo.

Item 165, Consent to Terms of Tariff:

The use of the facilities under the jurisdiction of The Port Authority shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents and other users of such facilities to all such charges specified in this tariff and be governed by all rules and regulations herein contained.

D: PORT ARTHUR[4]

1. Portions as follows:[5]

Item 105, Not Common Carrier:

The Port Authority is not a common carrier and is sole interpreter of its tariff rules and regulations.

Item 110-A, Payment of Charges:

All bills rendered by the Port Authority for service, claims or for any causes whatsoever, are due and payable upon presentation, and any Agents, Owners, person, firms or corporations receiving such bills and failing to make full payment within ten days after presentation shall be placed upon A Delinquent List, conditions of which are hereinafter defined.

The Port Authority does not recognize the numerous shippers or consignees and cannot attempt to collect or assist in collecting any port invoices or bills which may be passed on to shippers and consignees by the vessel, its Owner and/or Agent. Such bills are due when presented and must be paid regardless of when the vessel, its Owner and/or Agents are reimbursed.

Bills must be paid when presented and errors, if any, will be rectified by the Port Authority. Claims in excess of $10.00 will require specific approval of the Port Authority before refund is made.

The Port Authority reserves the right to estimate and collect in advance all charges which may accrue against vessels, their Owners and/or Agents, or against cargo loaded or discharged by such vessels, or from other users of the facilities of the Port Authority, whose credit has not been properly established with the Port Authority or who are habitually on the Delinquent List. Use of such facilities may be denied until such advance payments or deposits are made.

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[4] Complainant introduced Ex. 49, containing Item 605-A of Port Arthur's tariff dealing with use of privately owned cranes. See Port Arthur letter of November 16, 1978.

[5] The portions appeared in Tariff No. 1-A. Tariff No. 1-B is now in effect. Although the provisions have been renumbered, the language remains the same. See Port Arthur letter of October 13, 1978.

The Port Authority reserves the right to apply any payment received against the oldest bills rendered against vessels, their Owners and/or Agents, or other users of the facilities.

Item 120, Wharfage Rules:

(A) Wharfage charges earned on import cargo placed on Port Facilities must be paid by vessel owners (operators) or their Agents and placing of such cargoes on Port Facilities shall be deemed an acceptance and acknowledgment of this responsibility. Vessel Owners (Operators) or their Agents shall furnish Port Authority manifests on import and outbound cargo, as the case may be, loaded to or from Port Facilities. See Exception 1.

EXCEPTION 1.—Where specific arrangements are made with owner or agent of import cargo guaranteeing payment of import wharfage charges, such charges will be collected direct from said owner or agent of the cargo.

(B) Wharfage charges earned on export, Coastwise, Intracoastal, or local cargo must be paid by owner or agent of cargo and placing of such cargo on Port Facilities shall be deemed an acceptance and acknowledgment of these responsibilities. See Exception 2.

EXCEPTION 2.—Where specific arrangements are made with owners or agents of export, Coastwise, Intracoastal, or local cargo guaranteeing payment to Port Authority of wharfage charges earned on export, Coastwise, Intracoastal or local cargo by a railroad, truck line, or other party, such charges will be collected from such railroad, truck line, or other party as the case may be.

Item 175, Consent to Terms of Tariff:

The use of the facilities under the jurisdiction of the Port Authority shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their Owners and/or Agents and other users of such facilities to all such charges specified in this Tariff and to be governed by all rules and regulations herein contained.

E. CORPUS CHRISTI [6]

1. Portions of Tariff definitions, as follows:

3. Wharfage—A charge assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service.
9. Usage—The use of terminal facility by any rail carrier, lighter operator, trucker, shipper, or consignee, their agents, servants, and/or employees, when they perform their own car, lighter or truck loading or unloading, or the use of said facilities for any other gainful purpose for which a charge is not otherwise specified.

2. Portions of Rules and Regulations, as follows:

Item 15, Payment of Charges and Responsibility Therefor; Extensions of Credit; and Liens:

Wharfage, wharf demurrage, car loading and unloading (when not absorbed by the ocean carriers) are due from the owner, shipper or consignee of the cargo, and shall be collected for and on behalf of the Navigation District by the vessel discharging or loading the cargo, or for which the cargo was received, through the vessel's owner, agent or other person duly authorized to do so, and such vessel and its owner and agent, jointly and severally, shall guarantee and be liable for the payment of such charges to the Navigation District whether or not collected by such vessel or its owner or agent. The use of the wharf or other terminal facility by the vessel or its owner or agent shall constitute acceptance and acknowledgment of this agency, guaranty and liability.

All bills rendered by the Navigation District for wharfage, dockage, wharf demurrage, shed and/or wharf use hire, charges for providing water and electricity, charges for equipment rental, charges for cleaning wharves and sheds, charges for terminal storage, special services, other services and claims or for any causes whatsoever, are due and payable in cash upon presentation,

[6] Complainant also introduced Exs. 47 and 51 containing provisions dealing with crane rental. See Corpus Christi letter of November 15, 1978.

unless arrangements for extension of credit are made. When credit arrangements have been made, any agents, owners, persons, firms or corporations receiving bills and failing to make full payment after presentation within the time permitted under the credit arrangements may be placed upon a cash basis.

The Navigation District does not recognize the numerous shippers or consignees and cannot attempt to collect or assist in collecting any port invoices or bills which may be passed on to shippers and consignees by the vessel, its owner and agent. Such bills must be paid regardless of when the vessel, its owner and agents, are reimbursed. Any errors in bills will be recitifed by the Navigation District.

The Navigation District reserves the right to estimate and collect in advance all charges which may accrue against vessels, their owners and agents, or against cargo loaded or discharged by such vessels, or from other users of the facilities of the Navigation District, whose credit has not been properly established with the Navigation District. Use of such facilities may be denied until such advance payments or deposits are made.

The Navigation District, at its option and subject to termination at its election, may at any time and from time to time extend credit to any user or other person conducting business with the Navigation District under the provisions of this tariff or amendments or reissues thereof by such user or other person establishing and maintaining financial responsibility acceptable to the Navigation District, or by posting and maintaining a single transaction or a period or an annual surety bond in form and content and with corporate surety acceptable to the Navigation District in amount equal to 125% of maximum liability on a single transaction or equal to an estimated period or estimated annual maximum liability. Further extension of credit may be suspended or terminated by the Navigation District subject to the establishment of added or extended credit acceptable to the Navigation District.

The Navigation District reserves the right to apply any payment received against the oldest bills rendered against vessels, their owners and agents, or other users of the facilities.

Presentation of bills to owners and agents of vessels or to stevedores is done as a matter of accommodation and convenience and shall not constitute a waiver of the liens for charges furnished a vessel for which the maritime law gives the lien.

Item 35, Responsibility for Loss or Damage:

Users of its facilities agree to indemnify and save harmless the Navigation District from and against all losses, claims, demands, and suits for damages, including death and personal injury, and including court costs and attorneys' fees, incident to or resulting from their operations on the property of the Navigation District.

Item 52, Application and Interpretation of Tariff:

The use of the waterways and facilities under jurisdiction of the Navigation District shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities to pay all charges specified and be governed by all rules and regulations herein contained.

The Navigation District shall be the sole judge as to the interpretation of this tariff.

F. Brownsville

1. Portions of Section One—General Rules and Regulations, as follows:

Item 105, Consent to Terms:

Use of the public wharves and related facilities shall constitute consent to the terms and conditions of this tariff, including the payment of all applicable charges specified herein.

Item 110, Collection of Charges:

The District may, at its discretion, extend customary trade credit or require the posting of bond or prepayment of charges. Vessel charges, as set out hereinafter, shall constitute a lien against the *vessel* and/or her agents. Cargo charges, as set out hereinafter, shall constitute a lien against the merchandise or commodity and/or the custodian at the port thereof. Service charges shall be payable by the party requesting such service.

Item 111, Service Charge on Past Due Accounts:

On all invoices except lease rentals: A service charge will be assessed on all accounts over 30 days old, at a monthly rate of 1½% on the first $500, and 1% on amounts over $500, with a minimum monthly charge of $0.50. *Exception:* Brownsville steamship agencies and stevedoring companies will be assessed on all accounts over 60 days old at the same rates as shown above.

Item 115, Interpretation of Tariff:

The District further reserves the right to be the sole judge in the interpretation of this tariff or any supplements thereto.

G: ORANGE

1. Portions of Application, as follows:

Item 85, Responsibility for Wharfage:

On shipments inward and outward bound, handled over the wharves or piers, or on shipments handled direct between barges or vessels, and vessels that are berthed at wharves or piers, the shipper will be held responsible for wharfage charges, and will not be permitted to load any property from the wharves or piers, or from barges or vessels onto a vessel without prepayment of the wharfage charges, or until satisfactory provisions have been made for the payment.

2. Portions of Rules and Regulations, as follows:

Item 115, Interpretation of Tariff:

The Port District shall be the sole judge as to the interpretation of its Tariff rules and regulations.

Item 120, Payment of Charges:

All bills rendered by the Port District for service, claims or for any causes whatsoever, are due and payable upon presentation, and any owners, agents, companies or persons receiving such bills and failing to make full payment within ten days after presentation shall be placed upon the delinquent list, conditions of which are hereinafter defined.

The Port District does not recognize the numerous shippers or consignees and cannot attempt to collect or assist in collecting storage and similar bills which may be passed on to shippers and consignees by the vessel, its owners and agents. Such bills are due when presented and must be paid regardless of when the vessel, its owners and agents, are reimbursed.

Bills must be paid when presented, and errors, if any, will be rectified by the Port District. Claims in excess of $10.00 will require specific approval of the Port District before refund is made.

The Port District reserves the right to estimate and collect in advance all charges which may accrue against vessels, their owners and agents, or against cargo loaded or discharged by such vessels, or from other users of the facilities of the Port District whose credit has not been properly established with the Port District or who are habitually on the delinquent list. Use of facilities may be denied until such advance payments or deposits are made.

The Port District reserves the right to apply any payment received against the oldest bills rendered against vessels, their owners and agents, or other users of facilities.

Item 130, Wharfage:

(A) Wharfage charges must be paid by owner or agent of cargo and placing of said cargo on Port facilities shall be deemed an acceptance and acknowledgment of this responsibility.

Item 195, Consent to terms of Tariff:

The use of the facilities under the jurisdiction of the Port District shall constitute a consent to the terms and conditions of this Tariff, and evidences and agreement on the part of all vessels, their owners and agents and other users of such facilities to pay all charges specified in this Tariff and be governed by all rules and regulations herein contained.

APPENDIX B

Contentions of Complainant and Respondents

1. *Points in WGMA's Opening Brief*

Point One—Each of the tariffs here complained of provides that use of the Port's facilities constitutes consent to be bound by all of the tariff provisions. Such language is a nullity, because lawful tariff provisions do not rest on consent but as a matter of law are binding upon all persons subject to them. Therefore use cannot lawfully be the equivalent of agreement. These provisions should therefore be ordered stricken and given no consideration in the determination of this complaint;

Point Two—Interpretation of a port's tariffs is a matter within the jurisdiction of the Federal Maritime Commission and the courts, and the statements in respondents' tariffs that they are to be interpreters of their tariffs are void as a matter of law as attempts to oust such jurisdiction;

Point Three—The ports tariff provisions, and billing practices, that make agents for vessels using port facilities personally liable for their principals' port charges are unlawful because the charges are obligations of third persons not agreed in writing to be borne by the agent and therefore unenforceable under the Texas Statute of Frauds, and contrary also to the Law of Principal and Agent, and violate sections 16 and 17 of the Shipping Act of 1916 (46 U.S.C.A. §§815, 816) in subjecting vessels' agents to an unreasonable disadvantage and to unjust and unreasonable regulations and practices;

Point Four—The ports' tariff provisions and billing practices which subject vessels' agents to responsibility for collecting, and personal liability for, wharfage and pier demurrage (which are liabilities of cargo) are unenforceable under the Texas Statute of Frauds, and they violate sections 16 and 17 of the Shipping Act of 1916 (46 U.S.C.A. §§815, 816) because they subject agents to unreasonable disadvantages and are unjust and unreasonable.

Point Five—Requiring renters of cranes and other heavy equipment from the ports *ipso facto* to become liable for the negligence of the operators of that equipment, who are employees of the Port, is violative of section 16 of the Shipping Act of 1916 (46 U.S.C.A. §815) in subjecting stevedores to undue and unreasonable disadvantages, and unjust and unreasonable and hence unlawful under section 17 of that Act; and

Point Six—The Galveston Wharves' tariff provision assessing strike penalty pier demurrage rates according to the status of cargo at the commencement of the strike is patently discrminatory and unlawful under sections 16 and 17 of the Shipping Act of 1916 (46 U.S.C.A. §§815, 816) because all of the strike-bound cargoes are in an identical position during a strike and assessing different charges on cargoes in an identical position is plainly unjust and unreasonable.

2. *Points in Respondents' Answering Brief*

Counterpoint One—Complainant has wholly failed to sustain its burden of proof by reliable, probative evidence that respondents' tariffs, or their practices thereunder, make or give any undue or unreasonable preference or advantage (section 16) or that the complained of tariffs and practices thereunder are unjust and unreasonable (section 17).

Reply Point One (germane to WGMA's Point One)—Tariff provisions that the use of the port facilities constitutes consent to be bound by the tariffs are merely a statement of the law, clearly informing users of the applicability of the tariffs and their responsibilities thereunder. Complainant claims that such tariff provisions are unlawful, but fails to offer any evidence that such language or port practices thereunder constitute an unreasonable preference or advantage or that such provision is unjust and unreasonable.

Reply Point Two (germane to WGMA's Point Two)—Provision in some of respondents' tariffs that the issuer of the tariff shall be the interpreter of their tariffs does not, cannot and is not intended to oust jurisdiction of the Federal Maritime Commission and the courts. The interpretation provision does serve a useful purpose in non-litigious inquiries and situations, particularly involving complex and technical interpretation of language terms common to the trade and relating to customs of the port.

Reply Point Three (germane to WGMA's Points Three and Four)—Ports' tariff provisions and billing practices assessing responsibility for charges upon vessels, their owners and agents and other users of the facilities are not only lawful but essential to insure collection of port charges and the continued economic viability of public ports. Such tariff provisions, rather than resulting in agents being held responsible for debts of others, impose a direct obligation upon the agents for collection of port charges.

Reply Point Four (germane to WCMA's Point Five)—Ports' tariff provisions concerning the responsibility of lessees of cranes and other such heavy equipment providing that any leased operator of the port shall be under the direction of the lessee and shall be considered as lessee's employee are reasonable requirements, uniform in the port industry and non-discriminatory.

Reply Point Five (germane to WGMA's Point Six)—The Galveston Wharves' tariff provision eliminating penalty portion of demurrage rate and making additional free time allowance during strike period is most reasonable, makes or gives no undue or unreasonable preference or advantage and is consistent with Commission rulings.

3. *Points in WGMA's Reply Brief*

First Reply Point—The tariff provisions here stating that use of port facilities "constitutes a consent to the terms and conditions of this tariff" is not a statement of the law: Use of a public utility's facilities constitutes consent only to be bound by *lawful* tariff provisions. The tariff language is unjust and unreasonable and therefore violative of Section 17 of the Shipping Act of 1916 and lawfully should be disregarded;

Second Reply Point—The provision in the tariffs that the port is to be the "sole judge" or "sole interpreter" of the tariff's meaning is unlawful, and hence

Third Reply Point—As Texas municipal corporations respondents are subject to the laws of the State of Texas. As instruments of interstate and foreign commerce they are subject to applicable laws of the United States. Respondents' tariff provisions making vessels' agents responsible for vessels' and cargo owners' port charges are violative of both bodies of law and cannot lawfully be upheld as just and reasonable under Section 17 of the Shipping Act of 1916;

Fourth Reply Point—Respondents have reasonable alternatives for collection of their charges to holding steamship agents liable for collection and payment of port charges. It is unjust and unreasonable for respondents to impose such liability of steamship agents since it is done simply for respondents' convenience;

Fifth Reply Point—Respondents' monopolistic position with respect to use on their premises of their rented heavy lift equipment makes their tariff provisions exculpating themselves from liability for the negligence of their employees unlawful under well-established legal principles, and hence these tariff provisions should be found unjust and unreasonable and hence unlawful also under Section 17 of the Shipping Act of 1916;

Sixth Reply Point—The Galveston strike demurrage charge is plainly discriminatory, and not based on compensation for services rendered, and therefore unlawful under Sections 16 and 17 of the Shipping Act of 1916.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-86

JAPAN/KOREA—ATLANTIC AND GULF FREIGHT CONFERENCE RULES PERTAINING TO CHASSIS AVAILABILITY AND DEMURRAGE CHARGES THAT RESULT WHEN CHASSIS ARE NOT MADE AVAILABLE

Conference tariff rule allowing carrier members to provide chassis for containers to the extent available found permissive and consequently in violation of section 18(b)(1) of the Shipping Act, 1916.

Conference tariff rule permitting the assessment of demurrage on containers at amounts greater than compensatory during periods of general unavailability of chassis in port area found unjust and unreasonable in violation of section 17 of the Shipping Act, 1916.

Charles F. Warren and *George A. Quadrino* for Japan/Korea-Atlantic and Gulf Freight Conference and its member lines.

Joseph S. Fontana for John Sexton & Company.

Lawrence G. Cohen for Mitsubishi Corporation.

Arthur S. Schmauder for Sumitomo Corporation of America.

Gerald H. Ullman for National Customs Brokers & Forwarders Association of America, Inc.

Francis J. Gorman for Baltimore Customhouse Brokers and Forwarders Association.

William D. Weiswasser, C. Douglass Miller, and *John Robert Ewers* for Bureau of Hearing Counsel.

REPORT AND ORDER

February 7, 1980

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

This proceeding was initiated on August 31, 1979 by an Order directing the Japan/Korea—Atlantic and Gulf Freight Conference (J/KAG) to show cause why the Commission should not find certain of its tariff rules concerning the availability of chassis equipment and the assessment of demurrage: (1) to result in the assessment of varying rates and charges which are unjustly discriminatory and constitute an unreasonable practice or regulation in violation of section 17 of the Shipping Act, 1916 (46 U.S.C. § 816); and (2) be permissive in nature and indefinite in application in violation of section 18(b) of the Shipping Act, 1916 (46 U.S.C. §817(b)).[1]

J/KAG and its member lines were named Respondents. The National Customs Brokers & Forwarders Association of America, Inc., Baltimore Customhouse Brokers and Forwarders Association, Mitsubishi Corporation, Sumitomo Corporation of America, and John Sexton & Company subsequently intervened.

Affidavits and/or memoranda of law have been submitted by J/KAG, John Sexton, Baltimore Customhouse Brokers, and the Commission's Bureau of Hearing Counsel. In addition, both Baltimore Customhouse Brokers and Hearing Counsel have requested an evidentiary hearing, which is opposed by J/KAG. Also, J/KAG has moved: (1) to strike a notice of deposition which was filed by Baltimore Customhouse Brokers, and (2) for leave to file a rebuttal affidavit and memorandum, to which Hearing Counsel has filed in opposition. The National Customs Brokers have requested oral argument.[2]

BACKGROUND

J/KAG operates pursuant to agreement No. 3103 and serves the trades from Japan and Korea to United States Atlantic and Gulf Ports. It consists of 13 ocean carriers which during 1978 carried 378,772 TEU's[3] of container space in this trade. The Conference trade has become substantially containerized in the past five and a half years.

Though J/KAG members serve numerous discharge ports on the Atlantic and Gulf coasts, the Order to Show Cause and the responses of the parties have focused exclusively on the situation at the Port of Baltimore. Prior to 1978, there had been occasions when chassis were in short supply at Baltimore. However, during the early months of 1978 an extreme chassis shortage developed which was exacerbated by a dock strike and severe winter weather. Some J/KAG members were consequently unable to provide chassis within the five days' free time permitted by J/KAG tariff. In previous situations, individual J/KAG members had, on occasion, failed to assess demurrage after the expiration of this free time, although required to do so by tariff rules similar to those under review. Following an investigation by the Conference's independent neutral body, all J/KAG members began to assess demurrage after the expiration of the free time period regardless of whether the member had provided a chassis for the container. As a result, many consignees incurred demurrage charges when chassis were unavailable.

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[1] Though the Order fails to cite specific tariff rules, the parties agree that Rules 106 and 114 of Tariff No. 36 FMC 7 are the relevant rules.

Rule 106 provides that:

> [t]o the extent available, carriers are permitted to provide chassis at discharge ports at a rental charge of $6.00 for each twenty-four hours. . . .

Rule 114 states that all containers held with cargo at a carrier's discharge port container yard after the carrying vessel has completed discharge, whether the carrier has provided a chassis therefor pursuant to Rule 106 or not, will be subject to demurrage after 5 days' free time.

[2] The National Custom Brokers have offered no compelling reason for granting oral argument, and their request therefor will be denied.

[3] Twenty-foot equivalent unit, a unit of measure for cargo space suitable for containers on a liner vessel. Containers are generally twenty or forty feet in length.

Once unloaded at its discharge port, a container of cargo is virtually immobile. If the container is to proceed further inland by way of motor carrier it must first be placed upon a chassis compatible with its size. Generally, ocean carriers have provided such chassis to consignees on a rental basis to facilitate the removal of containers from their terminals and container yards. Carriers obtain chassis either from their own stock or from chassis leasing companies which are situated in port areas.

At least two major chassis leasing companies serve the Port of Baltimore—Uniflex and XTRA. They lease chassis to J/KAG members but do not restrict their services solely to ocean carriers. When consignees utilize chassis supplied by J/KAG members they are charged a *per diem* rate which covers the carriers' leasing costs.

Terminal and container storage space is in short supply at Baltimore. As a result, Conference members desire to clear cargo from their yards at the earliest possible time, particularly since Conference members provide a weekly service in the trade. Limiting the time within which to remove loaded containers to five days is intended to accommodate this service and minimize congestion at the port. However, the J/KAG tariff does allow the Conference to permit additional free time and/or waive demurrage during periods of "port tie-up" when a consignee is prevented by factors beyond its control from removing a container from the container yard.

POSITIONS OF THE PARTIES

Respondent

J/KAG states that the ocean common carrier's obligation is to transport cargo to the port of destination, discharge it from the vessel and tender it for delivery with notice to the consignee or its agent. It defines "chassis" as an integral part of a motor vehicle and argues that because the ocean carrier is not required to provide a motor vehicle for hauling away goods, neither is it required to provide any part of the vehicle—such as the chassis.

J/KAG claims that it has not established a historic practice of providing chassis to all consignees. The Conference maintains that it provides chassis, which it leases at Baltimore, only to the extent that such chassis are available. Under this arrangement, chassis are allocated on a first come-first served basis with no discrimination or favoritism.

Respondent explains that there are two reasons for assessing demurrage: (1) to recompense the ocean carrier for the extended use of its equipment and facilities, and (2) to minimize port congestion. It maintains that the latter purpose is especially compelling at Baltimore due to the lack of sufficient container storage areas. J/KAG concludes that any problem which may exist concerning chassis availability at Baltimore will be resolved by normal market forces and that any alteration of its existing tariff rules will impose obligations upon its members which, as common carriers, they are not required to assume.

Intervenors[4]

Intervenors agree that an ocean common carrier does not have an obligation to deliver goods to a consignee; rather, it must only tender them for delivery. They argue, however, that a proper tender occurs only when a container is mounted on a chassis, for it is only then that the cargo is reasonably accessible. They also contend that the fact that common carriers by water, including J/KAG members, have historically tendered containers mounted on chassis implicitly supports their view.

Intervenors argue that because demurrage charges are in effect penalties to induce the removal of containers from the carrier's container yard, the assessment of demurrage when chassis are not available at the port is unreasonable and therefore unlawful under section 17. They maintain that where both the carrier and the consignee are jointly affected by conditions beyond their control, neither should profit from the other's disability.

The National Customs Brokers claim that if a member line provides chassis to some consignees, it must do so for all consignees. It further suggests that J/KAG tariff rules should be amended to extend free time whenever chassis are unavailable.

Sumitomo contends that the subject tariff rules are ambiguous. It claims, for instance, that Rule 106 provides no guidance as to when chassis will be available, nor does it indicate the order in which chassis will be allocated during shortages. The danger perceived is that a variety of different interpretations may be given by various conference members. Sumitomo therefore concludes that these rules violate the principle of commercial certainty which tariffs are required to meet.

Hearing Counsel

Hearing Counsel generally agrees with the arguments raised by Intervenors. It does not allege, however, that J/KAG members have a common carrier obligation to provide chassis to consignees and concludes, therefore, that they could refuse to provide such service. Hearing Counsel adds, however, that once they elect to offer the service, they must meet certain requirements under the Shipping Act, 1916; *i.e.:* (1) the tariff must be certain and clearly identify the carrier's undertaking, and (2) shippers and consignees must be provided with actual notice of the service the carrier will provide. In addition, Hearing Counsel questions why, in situations of chassis shortage, consignees could be any more successful than ocean carriers in leasing chassis. Hearing Counsel also contends that in such situations, the provisions of Tariff Rule 114 which relate to the extension of free time or limiting demurrage would apply.

[4] The arguments raised by the Intervenors are similar and will, therefore, be discussed together unless reference to a specific Intervenor is warranted.

DISCUSSION

Procedural Matters

A. *Evidentiary Hearing*

The Baltimore Customhouse Brokers and Hearing Counsel have requested an evidentiary hearing. Hearing Counsel asserts that a significant question of fact exists concerning what notice consignees would need in order to acquire chassis for themselves on the "spot market," if such chassis are available. However, no effort is made by Hearing Counsel to explain why such information, if indeed relevant, could not be submitted through affidavit. In fact, Hearing Counsel fails to state how and by whom such evidence would be adduced.

The Baltimore Brokers claim that J/KAG's affidavit contains certain inaccuracies which are correctly described in their own affidavit. They then note several questions which are raised by J/KAG's affidavit and conclude that the Commission should explore in an evidentiary hearing whether: (1) J/KAG's historical and existing freight rates cover the cost of providing chassis; (2) truckers normally offer to provide chassis to shippers and consignees; and (3) it is impractical to expect importers and consignees to lease containers after being informed that the ocean carrier will not provide chassis. They contend that these matters "have not been adequately presented by affidavit," but, like Hearing Counsel, fail to explain why such proof cannot be submitted through affidavit or what evidence they would adduce.

In limiting this proceeding to the submission of affidavits of fact and memoranda of law, the Commission's Order to Show Cause provided that any party considering an evidentiary hearing necessary must accompany its request:

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

Neither Hearing Counsel nor Baltimore Brokers has strictly complied with this requirement. Moreover, neither party has indicated why the limited issues raised by the Order to Show Cause cannot be resolved on the present record. Consequently, the Commission will deny these requests for evidentiary hearing.

B. *Deposition*

J/KAG has moved to strike a notice of deposition served by the Baltimore Customhouse Brokers. The taking of the deposition, originally scheduled for January 8, 1980, has been postponed pending this decision. Because of the Commission's ruling above denying evidentiary hearing in this proceeding, J/KAG's motion will be granted. The proceeding was limited to the submission of affidavits of fact and memoranda of law, with no provision for discovery. In light of the nature and limited extent of the issues presented and the sufficiency of the affidavits submitted, there is no reason to deviate from this procedure.

C. *Rebuttal*

J/KAG has also moved for leave to file a rebuttal affidavit and memorandum, which it attached to its request. The Conference notes that the petitions to intervene were not granted until after it submitted its *prima facie* case and that it has not, therefore, been presented with an opportunity to respond to or rebut allegations contained in Intervenors' submissions. It argues that "administrative due process and fundamental fairness" require that it be given an opportunity to respond. Hearing Counsel opposes this motion primarily on the ground that J/KAG has failed to cite any support therefor, contrary to the express requirement of Rule 73 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.73). Hearing Counsel also submits that the rebuttal affidavit is "argumentative" and without cross-examination, would further confuse the proceeding.

The Order to Show Cause did not provide the Respondent with a right of rebuttal, nor was it required. Under the circumstances of this case, however, the Commission will grant Respondent's motion and accept the filing of the rebuttal affidavit and memorandum. In light of the ultimate decision in this proceeding, the Commission does not perceive that any party will be aggrieved by this ruling. To the extent that the affidavit of *fact* is argumentative or non-responsive to the issues, it will be ignored.

Substantive Matters

The Order raised the issue of whether the subject tariff rules are "permissive in nature and indefinite in application in violation of section 18(b)." A review of Tariff Rule 106 clearly indicates that, on its face, it is permissive in nature. The rule states that "[t]o the extent available, carriers are permitted to provide chassis at discharge ports at a rental charge of $6.00 for each twenty-four (24) hours. . . . " Carriers "are permitted" to provide chassis, to the extent available, but are clearly not holding themselves out as required to do so. Such a provision is contrary to established principles of tariff certainty. In one of the earliest reported cases, the United States Shipping Board stated:

> principle of tariff construction is that tariffs should be specific and plain. The board's tariff regulations throughout direct the carriers to this end, and provide that tariffs filed and kept open to public inspection in compliance with section 18 of the statute shall be explicit.
> *The Gelfand Manufacturing Co. v. Bull Steamship Line, Inc.*, 1 U.S.S.B. 169, 170 (1930).

A tariff should fully and clearly state the conditions under which a service will be accorded. *Puerto Rican Rates,* 2 U.S.M.C. 117, 129 (1939).

Section 18(b)(1) requires that shippers be fully apprised of the services carriers are providing and the rates which will be charged. The Commission's tariff rules also specifically require that tariffs contain "[a] clear statement of all the services provided to the shipper and included in the transportation rates set forth therein." 46 C.F.R. § 536.5(d)(2). Tariff Rule 106, however, does not inform the shipper at the time of shipment of the exact service the carrier will perform and is, therefore, violative of the Commission's rules and section

18(b)(1) of the Shipping Act, 1916 (46 U.S.C. §817(b)(1)). Rule 106 must consequently be modified.

The Order also raised as an issue whether the tariff rules "result in the assessment of varying rates and charges which are unjustly discriminatory and constitute an unreasonable practice or regulation in violation of section 17." There is no evidence in the record that the tariff rules under consideration are actually applied in an unjustly discriminatory manner. There have been no allegations of unequal treatment of shippers/consignees in the allocation of chassis during periods of shortages. The Commission concludes, therefore, that the J/KAG chassis allocation process does not constitute an unreasonable practice in violation of section 17. The Conference's demurrage practices are another matter, however.

Tariff Rule 114 states that all containers, whether the carrier has provided a chassis therefor pursuant to Rule 106 or not, are subject to stated free time and demurrage, *e.g.,* five days' free time, excluding Saturdays, Sundays and holidays. Thereafter, demurrage is assessed in three periodic and increasing increments. The Commission finds the assessment of such demurrage during periods of chassis unavailability throughout the port area to be an unjust and unreasonable regulation and practice relating to or connected with the delivery of property and violative of section 17.[5] The Commission recognizes the dual composition of demurrage charges: (1) compensation for the storage of property or use of equipment, and (2) a penalty to induce its removal and further the public interest of minimizing port congestion. *Free Time and Demurrage Charges at New York,* 3 U.S.M.C. 89, 107 (1948). However, in situations where there is a port-wide lack of chassis, the punitive element of demurrage is inappropriate. As was noted in *Free Time and Demurrage Charges at New York, supra:*

> [w]here carriers and consignees are jointly affected by conditions beyond their control, neither should be subjected to an avoidable penalty, and neither should be permitted to profit from the other's disability.
> 3 U.S.M.C. at 107

This does not mean that a carrier should be precluded from assessing any demurrage under such circumstances. Rather, that portion of the demurrage charges which is compensation for the carrier's storage and protection of the consignee's property during the period involved (after the expiration of free time) or for the use of the carrier's equipment or facilities is properly assessible. *See Midland Metals Corporation v. Mitsui O.S.K. Line, et al.,* 15 F.M.C. 193 (1972), and *Free Time and Demurrage Charges at New York, supra,* at 108. In this case, such compensation is obviously reflected by the first period demurrage charges. Anything more would appear to be an unwarranted and unjustified penalty.

There is no need for the Commission to prescribe a rule of general applicability at the Port of Baltimore. The problem concerning chassis unavailability and consequent demurrage charges has not been shown to affect other carriers

[5] To the extent that there is any ambiguity in the phrase "to the extent available" in Tariff Rule 106, the Commission interprets it to refer to "availability" from normal sources of chassis supply within the port area.

or conferences. The Commission will, therefore, order only J/KAG to modify its relevant tariff rules (106 and 114) to comport with this decision.

THEREFORE, IT IS ORDERED, That the Requests for Evidentiary Hearing submitted by the Baltimore Customhouse Brokers and Forwarders Association and the Bureau of Hearing Counsel are denied, and

IT IS FURTHER ORDERED, That the Motion to Strike Unauthorized Notice of Deposition and the Motion for Leave to File Rebuttal Affidavit and Memorandum submitted by the Japan/Korea-Atlantic & Gulf Freight Conference are granted, and

IT IS FURTHER ORDERED, That the request for oral argument of the National Customs Brokers & Forwarders Association of America, Inc. is denied, and

IT IS FURTHER ORDERED, That the Japan/Korea-Atlantic & Gulf Freight conference modify its Tariff No. 36, FMC–7 consistent with the above discussion, and file its amended tariff with the Commission within 30 days of the date of this Order, and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-89

HANOVER BRANDS, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE

February 11, 1980

Notice is given that no appeal has been taken to the December 28, 1979 dismissal of the complaint in 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. 79–89

HANOVER BRANDS, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE ON COMPLAINANT'S REQUEST FOR DISMISSAL OF COMPLAINT

Finalized February 11, 1980

As requested in the Presiding Administrative Law Judge's December 6, 1979, notice, parties herein filed additional information. The parties each sent a letter. The Complainant's letter dated December 13, 1979 (received in the Commission December 18, 1979), stated:

Pursuant to your notification for parties to file additional information dated December 6, 1979, please be advised that our company will make payment in the amount of $5,840.47 within the specified time period delineated and approved by your office. Of course, payment will be made by Complainant assuming that this case will be considered closed.

The Respondent's letter dated December 19, 1979 (received in the Commission December 26, 1979), stated:

I have been advised by counsel for Hanover Brands, Inc. that Complainant acknowledges the propriety of the outstanding charges of $5,840.47 and will pay those charges to Sea-Land Service, Inc. as billed. Additionally, I received on December 16, 1979 a copy of a letter from counsel for Hanover Brands, Inc. to you specifying that the Complainant will, in fact, pay these outstanding charges.

At such time as Complainant, within the time period set, pays these outstanding charges, Sea-Land Service will provide you with appropriate verification of payment as ordered by your Notice issued December 6, 1979. If Sea-Land Service, Inc. may provide further assistance in this matter please advise the undersigned.

DISCUSSION

The Complainant on November 30, 1979, served (received December 3, 1979), its request for withdrawal and dismissal of its complaint in this proceeding. The Complainant indicates that the proper and correct rate applicable to shipment on September 23, 1978, of frozen vegetables weighing 35,950 lbs. and measuring 1,395 cubic feet, from Baltimore, Maryland, to Santo Tomas de Castilla was $231.00 per 40 cubic feet under Sea-Land Service, Inc., Tariff No. 283, FMC No. 161, effective date August 28, 1978, Item No. 1250, for a charge of $8,566.46. Sea-Land Service, Inc. applied a rate of $73.00 per 40 cubic feet under its Tariff No. 283, FMC No. 161, effective date August 28, 1978, Item No. 1250, and on the basis of that rate assessed a charge to claimant of $2,725.59 which charge was duly paid on October 24, 1978. Claimant has refused to pay the difference between the $2,725.59 and the charge as per tariff of $8,566.46 or $5,840.47 because it believed such charge to be so unreasonably high as to be detrimental to the commerce of the United States. Claimant requested waiver of the $4,840.47.

In Complainant's request for withdrawal and dismissal of the complaint herein, and Sea-Land's submission of a copy of its 15th Revised Page 159 amending rate for frozen foods, Item No. 1250, to $130.00 W, effective November 30, 1979, no mention is made by either party of the disposition as to the $5,840.47 for which waiver was sought.

Ordinarily the request for withdrawal and dismissal of the complaint possibly would not entail such information, but having been brought to the Commission's attention, the Commission should and possibly must have in this record such information. Therefore, so the Presiding Administrative Law Judge and the Commission could act knowledgeably upon the Complainant's request to withdraw and dismiss the complaint in this proceeding, the parties were directed to file information and evidentiary proof as to the disposition as to the $5,840.47. The responses were the letters quoted above.

There were previous letters in the proceeding from the parties, each letter dated November 29, 1979, was received in the Commission on December 3, 1979. The Complainant's letter contained a copy of the instant request for dismissal of the complaint which letter stated:

1. That since the time of shipment by Respondent, Sea-Land Service, Inc., which is at issue, Petitioner has been informed and is of the belief that Sea-Land Tariff No. 483, FMC 161, dated August 28, 1978, has been changed by the 15th revised page 159, effective November 30, 1979. Said change would provide for imports from Guatemala to Baltimore for foods, frozen, N.O.S. in straight or mixed shipments—trailers; minimum 40,000 pounds at the rate of $130.00 W. As a result of said proposed change and a reliance thereon, Petitioner feels that it is not in its best interest to continue with this action and thereby respectfully requests that the Complaint in this matter be withdrawn and this case be dismissed, with both parties paying their own costs.

The Respondent's letter stated, *inter alia,* that it had been notified of Complainant's determination to withdraw the complaint or to request dismissal of the proceeding; that in conformance with request of Complainant, Respondent was supplying a copy of 15th Revised Page 159 of Sea-Land Service Tariff No. 283 (FMC No. 161).

From the above it can be seen that the additional information requested by the Presiding Administrative Law Judge and supplied by the parties indicates that there will be no ignoring of the Shipping Act, 1916.

Upon consideration of the above and the record herein the Presiding Administrative Law Judge *finds* and *concludes* the Complainant's request to withdraw the instant complaint and discontinue this proceeding should be granted.

Also that Sea-Land's offer to provide the Commission with appropriate verification of payment of the outstanding freight charges concerned in this proceeding be accepted.

Wherefore, it is ordered,

(A) Request of Complainant to withdraw the complaint herein be and hereby is granted.

(B) Sea-Land will provide the Commission with appropriate verification of the payment of the outstanding freight charges in this proceeding.

(C) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

December 28, 1979

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 704(I)

DOW CORNING CORPORATION

v.

UNITED STATES NAVIGATION, INC.

NOTICE

February 14, 1980

Upon consideration, the Commission has determined not to further review the decision of the Settlement Officer in this proceeding served October 29, 1979. Accordingly, the decision is administratively final.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 704(I)

DOW CORNING CORPORATION

v.

UNITED STATES NAVIGATION, INC.

DISMISSAL OF COMPLAINT

Finalized February 14, 1980

DECISION OF TONY P. KOMINOTH, SETTLEMENT OFFICER

Dow Corning Corporation (complainant), a company engaged in the manufacture and distribution of synthetic resin, silicon rubber compounds and various chemicals, filed a complaint through its agent, Traffic Service Bureau, Inc., against U.S. Navigation, Inc. (respondent), for an alleged overcharge on a shipment of Chemicals, NOS (Catalyst), from New York, New York, to Antwerp, Belgium. Complainant seeks $347.35 in reparation plus 6% interest.

U.S. Navigation, Inc., in its answer, noted that the complaint was "improperly served." U.S. Navigation acts as agent for a number of water carriers including Hapag Lloyd, A.G., the actual carrier of the shipment in question. The "improper service" was not raised as a defense to the complaint; in fact, U.S. Navigation, Inc., identified itself as agent for Hapag Lloyd A.G. on this shipment and has consented to the informal procedures under Subpart S.

The basic authority for the filing of complaints can be found in section 22 of the Shipping Act, 1916 which provides in part:

> That any person may file with the Commission a sworn complaint setting forth any violation of the Act by a *common carrier by water, or other person subjct to the Act,* and asking reparation for the injury, if any, caused thereby. (emphasis added)

In this instance, the complaint was filed against U.S. Navigation, Inc., which is not a common carrier by water or other person subject to the Shipping Act, 1916. Complainant's failure to identify a common carrier by water in the complaint is fatal to their cause of action and deprives the Commission of jurisdiction to determine the controversy. *Caterpillar Overseas, S.A. v. South African Marine Corp. (N.Y.),* 19 F.M.C. 316 (1976). Further, the naming of an agent of such common carrier does not confer Commission jurisdiction over this matter. *Trane Company v. South African Marine Corp. (N.Y.),* 19 F.M.C. 374 (1976).

I realize that dismissal of the complaint at this date may preclude the filing of a new complaint in this matter since the two year statute of limitations has apparently run.* However, the latitude extended by the Commission in allowing an amendment to a complaint in order to preserve its viability within the two year limitation period does not extend to a situation where there has been a failure to name a jurisdictionally indispensable party. *Trane v. South African Marine, supra,* at 383-85; Cf. *Kam Koon Wan v. E. E. Black, Limited,* 75 F.Supp. 553 (D. Hawaii 1948) affirmed, 188 F.2d 558, *cert. den.* 342 U.S. 826 (1951).

Accordingly, the subject complaint is hereby dismissed.

(S) TONY P. KOMINOTH
Settlement Officer

October 29, 1979

*The bill of lading is dated September 30, 1977 and the shipment moved on a "Freight Prepaid" basis; however, there is no indication when the actual freight charges were paid. The complaint was filed with the Federal Maritime Commission on July 2, 1979.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 684

APPLICATION OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF SOLTEX POLYMERS CORPORATION

ORDER ADOPTING INITIAL DECISION

February 19, 1980

This proceeding was instituted pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817(b)(3)), upon the application of Sea-Land Service, Inc., for permission to waive $10,675.74 of the applicable freight charges owed by Soltex Polymers Corporation on a shipment of Synthetic Resin, N.O.S., that was transported from Houston, Texas to Moss, Norway via Bremerhaven, Germany, and Gothenburg, Sweden.

Administrative Law Judge Stanley M. Levy issued an Initial Decision granting Sea-Land's application. No exceptions were filed, but the Commission on its own motion, determined to review the Initial Decision.

Although the findings and conclusions of the Initial Decision are well founded and correct, one further matter raised by the Commission's grant of the subject application must be addressed. Because of the Commission's decision here, the carrier is permitted to collect less in freight charges than the amount that would have been due under the rate on file and in effect at the time of the shipment in question. To the extent forwarder compensation may have been based upon the total amount from which a waiver has been granted, the parties are reminded that Sea-Land's tariff and section 18(b)(3) of the Shipping Act require that such forwarder compensation be adjusted to reflect the freight rate actually paid.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding, is adopted; and

IT IS FURTHER ORDERED, That Sea-Land shall promptly publish in its appropriate tariff, the following notice:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 684, that effective January 1, 1979, for purposes of refund or waiver of freight charges on any shipments which have been shipped during the period from January 1, 1979 through May 10, 1979, the rate from Singapore on Synthetic Resin, N.O.S. is 101.50 W, subject to all rules, regulations, terms and conditions of said rate and this tariff.

IT IS FURTHER ORDERED, That this proceeding is discontinued.
By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 684

APPLICATION OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF SOLTEX POLYMERS CORPORATION

Adopted February 19, 1980

Application for permission to waive a portion of the freight charges granted.

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

This special docket application,[2] mailed to the Secretary of the Commission on October 19, 1979, seeks a waiver of freight charges of $10,675.74 arising out of a shipment of synthetic resin, NOS, sailing April 30, 1979, from Houston, Texas, to Moss, Norway, via Bremerhaven, Germany, and Gothenburg, Sweden, on Sea-Land vessel *Venture*, voyage 108E.[3]

The pertinent facts giving rise to the relief requested are as follows:

Prior to January 1, 1979, the applicable all-water rates via Sea-Land Service, Inc. (Sea-Land) from United States Gulf ports to Baltic ports were published in Sea-Land's Freight Tariff No. 162-A, FMC-137. This tariff contained an Item 4320 applying on Rosin or Resin, Viz: Synthetic NOS, packed with applicable rates applying on a weight basis. The item contained a circle reference 3 which indicated that the rate also applies in "Sea-Bulk" Liner Bags. "Sea-Bulk" is a registered name for a polyethylene liner that permits the conversion of a standard dry container for the contamination-free, moisture-free transportaion of dry bulk commodities.

During November 1978 the Gulf European Freight Association (GEFA), of which Sea-Land is a member, held meetings in order to establish a uniform FMC Agreement 10270 Tariff to apply via its member lines from the Gulf ports to ports in Scandinavia and the Baltic. At one of these meetings, Sea-Land's duly authorized Conference Manager, James Stevens, instructed the GEFA Chairman to overlay portions of Sea-Land's Tariff No. 162A for trans-

[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] Pursuant to section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. §817, as amended.

[3] One Hundred Seventy-Two days elapsed time from date of sailing until date of mailing of application.

fer into the new 10270 Agreement Tariff. The new tariff, GEFA Agreement No. 10270 Scandinavia/Baltic Tariff No. 1 (FMC-5) became effective January 1, 1979. On that same date Sea-Land Tariff No. 162-A, FMC-137 was cancelled.

The applicable rates of $101.50 W, minimum 15,241 kgs. on Rosin or Resin, viz: Synthetic N.O.S. were published in the new Tariff No. 1 on Page 176. However, as a result of a clerical error in the overlay of the Sea-Land Tariff No. 162-A no reference was made in the GEFA tariff to these rates applying on shipments in bulk in liner bags for the account of Sea-Land. When the omission was detected, Mr. Stevens notified the GEFA secretariat and the clause was added to 3rd Revised Page 176, effective May 10, 1979.

On April 30, 1979, one shipment consisting of three (3) containers of Synthetic Resin in bulk moved via Sea-Land from the port of Houston, Texas, destined to Moss, Norway. In the absence of specific tariff provision for bulk shipments, the bill of lading was rated on the basis of General Cargo, N.O.S. at the rate of $265.50 W/M. In addition to the ocean freight a Currency Adjustment Factor of 8% on the ocean freight, an Energy Surcharge of $3.50 per ton as freighted, and a Houston wharfage charge of $1.10 per ton of 2000 lbs. was assessed. Charges thus billed totalled $17,567.01. The shipper's agent, Stone Forwarding, has paid the ocean freight and Currency Adjustment on the basis of Synthetic Resin N.O.S. at the rate of $101.50W, minimum 15,241 kgs. plus the Energy Surcharge and Wharfage in full for a total of $6,891.27.

It was the intention of GEFA to publish a uniform tariff for its member carrier lines. The new publication was to include portions of the applicable Sea-Land publication, including the provisions for bulk shipments of Syntheitic Resin. However, through a clerical error in the transfer from one tariff to another, the bulk shipment provisions applying for the account of Sea-Land did not become effective until after the shipment had been made.

The applicants have certified that there are no other pending applications involving the same rate situation and that, to the best of their knowledge there are no other shipments of other shippers of the same or similar commodity which moved 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 involved in this application.

Section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. §817 (as amended by Public Law 90-298), and Rule 92(a), *Special Docket Applications*, Rules of Practice and Procedure, 46 C.F.R. §502.92(a), set forth the applicable law and regulation. The pertinent portion of section 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce . . . to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: *Provided further*, That the common carrier . . . has, prior to applying for . . . a refund, filed a new tariff with the . . . Commission which sets forth the rates on which such refund or waiver would

be based. . . . (and) Application for refund or waiver must be filed with the Commission within (180) days from the date of shipment.

The error in filing the new tariff, as recited in the application, is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

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

(1) There was an error due to an inadvertent failure to file a new tariff transferring the rates from one tariff to another as intended.

(2) Such a waiver of a portion of the freight charges will not result in discrimination among shippers.

(3) Prior to applying for authority to waive a portion of the freight charges, the conference filed a new tariff which set forth the rate upon which such waiver would be based.

(4) The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted for Sea-Land to waive a portion of the freight charges in the amount of $10,675.74[4]

An appropriate notice will be published in the conference tariff.

(S) STANLEY M. LEVY
Administrative Law Judge

WASHINGTON, D. C.
November 16, 1979

[4] Charges originally billed—$17,567.01; charges paid—$6,891.27.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-55

MATSON NAVIGATION COMPANY—PROPOSED BUNKER SURCHARGE IN THE HAWAII TRADE

ORDER OF CLARIFICATION

February 19, 1980

The Commission's Bureau of Hearing Counsel has filed a petition requesting clarification of that portion of the Commission's Report and Order Adopting Initial Decision, served November 23, 1979, which addresses the remedy to be applied to the overrecoveries of fuel costs collected by Matson Navigation Company.

In its Report and Order the Commission found that the Presiding Officer relied on the mechanism provided in Domestic Circular Letter No. 1-79 to adjust the overrecovery of fuel costs, *i.e.*, Line 7 of Form FMC-274. In its Petition for Clarification, Hearing Counsel asserts that the Presiding Officer did not rely exclusively on the remedies incorporated in the Circular Letter but also held that claims for reparations under section 22 of the Shipping Act, 1916 (46 U.S.C. §821) may lie. In support of this contention, Hearing Counsel refers to the following language at page 46 of the Initial Decision:

> In the last analysis, therefore, apparently the Commission has decided that the best protection for shippers paying surcharges at any particular time is the guarantee that Matson has been required to follow reasonable forecasting techniques (*failing which Matson would be liable to reparation cases*) and that in the event of overrecovery there will be future reducing effects on subsequent surcharges. (emphasis added).

Hearing Counsel concludes from the above quoted language that Form FMC-274 was to be used to adjust only those overrecoveries that result from discrepancies between a carrier's reasonable forecasts of fuel costs and consumption and that which subsequently actually occurs, with any other overrecoveries resulting from either unreasonable forecasts or erroneous methodologies to be remedied by section 22 complaints.

Total reliance on the remedy allowed by the Domestic Circular Letter would allegedly result in carriers avoiding their responsibility to establish just and reasonable rates, open avenues to avoid repaying overrecoveries, render inconsequential the Commission's function in determining the reasonableness of such surcharges, fail to compensate those who paid the excess charges, provide a windfall to carriers and possibly render carriers liable to double recoveries.

On the basis of the foregoing, Hearing Counsel specifically requests that the Commission clarify its November 23 Order to expressly permit the filing of section 22 reparation claims to lie for the recovery of excess revenues collected by Matson.

In its Reply to Hearing Counsel's Petition Matson takes the position that: (a) the Commission's Report and Order is not ambiguous; (b) its findings have already been incorporated into Matson's January 14, 1980 bunker surcharge; and (c) allowing an alternative remedy in this case would result in a needless multiplicity of litigation.

DISCUSSION

The portion of the Intitial Decision relied upon by Hearing Counsel, in and of itself, does not support the full extent of the relief requested. First, that language does not refer *specifically* to the overrecovery at issue in this case. Moreover, in other passages, the Initial Decision suggests that the remedy for overrecoveries is limited to the reduction of future surcharges through operation of the Domestic Circular Letter. I.D. at 35, 45, 46, 59, 60. For example, at page 35, the Presiding Officer advises:

> Again, although the Line 7 solution is not perfect, it is a substantial safeguard and given the practical difficulties of litigating the merits of constantly changing surcharges under strict time constraints, *perhaps there is no better solution*. (Emphasis added).

However, because the Initial Decision does not clearly address the appropriate remedy in this case, and because of the uncertainty expressed in Hearing Counsel's petition, the Commission is of the opinion that some clarification of the remedy issue is warranted.

The consideration that is perhaps most important with regard to remedies is whether a given approach will most effectively make whole the injured shippers without unduly penalizing the carrier. Docket No. 76–43—*Matson Navigation Company Proposed Rate Increases, etc.* Order on Reconsideration, 19 S.R.R. 263, 269 (1979). It was the Commission's intention that the Line 7 procedure provide the primary remedial device to be applied to the overrecoveries of fuel costs by carriers filing bunker surcharges.[1] This, however, is not intended to preclude the Commission from giving favorable consideration to shipper reparation claims under section 22 of the Act where the Line 7 remedy does not provide adequate relief.

Carriers should not realize a windfall from a proper application of Line 7 of Form FMC–274. Under a Line 7 theory any excess surcharge will have to be accounted for in future surcharges, and, it appears that bunker surcharges will continue to be filed. While a problem would be presented if no subsequent

[1] In fact, the application of the Line 7 procedure would, particularly in this case, appear to provide a more realistic remedy than reparations. The potential section 22 recovery here is a very small portion of the total freight an average rate payer remits. The theoretical maximum amount of money in question had the surcharge been in effect a full 120 days is $42,860, which represents only .07% of the $63,617,200 gross projected revenue during this period. I.D. at 19 n. 7. Under such circumstances it is highly unlikely that the recognition of a shipper's theoretical right of reparation in this case will result in the filing of any section 22 complaints and primary reliance upon such a remedial procedure would result in the carrier enjoying a windfall.

surcharges were imposed by a carrier, in this case Matson has, in fact, accounted for the excess recovery of fuel costs determined in this case in a subsequently filed surcharge.

Similarly, the application of current overrecoveries to future fuel cost needs does afford at least some of the overcharged ratepayers a benefit under such circumstances.[2] While not all of Matson's shippers remain the same due to the seasonal nature of some commodity movements, the majority of them should be the same from one four month period to the next. These should include the large volume shippers such as the intervenors in this case.

There was no ambiguity about the possibility of double recovery in the Commission's Report and Order in this case. Reparations are discretionary and if in any particular case the Commission is of the opinion that Line 7 has effectively returned any excess surcharge revenue to the complainant, then it would not appear to be an abuse of discretion to refuse to order reparation under section 22 to the extent a shipper was actually compensated by such a procedure. However, as indicated above, this should not be construed so as to prevent shippers from seeking reparations in those circumstances where the Line 7 remedy proves inadequate.

Finally, the Commission emphasizes the fact that the use of Line 7 of Form FMC-274 does not relieve carriers of their legal obligation to file reasonable rates. Regardless of the available statutory remedies, carriers still have a legal obligation to charge and establish reasonable rates. In this regard, the Commission will exert every effort to devise and utilize whatever meaningful and lawful remedial actions are warranted in any particular case.

THEREFORE, IT IS ORDERED, That the Petition for Clarification filed by Hearing Counsel is granted to the extent indicated above, and is denied in all other respects.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[2] As was noted in the Initial Decision, the subject 4.43% surcharge should have been set at 4.24%. (I.D. at 59). This computes to $.11 per barrel of bunker fuel allocable to general cargo and consumed in the four month test period in this case. See I.D. at 42. If it can be assumed that Matson's fuel consumption will remain reasonably constant in the near future the Line 7 accounting of the excess recovery should dampen the following four months' per barrel fuel cost by a figure of similar magnitude.

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND ACTIVITIES

[GENERAL ORDER 13, AMDT. 2 AND GENERAL ORDER 43; DOCKET NO. 79-65]

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

PART 552—CERTIFICATION OF COMPANY POLICIES AND EFFORTS TO COMBAT REBATING IN THE FOREIGN COMMERCE OF THE UNITED STATES

Feburary 20, 1980

ACTION: Final Rule

SUMMARY: These final rules implement provisions of Public Law 96-25, 93 Stat. 71, which mandates that the Commission require the Chief Executive Officer of every vessel operating common carrier by water in the foreign commerce of the United States to file periodic certification attesting to company policies and efforts to combat rebating. Discretionary authority is given to the Commission to require similar certification from any shipper, consignor, consignee, forwarder, broker, other carrier or other person subject to the Shipping Act, 1916.

EFFECTIVE DATE: February 27, 1980

SUPPLEMENTAL INFORMATION:

The Commission previously gave notice (44 Fed. Reg. 39232-33) that it proposed to amend 46 C.F.R. § 536 and to add a new Part 552 to enable the Commission to implement the provisions of Public Law 96-25, 93 Stat. 71, which mandates that the Commission require the Chief Executive Officer of every vessel operating common carrier by water in the foreign commerce of the United States to file periodic certification attesting to company policies and efforts to combat rebating. Further, Public Law 96–25 gives the Commission discretionary authority to require similar certification from a shipper, consignor, consignee, forwarder, broker, other carrier, or other person subject to the Shipping Act, 1916. Comments from the public were invited with respect to the proposed rules, and a total of 15 comments were filed on behalf of 29 representative commentators. Of the 15 separate comments, 8 comments represented the opinion of 21 conferences, 3 comments represented the views of U.S. flag carriers (Farrell Lines, Lykes Brothers Steamship Co. and Sea-Land Service), 2 comments were received from 2 shippers (City Products Corporation and NCR Corp.), 1 comment was submitted by the Council of European and Japanese National Shipowners' Associations (CENSA) and the Department of State forwarded an Aide Memoire from the Consultative Shipping Group (CSG).

POSITIONS OF THE COMMENTATORS

Many of the commentators viewed portions of the proposed rules as exceeding the authority prescribed by Public Law 96–25. One commentator was in total agreement with the rules as proposed, while another totally rejected the rules in the proposed form. The majority of comments, however, suggested specific changes in the proposed rules.

The CENSA group urged that the rules as proposed be rejected because the certification would (1) exceed the statutory mandate under section 4(b) of Public Law 96–25, and (2) do violence to established principles of international law and comity.

Three commentators urged that the certification requirements be binding upon nonvessel operating common carriers (NVO's) as well as vessel operating common carriers (VOC's) for the reasons that, (1) NVO's would not present the Commission with an identification problem since they are required to file tariffs with the Commission and, (2) that VOC's are sometimes in competition with NVO's, and NVO's would gain an unfair advantage by not being bound to the certification requirements. One of these commentators also urged that in addition to NVO's, freight forwarders and major shippers, consignees and consignors be bound by the certification requirements.

One commentator suggested that the Chief Executive Officer be defined as the most senior officer within the company as designated by the Board of Directors. This commentator also suggested that, if the Chief Executive Officer is domiciled in a country other than the United States, the top ranking official domiciled in the United States also be required to make such certification in order to avoid any legal impediments in the country where the Chief Executive Officer resides.

One commentator wanted to make the certification subject to national law and/or the express permission of its government.

One commentator urged clarification of section 552.2(a) in order to show that this section applies to the company generally as well as officers, employees or agents of that company. The same commentator also stated that the broad promulgation required under paragraph (b) of this section is neither feasible nor reasonable for persons other than vessel operating common carriers, since such person, particularly shippers, have many employees and agents who are in no way connected or associated with the company's ocean shipping practices and to require promulgation to such persons is an unnecessary and undue burden.

One commentator states that the language of paragraph 552.2(c) could be interpreted as requiring the filing company to establish an intra-corporate program to prevent malpractices, while the statute only appears to call for disclosure of the measures, if any, which have been taken by the filing company to prevent or correct the illegal rebating. Two commentators urge the deletion of "and any subsidiaries, affiliated companies, or agents" from this paragraph, stating that compliance is impossible in the current world of interrelated companies and submitted that the Commission does not have jurisdiction to so extend the clear terms of the statute.

Nine commentators favored deletion of the last sentence of paragraph (d) of section 552.2 which states that full cooperation shall include disclosure of all relevant documents and information. Commentators felt that this requirement exceeded the statutory authority under section 4(b) of Public Law 96-25 because regardless of any privilege, statutory requirement or other ground for exception from such disclosure, the Commission has introduced a substantive change in the certification requirement that was neither considered nor contemplated by Congress. Another commentator suggests that at the very least, if not deleted, such affirmation for disclosure of relevant documents or information be required "only as otherwise required by law." Another commentator stated that the Commission has the authority to implement the certification requirements only with respect to the frequency, form and specific content of the certification.

Six commentators, all representing conferences/rate agreements, strongly opposed the tariff notification requirement of section 552.3, as applicable to conferences and rate agreements. These commentators argue that this requirement would serve no useful function, that the Commission offered no justification for this requirement in the Notice of Proposed Rulemaking, and that conferences and rate agreements have neither statutory responsibility nor any means of knowing whether member lines have implemented such policies. Their concern is that the carrier would be subject to additional sanction for the violation of the tariff notation required by the proposals and that such a requirement does not in any way enhance enforcement of the anti-rebating laws.

Two commentators urged that section 552.4—(Change of Chief Executive Officer) be deleted, since it is the commitment of the carrier, and not the Chief Executive Officer, that is the goal of the certification process and there is no reason to believe that a company would change its policy with a change of its executive officer.

Regarding the reporting requirement of section 552.5, one commentator suggested that a period of every three years would fully satisfy the statutory purpose and would significantly reduce the administrative burden of the certifications to the carrier. Another commentator suggested that all certifications be required to be filed within a specified period of time in each calendar year, so as to avoid inadvertent default because the carrier failed to recall the date of its initial submission to the Commission.

Regarding paragraph (b) of the reporting requirement section, one commentator questioned whether annual certifications for persons other than carriers should be required unless the Commission has good cause.

All comments submitted with respect to the proposed rules were given due consideration. The following is a section-by-section analysis of the changes made as a result of the comments received.

552.1 *Scope*

Two conference commentators and one carrier suggested that NVO's be bound by the proposed rules. One of these commentators also recommended that major shippers, consignees, consignors and all freight forwarders be bound by the rules proposed.

It was pointed out that since NVO's are already required to file tariffs with the Commission, and freight forwarders are required to obtain licenses from the Commission, the identification problem would be manageable and not an administrative burden to the Commission. Further, commentators argue that VOC's are sometimes in competition with NVO's and to require NVO certification would tend to eliminate the opportunity for the NVO's to gain an unfair advantage through not being subject to the anti-rebating principles of the statute. In order to implement the certification requirement of Public Law 96-25 expeditiously, the final rule has not been changed to bind NVO's to the same certification requirement as vessel operators. However, the Commission will consider the issuance of a separate notice of proposed rulemaking proposing to amend this rule to bind NVO's and other entities to the annual certification requirement.

Freight forwarders, shippers, consignees and consignors do represent an enormous number of potential ocean carrier users for which a certification requirement cannot feasibly be administered by the Commission. The discretionary authority prescribed in the statue for such certifications on a case-by-case basis has, however, not been changed.

552.2 *Form of Certification*

The first paragraph of this section has been changed to include a definition of "Chief Executive Officer". Paragraph (a)(1) has been clarified to show that rebates *by the company*, as well as by any officer, employee or agent, are prohibited.

Paragraph (b) of the proposed rules which is now paragraph (a)(2), has been changed to require that the company policy be promulgated to each company owner, officer, employee and agent who is directly or indirectly connected with commercial ocean shipping, import or export sales or purchasing.

Proposed paragraph (c) which is now paragraph (b), has been changed to conform more closely with the statutory language. The reference to subsidiaries, affiliated companies or agents has been deleted in order to ascertain the specific efforts made within the company or otherwise to prevent illegal rebating.

Proposed paragraph (d) which is now paragraph (c), has also been changed to conform more closely with the statutory language. The Commission deems it unnecessary to elaborate on the question of what constitutes full cooperation since this rule will not and cannot affect the obligation of carriers to produce documents and information in response to subpoenas or discovery in rebating investigations and the statutory sanctions for failure to produce such documents and information.

The changes in section 552.2 have been incorporated in the certification form.

With regard to the one comment suggesting that the Commission also require certification from the top ranking official of a foreign company who is domiciled in the United States, the Commission has determined that such a requirement is not necessary at this time.

552.3 *Tariff Notification*

The justification for this requirement evolves from the basic definition and purpose of a tariff, i.e. a publication containing the actual rates, charges, classifications, rules, regulations, and *practices* of a carrier or conference of carriers for transportation by water (46 C.F.R. §536.2(m)). The term "practice" refers to usages, customs, or modes of operation which in anyway affect, determine or change the transportation rates, charges, or services provided by a carrier. The unlawful practice of rebating, or charging any rate lower than those in published tariffs, has been singled out by Congress to be "eliminated from the U.S. ocean commerce".

To require that a practice (or policy) against illegal rebating be published in a carrier's tariff is consistent with the purpose of the tariff filing requirements and the purpose of Public Law 96-25. The Commission believes that such publication will inform the shipping public of the carrier's prohibition against rebates.

Although the Commission agrees with several conference commentators that conference/rate agreements have neither the responsibility nor the means of knowing whether such policies of the member lines have been implemented, it believes that conference/rate agreements do have the duty to publish the anti-rebating practices or policies of their members.

Therefore, section 552.3 has been revised to provide that, when the carrier's tariff is a conference/rate agreement tariff, the carrier shall ensure that the conference publish the carrier's tariff provision in the conference or rate agreement tariff.

552.4 *Change of Chief Executive Officer*

Two commentators urged that this section be deleted since it is the commitment of the carrier, and not its chief executive that is the objective of the certification process and that there is no reason to believe that a company policy in favor of adhering to United States laws would change because of a change of the Chief Executive Officer.

While the Commission agrees that company policy may not change with a new Chief Executive Officer, the statute mandates that the Commission shall have such certification from the Chief Executive Officer and the proposed paragraph assures that such certification will be kept up-to-date, regardless of company personnel changes.

Therefore, no change in this requirement has been made.

552.5 *Reporting Requirements*

This section has been revised to require written certification from vessel operating common carriers on or before March 31 of each year. The provision referring to every person other than a vessel operating common carrier required to submit such certification has been changed to delete the annual certification requirement.

The Commission has considered all filed comments and arguments reasonably related to this rulemaking proceeding.

Accordingly, pursuant to the provisions of section 4 of the Administrative Procedure Act (5 U.S.C. § 553), sections 21 and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 820 and 841(a)), the Federal Maritime Commission hereby amends 46 C.F.R. § 536 and enacts 46 C.F.R. § 552 as follows. The reporting requirements contained in 46 C.F.R. § 552 sections 2, 3, 4 and 5(a) have been approved by the U.S. General Accounting Office under number B–180233 (R0663).

PART 536

Section 536.5(c)(2) is amended to add the following language:

Every vessel operating common carrier shall publish a tariff provision to be effective upon filing which shall read substantially as follows:

> (Name of Company) has a policy against the payment of any rebate, directly or indirectly, by the company or by any officer, employee, or agent, which payment would be unlawful under the United States Shipping Act, 1916. Such policy has been certified to the Federal Maritime Commission in accordance with the Shipping Act Amendments of 1979, Public Law 96–25, 93 Stat. 71, and the regulations of the Commission set forth in 46 CFR 552.

When the carrier's tariff is a conference/rate agreement tariff, the carrier shall ensure that the conference or rate agreement publish the carrier's tariff provision in the conference/rate agreement tariff.

PART 552

552.1 *Scope*

The requirements set forth in this part are binding upon every vessel operating common carrier by water in the foreign commerce of the United States and, at the descretion of the Commission, will be applicable to any shipper, consignor, consignee, forwarder, broker, other carrier, or other person subject to the Shipping Act, 1916.

552.2 *Form of Certification*

The Chief Executive Officer (defined as the most senior officer within the company designated by the board of directors, owners, stockholders or controlling body as responsible for the direction and management of the company) of every vessel operating common carrier by water in the foreign commerce of the United States and, when required, at the discretion of the Commission, the Chief Executive Officer of any shipper, consignor, consignee, forwarder, broker, other carrier or other person subject to the Shipping Act, 1916, shall file a written certification, under oath, as set forth in the format in Appendix A attesting to the following:

(a)(1) That it is the stated policy of the filing company that the payment, solicitation or receipt of any rebate, directly or indirectly, by the company or by any officer, employee, or agent which is unlawful under the provisions of the Shipping Act, 1916, is prohibited; and

(2) That such company policy was promulgated (together with the date of such promulgation) to each company owner, officer, employee, and agent who is, directly or indirectly, connected with commercial ocean shipping, import or export sales or purchasing; and

(b) The details of measures instituted within the filing company or otherwise to eliminate or prevent the payment of illegal rebates in the foreign commerce of the United States; and

(c) That the filing company will fully cooperate with the Commission in any investigation of illegal rebating or refunds in United States foreign trades and with the Commission's efforts to end such illegal practices.

552.3 *Tariff Notification*

Within 90 days after the effective date of this Part, each vessel operating common carrier by water in the foreign commerce of the United States shall file a provision in each of its tariffs that shall read substantially as follows:

(Name of Company) has a policy against the payment of any rebate, directly or indirectly, by the company or by any officer, employee, or agent, which payment would be unlawful under the United States Shipping Act, 1916. Such policy has been certified to the Federal Maritime Commission in accordance with the Shipping Act Amendments of 1979, Public Law 96-25, 93 Stat. 71, and the regulations of the Commission set forth in 46 CFR 552.

When the carrier's tariff is a conference/rate agreement tariff, the carrier shall ensure that the conference or rate agreement publishes the carrier's tariff provision in the conference/rate agreement tariff. This provision shall be effective upon filing.

552.4 *Change of Chief Executive Officer*

Every vessel operating common carrier by water and any other person required by the Commission to file a certification in accordance with section 552.2 shall notify the Secretary, Federal Maritime Commission, of the identity of any new Chief Executive Officer within thirty (30) days of such appointment. Each new Chief Executive Officer shall file a certification as required by section 552.2 of this Part within thirty (30) days of appointment.

552.5 *Reporting Requirements*

(a) Every vessel operating common carrier by water in the foreign commerce of the United States required by this Part to submit a written certification to the Secretary, Federal Maritime Commission, shall submit such certification on or before March 31 of each year.

(b) Every person other than a vessel operating common carrier by water in the foreign commerce of the United States who is required by the Commission to submit a written certification under section 552.2 of this Part shall submit the initial certification to the Secretary, Federal Maritime Commission, on the date designated by the Commission and, thereafter, as the Commission may direct.

By the Commission

(S) FRANCIS C. HURNEY
Secretary

APPENDIX A

(Name of Filing Company)

Certification of Company Policies and Efforts to Combat Rebating in the Foreign Commerce of the United States

Pursuant to the requirements of section 21(b) of the Shipping Act, 1916, 46 U.S.C. § 820, and Federal Maritime Commission regulations promulgated pursuant thereto, 46 C.F.R. § 552, I, ________________, Chief Executive Officer of (name of company), state under oath that:

1. It is the policy of (name of company) that the payment, solicitation, or receipt of any rebate, directly or indirectly, by the company or any officer, employee, or agent of such company which is unlawful under the provisions of the Shipping Act, 1916, is prohibited.
2. On or before ____________, 19___, such company policy was promulgated to each owner, officer, employee and agent of (name of company) who is directly or indirectly connected with commercial ocean shipping, import or export sales or purchasing.
3. [Set forth the details of measures instituted by the filing company or otherwise to eliminate or prevent the payment of illegal rebates in the foreign commerce of the United States].
4. (name of company) affirms it will fully cooperate with the Federal Maritime Commisison in any investigation of illegal rebating or refunds in United States foreign trades and with the Commission's efforts to end such illegal practices.

____

Signature

Subscribed and sworn before me this ____ day of ________________ 19___.

____

Notary Public

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-73

DRAYAGE SERVICE UNDER AGREEMENT NO. 2846

REPORT AND ORDER

February 21, 1980

A steamship conference with section 15 authority to perform "delivery" service relating to port-to-port shipments, may deliver cargo to inland points located within a reasonable distance from the ocean terminals used by conference vessels; provided, that such transportation is geographically limited to motor carrier "exempt zones" established under 49 U.S.C. § 10526(b) and is, in any event, exempt from ICC economic regulation.

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

The Commission has before it the "Petition for Declaratory Order" filed by the 17 ocean carriers which comprise the West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference (WINAC), and the reply comments submitted by eight interested parties (Intervenors).[1]

WINAC serves the U.S. inbound trade pursuant to FMC Agreement No. 2846. Among their other activities, WINAC lines offer an "intermodal drayage service" between ocean terminals at various locations within the Port of New York and New Jersey and the Conrail "Portside" railroad terminal located in Port Elizabeth, New Jersey (Conrail Drayage) for containerized cargoes ultimately destined to interior points.[2] WINAC's petition does not state whether Conrail Drayage is furnished for cargo moving inland on *through* bills

[1] The other Intervenors are: Seatrain International, S.A., a member of WINAC; the Port Authority of New York and New Jersey; New York Terminal Conference; Virginia Port Authority; Maryland Port Administration; Delaware River Port Authority; Port of Philadelphia Marine Terminal Association; and the Commission's Bureau of Hearing Counsel.

[2] Conrail Drayage is performed by motor carriers. WINAC did not provide the exact location of the Conrail terminal or the ocean terminals used by its member lines, but the Commission has taken official notice of the locations specified in the 1978 "New York-New Jersey Port Directory." This directory indicates that about half the WINAC lines use terminals on the west side of the Hudson River (Port Elizabeth, Weehauken, Port Jersey, Newark) and half use terminals in Brooklyn, six miles due east of Port Elizabeth. WINAC Tariff No. FMC 3, 3rd Revised Page 58, Item 9 states that the charge for Conrail Drayage is "open" subject to a $55.00 minimum amount. Three member lines with terminals in Brooklyn publish $75.00 "open rates" under this provision. The terminal tariff of Sea-Land Service, Inc., FMC-T No. 3, 13th Revised Page 128, Item No. 5160, provides for Conrail Drayage at $21.00 per container except for WINAC shipments. WINAC shipments are assessed the $55.00 minimum specified in the WINAC tariff.

of lading or on *separate* bills of lading, but WINAC's tariffs do not include rates for intermodal transportation under through bills of lading *to* interior points within the United States. WINAC does publish through intermodal rates *from* interior points in Italy and Yugoslavia. WINAC member lines do not offer through intermodal service to interior U.S. points under separately published tariffs.

WINAC's organic conference agreement (Agreement No. 2846) has been approved by the Commission pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814). The preamble to Agreement No. 2846 contains two paragraphs which provide, in pertinent part, as follows:

> The parties . . . hereby associate themselves . . . [to establish] reasonable rates, charges and practices for the transportation of merchandise . . . in the trade from Italian ports (including Islands), points in Italy (including Islands), Yugoslavia ports and points, to the extent such cargo moves through ports of Italy and Yugoslavia to North Atlantic ports of the United States (Hampton Roads/Portland Range), whether moving on a through Bill of Lading or otherwise.
>
> This Agreement shall also extend to . . . arrangements or agreements among the parties: (1) with other modes of transportation for the movement of cargo to and/or from inland points moving from loading to discharge ports covered by this Agreement, whether moving under through bills of lading or otherwise; (2) concerning intermodal shipments, inland rates, rules, changes, classifications, practices, liability, Bill of Lading conditions, per diem, free time, detention on Carrier-provided containers, chassis and related equipment, position of equipment, interchange with connecting carriers, terminal and shoreside loading operations, including wharfage, free time and demurrage, *receipt, handling, storage and delivery of cargo,* consolidation, container yards, depots and freight stations, insofar as the foregoing concern cargo moving from loading to discharging ports covered by this Agreement whether any of the foregoing related to through Bill of Lading movements or otherwise; and (3) such other matters as may be *ancillary to the transportation of said intermodal shipments, whether moving on a through Bill of Lading or otherwise,* it being the intention of the parties to include within the scope of this Agreement to the maximum extent as may from time to time be permitted by applicable law, rates, charges and practices relating to *movements from and/or to inland points of origin or destination whether or not moving under a through Bill of Lading. . . .* (Emphasis supplied).

WINAC requests a ruling that the preamble to Agreement No. 2846, and particularly the portions underscored above, permit it to concertedly:

> [e]stablish, maintain, modify, or eliminate charges, including drayage charges, for the transportation of intermodal shipments from the members' ocean terminals at U.S. North Atlantic ports to inland points of destination. (Petition at paragraph 5).

The term "intermodal shipment" was not defined and no particular attention was given to it by the petitioners. The context of WINAC's petition indicates, however, that the conference interprets the term broadly and would prefer to perform Conrail Drayage for through bill shipments from European origins to *U.S. inland points* as well as for shipments rated only to U.S. *ports.*

In addition to the preamble's expansive language pertaining to "intermodal shipments," WINAC states that Conrail Drayage should be considered an integral part of its port-to-port transportation service. It is contended that Conrail Drayage is simply a manifestation of an ocean carrier's traditional responsibility to deliver cargo to a safe and convenient "place of rest," and

WINAC finds support for this argument in an informal opinion from the Director of the Commission's Bureau of Compliance.[3]

Most of the Intervenors oppose a construction of Agreement No. 2846 which would permit WINAC to establish rates for inland drayage or delivery services for any type of cargo over distances as extensive as those involved in Conrail Drayage.[4] There are, however, significant differences in the viewpoints expressed by the eight Intervenors.

Seatrain International is only concerned that Agreement No. 2846 not be construed to include through intermodal transportation to U.S. points or services ancillary to such transportation. The New York port interests are only concerned with the possibility that WINAC's Conrail Drayage practices could discourage cargo movements through the Port of New York. The representatives of Philadelphia, Baltimore and Norfolk port interests are only concerned with the possibility that WINAC's Conrail Drayage practices could unduly favor the Port of New York at the expense of other WINAC ports. Hearing Counsel believes that Agreement No. 2846 encompasses drayage services ancillary to port-to-port (or point-to-port) shipments.

The specific arguments raised by the Intervenors are:

(1) The instant petition represents an attempt by WINAC to avoid ordinary section 15 procedures and the need to justify the application of anticompetitive practices (price-fixing) to inland drayage activities which have developed subsequent to the Commission's approval of Agreement No. 2846–26 on December 12, 1975.

(2) The "ancillary authority" language in Agreement No. 2846 is overly broad, highly ambiguous and should not be extended to Conrail Drayage unless further details are provided. Among the allegedly critical facts omitted from WINAC's petition are: the types of shipments to be handled (port-to-port or house-to-house); the persons who will actually perform the drayage and the arrangements under which they will operate; the level of WINAC's inland drayage charges at each U.S. port it serves; and whether authority to "eliminate" inland drayage charges would authorize WINAC to absorb such charges at any or all the ports it serves.

(3) Any WINAC tariff covering Conrail Drayage should allow the shipper the *option* of performing such services for itself.

(4) WINAC would apparently assess an inland drayage charge only at New York. The $55.00 minimum rate now employed is higher than the rate charged by some WINAC member lines for the same service (*e.g.*, Sea-Land) and could therefore cause cargo to be diverted from New York.

[3] The July 27, 1978 staff opinion concerned the performance of Conrail Drayage by seven North Atlantic/Europe conferences with agreements similar to Agreement No. 2846. To the extent that opinion equated a carrier's duty to deliver cargo to a "place of rest" with a local delivery service covering several miles, it was erroneous. "Place of rest" is ordinarily a protected area adjacent to ship's tackle. The concept does not involve delivery to the shipper (or the shipper's agent) at locations beyond the ocean carrier's terminal.

[4] It is at least 15 highway miles from the New York Port Authority's Brooklyn piers to Port Elizabeth according to the 1979 *Rand McNally Road Atlas.* The highway distance between the various New Jersey ocean terminals and the Conrail Portside terminal may also be appreciable in any given case.

(5) If WINAC did not establish inland drayage charges at *all* its U.S. ports at rates which approximate the *prevalent rates* at each such port, there could be unlawful discrimination between shippers and ports. Unless New York bears the fair weight of the higher operating costs which prevail at its port—in particular the high cost of moving containers from Long Island piers to New Jersey rail yards—cargo will be diverted from Norfolk, Baltimore and Philadelphia.

(6) Any difference in WINAC's charges for inland drayage services performed at adjacent ports would violate section 205 of the Merchant Marine Act, 1936 (46 U.S.C. § 1115). *See Associated Latin American Freight Conference,* 15 F.M.C. 151 (1972), requiring uniform assessment of conference wharfage charges.

(7) Practices concerning the placement of loaded and unloaded containers at rail ramp locations—both within and without recognized "port areas"—should be uniform for (a) conferences with intermodal authority and (b) conferences without such authority.

DISCUSSION

The question posed by the instant petition is whether WINAC now possesses section 15 authority to establish rates and practices for Conrail Drayage, not whether such authority is or could be implemented in a fashion which violates the Shipping or Merchant Marine Acts. The conclusions reached concerning the section 15 issue do not preclude subsequent consideration of the lawfulness of specific WINAC rates and practices for inland drayage services in New York or other United States ports.

A conference may not lawfully set rates for ancillary services applicable to basic transportation movements which it lacks section 15 authority to provide. The first paragraph of the Agreement's preamble limits WINAC's activities to transportation terminating at *U.S. ports.*[5] Through intermodal transportation is only available from points in Italy and Yugoslavia, and may be extended to U.S. inland points only by an express amendment.[6] Language in the preamble's second paragraph referring to such matters as "through bills of lading," "inland points," "inland rates," and "agreement with other modes of transport," is limited to intermodal traffic originating at *European points* and cannot be viewed as authorizing a United States intermodal service inconsistent with the geographic scope provisions of the preamble's first paragraph.[7] Consequently, no delivery, drayage or other ancillary services applicable to *through intermodal carriage to U.S. points* may be established by WINAC pursuant to Agreement No. 2846. That Agreement can cover Conrail Drayage only if the drayage is performed for cargo moving under a *separate* U.S. inland bill of lading.

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[5] This limitation does not, of course, prohibit WINAC from carrying cargo which moves inland from U.S. ports via non-WINAC means. It only limits WINAC's authority to itself undertake such inland transportation.

[6] WINAC's authority to serve inland points in other European countries via Italian and Yugoslavian ports, first approved on December 19, 1974 (Agreement No. 2846-24), expired on October 15, 1975.

[7] Ambiguous agreements are narrowly construed against their proponents. *American West African Freight Conference* (Agreement No. 7680-36), 18 S.R.R. 339, 342 (1978).

Shipments carried by more than one mode of transport under separate bills of lading are not considered "intermodal shipments" from a section 15 point of view.[8] Such shipments are treated like other types of port-to-port shipments, even if carried at special proportional rates. *See Investigation of Overland and OCP Rates,* 12 F.M.C. 184, 208 (1969), *aff'd sub nom. Port of New York Authority v. Federal Maritime Commission,* 429 F.2d 663 (5th Cir. 1970).

The performance of inland transportation beyond a carrier's immediate terminal area (pier, wharf and cargo storage facilities) is not a matter "ancillary" to a basic conference port-to-port service. Neither is the concerted provision of transportation as extensive as that involved in Conrail Drayage authorized by section 15 language pertaining only to "drayage" or "ancillary services." A more precise description is necessary. Such a description is found in Agreement No. 2846, however, which expressly permits the "delivery of cargo" as a service ancillary to WINAC's port-to-port shipments.

A conference with authority to perform "delivery" services for port-to-port shipments may haul cargo to facilities of the shipper/consignee (or its designated agent) which are situated a reasonable distance from the ocean terminals used by conference members. In the instant case, the inland carrier (Conrail) is the shipper's agent for purpose of the local delivery provision, and drayage to the Conrail terminal is equivalent to delivery at the shipper's own plant. Moreover, because the Conrail terminal is less than thirty highway miles from the furthest WINAC pier and is located within the New York/New Jersey "commercial zone" exempt from Interstate Commerce Commission motor carrier regulation under 49 U.S.C. § 10526(d),[9] it is concluded that Conrail Drayage does not exceed a reasonable distance when undertaken from either the New Jersey or the Brooklyn piers used by WINAC members.

The exact geographic scope of a local pick-up and delivery service and the details of its availability are matters within the discretion of the conference in the first instance. These details need only be described with particularity in the conference tariff. It is necessary, however, for conference agreements pertaining to the pick-up or delivery of port-to-port cargo to clearly state that agreement may be reached concerning cargo pick-up or delivery to *local* receiving facilities designated by the shipper/consignee and that any such services shall not include activities subject to economic regulation under the Interstate Commerce Act.[10]

The exclusion of ICC regulated delivery activities is required because the FMC and ICC are prohibited from regulating a service performed by the same

[8] Conferences may not perform intermodal services absent approval of a specific section 15 agreement delineating the services involved; intermodal authority of any type will not be implied. *Lykes Bros. Steamship Company, Inc. v. Far East Conference,* 19 F.M.C. 589, 593 (1977). Because WINAC may not presently serve U.S. inland points, the use of the term "intermodal shipments" in Agreement No. 2846 is ambiguous and misleading. To remedy this situation, a clarifying amendment should be submitted by WINAC which indicates that ancillary services may be performed only with respect to shipments within the scope of the preamble's first paragraph. Such an amendment could simply delete the phrase "intermodal shipments" from item (2) of the second paragraph and replace it with the phrase "shipments within the scope of this agreement" in item (3) of that paragraph.

[9] Port Elizabeth is in Elizabeth, New Jersey, a "contiguous municipality" relative to the ocean terminals used by all of the WINAC member lines. *See* 49 C.F.R. §§ 1048.100 and 1048.101.

[10] Local pick-up and delivery service by motor carriers is exempt from Interstate Commerce Act regulation (other than safety standards) when performed within local "commercial zones" established under 49 U.S.C. § 10526(b). Although local delivery services need not be performed by motor carrier, any alternative method chosen by the ocean carrier must also allow full Shipping Act regulation of the service provided.

persons at the same time. 46 U.S.C. §832. To avoid confusion and possible regulatory overlap, local cargo delivery which does involve ICC regulated transportation must take the form of joint through intermodal rates filed pursuant to section 536.8 of the Commission's Rules (46 C.F.R. §536.8).[11] Such rates may be offered only by conferences with express "intermodal authority" under section 15 of the Shipping Act to serve appropriate interior points within the United States.

Because Agreement No. 2846 does not plainly state its applicability to the delivery of port-to-port cargoes to local facilities designated by the shipper/consignee, and does not restrict this ancillary activity to areas exempt from ICC motor carrier regulation, WINAC should submit an appropriate clarifying amendment at its earliest convenience.[12] In the future, agreements involving "pick-up and delivery services" will not be approved unless they describe the services upon which the proponents may agree in a manner consistent with this decision.

THEREFORE, IT IS ORDERED, That the "Petition for Declaratory Order" of the West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference member lines is granted to the extent indicated above, and denied in all other respects.

By Order of the Commission.

(S) FRANCIS C. HURNEY
Secretary

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[11] Section 536.8 is not restricted to *joint* through transportation. It also applies to the through route offerings of a single carrier which involve inland transportation extending beyond ocean terminal areas. An ocean carrier therefore has some flexibility in deciding whether to offer a through rate door-to-door service or a port-to-port service with separate pick-up and delivery. In all situations, inland transportation services must be separately identified and appropriately rated in an ocean carrier's tariff.

[12] An appropriate amendment to Agreement No. 2846 would authorize the conference to furnish:
local pick-up or delivery to or from shipper designated locations (including inland carrier terminals) within the Interstate Commerce Commission "commercial zone" set forth in 49 C.F.R. Part 1048 for each port served; *Provided*, that any pick-up or delivery service offered shall not be subject to economic regulation under the Interstate Commerce Act.

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 ADOPTING INITIAL DECISION

February 21, 1980

This proceeding was instituted by Order of Investigation served August 24, 1979, to determine the lawfulness of a 5.9% bunker surcharge filed by Matson Navigation Company. The surcharge became effective August 25, 1979 and though scheduled to expire in 120 days was superceded by a 6.66% surcharge, which has also been made the subject of a Commission investigation.[1] As with prior bunker surcharges filed by Matson, all commodities except bulk sugar and molasses which move under specially negotiated rates that include fuel cost escalator clauses were made subject to the surcharge.[2] While this difference in treatment was the subject of the Commission decision in Docket No. 79-55,[3] it was also included as an issue in this investigation to allow application of whatever findings were made in that proceeding.

Three additional matters were put at issue in this proceeding, to wit:

a. Should an allocation be made between trade and non-trade cargo carried between the West Coast and Hawaii;

b. Should the fuel cost of the vessel *KOPAA* be excluded from the calculation of expense while tonnage carried aboard the *KOPAA* is included in the trade tonnage figure; and

c. Is it proper to allocate fuel costs for the months of April and May on a percentage which is based on a four month period that included February and March?

Matson was named Respondent in this proceeding and two of Matson's shippers, Oscar Mayer & Co., Inc. and George A. Hormel & Co., were named

[1] Docket No. 79-92—*Matson Navigation Company—Proposed 6.66% Bunker Surcharge* (Order of Investigation, served October 15, 1979).

[2] Matson's tariffs FMC-F Nos. 164, 165, 166 and 167 include the surcharge at issue while tariffs FMC-F Nos. 168 and 169, applicable to raw sugar and bulk molasses, include negotiated fuel adjustment clauses.

[3] Docket No. 79-55—*Matson Navigation Company Proposed Bunker Surcharge In the Hawaii Trade*—Report and Order Adopting Initial Decision—19 S.R.R. 1065 (1979).

Protestants, along with the State of Hawaii. The Commission's Bureau of Hearing Counsel also participated. Administrative Law Judge Joseph N. Ingolia held a prehearing conference, wherein it was determined that in light of the Commission's decision in Docket No. 79-55 and Matson's admission that its position as to Issues (b) and (c) above was in error, the only issue left to be resolved was the question of the treatment of non-trade cargo. It was agreed that no oral testimony was necessary and that the hearing would be limited to written submissions. An Initial Decision was issued by the Presiding Officer on December 21, 1979. Exceptions to this decision were filed by Respondent, Protestants and Hearing Counsel.

Initial Decision and Position of the Parties

The Initial Decision essentially rejects the methodology utilized by Matson in computing the instant surcharge and adopts that advanced by the Commission's staff as the most reasonable. The staff methodology relies on the finding of Docket No. 79-55 that the increased fuel costs must be allocated between general cargo subject to the surcharge and bulk sugar and molasses subject to fuel escalation clauses on a measurement ton basis. Matson did not so allocate in computing the instant surcharge, but merely subtracted the escalation clause recovery from the total increased fuel costs for the entire service. This difference in methodology, which was the only difference that was found to affect the level of the surcharge, resulted in a finding by the Presiding Officer that the amount of the surcharge should have been 5.73% rather than the 5.90% charged by Matson.

The Presiding Officer found that resolution of the remaining issues stated in the Order of Investigation (Issues (a), (b), and (c) above) would not affect the level of the surcharge, regardless of how they were resolved. Early in the proceeding the parties had agreed that the inclusion of February and March in the four month period used to allocate fuel costs for the months of April and May did not change the amount of the surcharge and, therefore, the percentage allocation used was proper.

The inclusion of the tonnage carried on the vessel *KOPAA* in the surcharge tonnage, while an admitted error on the part of Matson, was also determined to have no effect on the final level of the surcharge and supplemental submissions by Matson appear to bear this out.

While Oscar Mayer expressed concern that the revenue deficiency for the *KOPAA*, resulting from the fuel escalation clauses applicable to the bulk sugar carried on the vessel, might be borne by general cargo in calculating the carrier's overall rate of return, the Presiding Officer held that this was not a matter at issue in this proceeding.

Whether an allocation should be made between trade and non-trade cargo carried in Matson's Hawaiian service was characterized by the Presiding Officer as "the only real issue remaining in this proceeding." However, in the final analysis the exclusion of non-trade cargo was also found not to make any difference in the level of the surcharge. Although both Matson and Hearing Counsel nevertheless urged a ruling on the issue of whether as a general matter a trade/non-trade allocation should be made, the Presiding Officer held that the record on this point was inadequate, and, as a result it would be unwise to decide the issue, particularly since it was unnecessary to resolve it in this particular proceeding. The matter was left to be resolved in an appropriate proceeding or by rulemaking.

Finally, although there is some discussion regarding the use of Line 7 of Form FMC-274 to adjust for any overrecovery of fuel costs and the relative merits of such a procedure, no finding is made with respect to the remedy issue in the Initial Decision.

Oscar Mayer excepts to the Initial Decision on three grounds. First, the *KOPAA* tonnage that was deducted from the surcharge tonnage allegedly must be recomputed and converted into measurement tons as the relevant exhibit allegedly stated it in terms of "tons" only and the Presiding Officer was incorrect in assuming this to mean measurement tons as opposed to weight tons. Second, it is argued that the methodology prescribed in Docket No. 79-55 must be retroactively applied to all prior Matson bunker surcharges and any resulting overrecoveries applied to revenue needs of Matson in this proceeding. Third, Oscar Mayer submits that the matter of what remedy is available to shippers that have been overcharged as a result of this and prior Matson bunker surcharges found excessive by the Commission must be resolved.

In its exceptions to the Initial Decision, Hormel seeks Commission advice as to how the alleged prejudicial allocation of fuel costs by Matson that resulted in a surcharge that averaged $5.50 per ton on general cargo and only $.29 per ton on bulk sugar and molasses will be remedied so as to compensate those shippers that have been paying the unreasonable surcharges. It argues that the Presiding Officer's suggestion that the Line 7 remedy may be inadequate does not resolve the matter.

Matson excepts to that portion of the Initial Decision which finds that the allocation of trade and non-trade cargo issue need not be resolved in this proceeding. It argues that although such a determination is not strictly necessary in this case, it will have an immediate impact on several pending surcharge investigations and therefore a resolution of the allocation issue serves a valid regulatory interest, especially in light of the strict decisional time limits imposed. On the merits of the issue, Matson submits that the considerations underlying the 5% non-trade cargo allocation exemption in Commission General Order No. 11 (G.O. 11) apply here with equal validity and that, accordingly, the Commission should adopt that standard.

Matson also takes the position that: (1) the evidentiary exhibit as to the tonnage carried on the *KOPAA* shows it to be in measurement tons; and (2) it has followed the requirements of Form FMC-274 in including past underrecoveries in its computation of the instant surcharge and has reduced the level of subsequent surcharges to provide for past overrecoveries as determined in Docket No. 79-55.

Hearing Counsel also excepts to the failure of the Presiding Officer to dispose of the trade/non-trade allocation issue, but disagrees with Matson as to the application of the G.O. 11 exemption to bunker surcharges. It is argued that unlike a G.O. 11 general revenue filing, a bunker surcharge is a purely cost pass through filing, and therefore, *all* non-trade cargo must be allocated out of the surcharge tonnage regardless of the effect of such methodology in any particular case.

Hearing Counsel also asserts that: (1) because Oscar Mayer did not raise the issue of retroactive application of methodology during the proceeding and because this issue was not specified in the Commission's Order of Investigation, the Commission should defer consideration of that issue pending a decision in Docket No. 80–4, where that issue is expressly raised; and (2) Hormel's attack on the percentage-of-revenue assessment mechanism is beyond the scope of this proceeding.

Discussion and Conclusions

The foregoing arguments and contentions of the parties raise the following matters for consideration by the Commission: (1) whether non-trade cargo must in all cases be allocated out of the surcharge calculations or whether some level of exemption in this regard is appropriate; (2) whether the findings in Docket No. 79–55 must be retroactively applied to all prior Matson surcharges in order to compute the proper level of surcharge in this case; (3) what remedies are available to shippers in light of the finding that the Matson surcharge was excessive; (4) whether the Presiding Officer correctly computed the *KOPAA* tonnage; and (5) whether the per ton surcharge rate must be equalized among all types of cargo.

After a full consideration of the positions of the parties the Commission is of the opinion that the findings and conclusions of the Presiding Officer are substantially correct, and, accordingly, the Initial Decision served in this proceeding is adopted. The specific issues raised by the parties on exception and enumerated above are discussed seriatim below.

Allocation of Trade and Non-Trade Cargo

Whether the 5% non-trade cargo allocation exemption contained in G.O. 11 is applicable here is a question that, as the Presiding Officer accurately found, cannot be adequately and properly resolved on the basis of the existing record. The testimony in the case did not address the point at which non-trade cargo would significantly affect the level of bunker surcharges either as to Matson's particular operations or in the domestic offshore trades generally. While it does appear that there is justification for some level of exemption, there is sufficient difference bewteen G.O. 11 statistics and Form FMC–274 statistics to render a blind application of the G.O. 11 5% exemption to Form FMC–274 inadvisable.

In light of the foregoing, it appears that such methodology matters of general application are more properly addressed in a rulemaking proceeding where a comprehensive treatment of the subject can be undertaken with input from all affected interests. Until such time as a rule of general applicability is established, the matter of trade/non-trade allocation will be left to *ad hoc* determinations in particular cases. Accordingly, Matson's and Hearing Counsel's exceptions in this regard are denied.

Retroactive Application of Methodology

Because this issue was not included in the Order of Investigation and was not fully litigated the Commission is of the opinion that final disposition of this matter should be left for decision in Docket No. 80–4.

Remedies

The question of what is the appropriate shipper remedy for excessive bunker surcharges was recently addressed in the Commission's Order of Clarification in Docket No. 79–55, served February 19, 1980. It was determined there that the Line 7 procedure will be the *primary* remedy, except in those cases where it may prove inadequate.[4] This holding applies here and should serve to resolve any uncertainty that may have existed.

The KOPAA Tonnage Calculation

The Presiding Officer's finding that the tonnage figure of the *KOPAA* referred to in the submission of Matson is in *measurement* tons is proper and well founded. All other data in the relevant exhibit is expressed in terms of measurement tons[5] and Matson itself has indicated that the tonnage is indeed stated in terms of *measurement* tons. Accordingly, there appears to be no reason to disturb the Presiding Officer's findings in this regard and Oscar Mayer's exception to the contrary is denied.

The Per-Ton Surcharge Rate

The merits of the percentage of revenue method of surcharge assessment of Form FMC–274 were not made an issue in this proceeding, nor were they fully litigated. This matter will be left for resolution in a more appropriate proceeding. Accordingly, Hormel's suggestion that the Commission address that matter here is rejected.

THEREFORE, IT IS ORDERED, That the Exceptions of Matson Navigation Company, Oscar Mayer & Co., Inc., George A. Hormel & Co., and the Commission's Bureau of Hearing Counsel are denied, and,

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is adopted and made a part hereof, and,

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[4] Although not computed by the Presiding Officer the excess recovery in this case would appear to be $29,739.24. This amount is arrived at by multiplying the estimated revenue subject to the surcharge ($58,312,232) by the implemented surcharge, and from this product ($3,440,421.69) subtracting the product of the estimated revenue multiplied by the reasonable surcharge ($3,341,290.89), and multiplying the remainder ($99,130.80), 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 36 days the surcharge was in effect ($99,130.80 × 36/120 = $29,739.24). This calculation can be verified by multiplying the estimated revenue by the difference between the implemented and reasonable surcharges (.17%) and applying the effective period ratio to the product ($58,312,232 × .0017 × 36/120 = $29,739.237).

[5] Direct Testimony of Vladimir Hrabeta, Exhibit A, Line 4, Comments, Attachment 2.

FEDERAL MARITIME COMMISSION

No. 79-84

Matson Navigation Company Proposed 5.90 Percent Bunker Surcharge Increase in Tariffs FMC-F Nos. 164, 165, 166 and 167

Adopted February 21, 1980

It is held that:

(1) The correct amount of the allowable bunker surcharge is 5.73 percent.
(2) Where the inclusion or exclusion of non-trade cargo in computing the bunker surcharge does not affect the amount of the surcharge a decision as to the propriety of including or excluding it is unnecessary. Further, where the Commission has stated it intends to review and, perhaps, modify its treatment of bunker surcharge applications it would be inappropriate and unwise to limt its alternative by a holding based on the record of this proceeding.
(3) Using a specific recovery of added fuel costs per escalation clauses contained in sugar and molasses contracts to compute a bunker surcharge is improper and the allocation to sugar and molasses must be on the basis of measurement tons.
(4) Where the fuel cost of a vessel was excluded from the calculation of expense for purposes of computing a bunker surcharge, the tonnage carried by the vessel should also have been excluded. Here, its inclusion or exclusion did not affect the amount of the bunker surcharge and it was improper to consider other questions regarding general rate increases where the Commission's Order of Investigation specifically limited the justiciable issue to consideration of the bunker surcharge.

David F. Anderson and *Peter P. Wilson* for Matson Navigation Company.
Dale N. Gillings for Oscar Mayer & Co., Inc.
Harold M. Finch for George A. Hormel & Co.
Suzanne E. Barth and *R. Dennis Chong* for The State of Hawaii.
J. Robert Ewers, C. Douglass Miller and *Charles C. Hunter* as Hearing Counsel.

INITIAL DECISION[1] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

Findings of Fact

1. On July 24, 1979, Matson Navigation Company (Matson) filed supplements to Matson Freight Tariff Nos. 1-T, 30-A, 15-C and 14-F (FMC-F

[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).

Nos. 164, 165, 166 and 167, respectively), which tariffs are the basic tariffs under which Matson provides service in the Pacific Coast-Hawaii trade.

2. The supplements provided for a bunker surcharge of 5.90 percent to become effective on August 25, 1979.

3. The 5.90 percent surcharge canceled a previously filed surcharge of 4.43 percent, so that the surcharge in issue here increased the surcharge in the Pacific Coast-Hawaii trade by 1.47 percent.

4. Subsequent to the 5.90 percent filing, effective October 1, 1979, another increase to 6.66 percent was filed. It is under investigation in another proceeding, *Matson Navigation Company—Proposed 6.66 Percent Bunker Surcharge Increase in Tariffs FMC–F Nos. 164, 165, 166 and 167*, Docket No. 79–92, Order of Investigation served October 15, 1979.

5. On June 6, 1979, the Federal Maritime Commission (Commission) published Domestic Circular Letter 1–79. It states in pertinent part:

> Vessel Operating Common Carriers (VOCC) and Non-Vessel Operating Common Carriers (NVOCC) in the Domestic Offshore Trades are hereby granted continuing outstanding special permission to establish and amend a bunker surcharge in their tariff publications on 30 days' notice to the Commission. The purpose of the special permission is (1) to allow the filing of bunker surcharges that fall within the definition of a general increase in rates contained in P.L. 95–475 on 30 days notice rather than 60 days notice; and (2) to suspend 46 C.F.R. Part 531 (G.O. 38) to the extent necessary to permit the filing of consecutively numbered supplements containing bunker increases for VOCC's and water transportation cost pass thru for NVOCC's when accompanied by specified financial justification. . . .
>
> Applicable provisions of Part 512, Part 531 and Section 502.67 (46 C.F.R. §§512, 531 and 502.67) of Commission regulations are hereby suspended to the extent necessary to carry out the specific purpose of this outstanding special permission. *This authority is expressly conditioned upon the simultaneous receipt of the information requested on FMC Form No. FMC–274 for VOCC's and FMC Form No. FMC–276 for NVOCC's in the Domestic Offshore Commerce of the United States*

6. The Commission issued Form FMC–274 (Fuel Surcharge Justification) with Domestic Circular Letter 1–79. In filing for the bunker surcharge increase to 5.90 percent, Matson submitted a completed Form FMC–274 as follows:

VESSEL OPERATING COMMON CARRIERS IN THE DOMESTIC OFFSHORE COMMERCE OF THE UNTIED STATES

Carrier: *Matson Navigation Company*
Date: July 25, 1979

Fuel Surcharge Justification
Tariff(s) FMC–F No. 164–165 & 166–167

1. Weighted average fuel cost per unit for units purchased between 12/25/78 and 1/5/79 or for the 10 days preceding the filing of the last general rate increase, whichever is later.	$10.59
2. Present per unit fuel cost:[2]	$17.51

[2] Documentation for the present fuel cost is required, such as copy of paid invoices, notice of price change(s) for the purveyor, etc. When the present fuel cost is supported by copy of paid invoices, the average for a consecutive ten day period, the end of which precedes the filing date of the surcharge by not more than ten days, shall be used. When fuel is purchased at more than one location, the weighted average shall be used. In those instances where the present fuel cost is supported by a notice of price change(s) from the purveyor, the weighted average for all locations where fuel is purchased shall be used. The carrier has the burden of demonstrating that this per unit fuel cost is truly representative of the fuel cost to be incurred while the surcharge is in effect.

3. Difference (Line 1 subtracted from Line 2):		$6.92
4. Estimated consumption for next 4 months commencing with effective date of surcharge:	470,816	
a. Last year's consumption for the identical period:	480,365	
b. Explain variations of 10% or more on attached sheets.		
5. Fuel consumption and cost for the 4 months period ending no earlier than 30 days prior to the filing date:	(Fuel) 483,489	(Cost) $5,829,901
6. Estimated 4 months consumption times difference in fuel cost (Line 3 times Line 4):	$ 3,116,927	
7. (Under) or over recovery of increased fuel costs from surcharges in effect since 1/1/79 (Fuel Surcharge Recovery Line 17):	(460,602)	
8. Estimated 4 months cost adjusted for over or (under) Recovery (Line 6 plus (under) Recovery of Line 6 minus over Recovery):		$3,577,529
9. Revenue for the same period used in Item 5:	$58,766,000	
10. Estimated revenue for the 4 month period utilized in Line 4 exclusive of proposed surcharge:	$60,656,669	
11. Last year's revenue for identical period as shown in Line 10, explain difference:	$55,425,000	
12. Percentage increase in revenue required to offset fuel costs as shown in Line 6 above (Line 8 divided by Line 10):	5.90%	
13. Attach an Income Statement applicable to the subject Tariff(s) for the latest available 12 month period which ends not more than 60 days prior to the filing date of the increase.		

Fuel Surcharge Recoveries

14. Total fuel surcharge charges included in customer billings from effective date of first surcharge since 1/1/79 to ending date of Line 5 of this Fuel Surcharge Justification:		$ 439,310
15. Total fuel costs for same period as Line 14: Barrels 254,919	$ 3,599,504	
16. Total costs for barrels shown on Line 15 based on Line 1 cost of this fuel surcharge justification:		
16a. Line 15 Barrels	254,919	
16b. Line 1 Cost	$10.59	
16c. −16a. × 16b.	$ 2,699,592	
17. Over or (under) recovery of increased fuel costs from surcharge in effect since 1/1/79 (Subtract Line 16c. from Line 15; then subtract that figure from Line 14. Place that figure on Line 17 and carry back to Line 7):		$(460,602)

7. After Matson filed for the 5.90 percent bunker surcharge, protests were filed by Oscar Mayer & Co. (Oscar Mayer), George A. Hormel & Co. (Hormel), and the State of Hawaii (Hawaii).

8. On August 24, 1979, the Commission issued its Order of Investigation. It indicates that the Commission elected to accept Matson's financial justification despite the fact that Matson did not use the correct four-month period specified in Form FMC-274. Further, after reviewing the arguments advanced by the parties, the Commission found that "an investigation is not the proper forum for discussion of the merits of Circular Letter 1-79, Form FMC-274 and General Order 11." It ordered the instant proceeding to be limited to an investigation of the following areas:

1. Should fuel costs be allocated between general cargo and sugar/molasses on the basis of measurement tons carried;
2. Should an allocation be made between trade and non-trade cargo carried between the West Coast and Hawaii;
3. Should the fuel cost of the vessel *KOPAA* be excluded from the calculation of expense while tonnage carried aboard the *KOPAA* is included in the trade tonnage figure; and
4. Is it proper to allocate fuel costs for the months of April and May on a percentage which is based on a four-month period that included February and March?

The Commission provided that the hearing would be completed within sixty (60) days of the effective date of the tariff and that the initial decision would be submitted within one hundred and twenty days (120) of the effective date.

9. On September 20, 1979, a prehearing conference was held. The parties agreed that oral testimony need not be taken and that, to the extent the issues presented in this proceeding were the same as those presented in the prior filing for the bunker surcharge increase to 4.43 percent, (*Matson Navigation Company—Proposed Bunker Surcharge in the Hawaii Trade*, Docket No. 79-55, 19 SRR 793 (1979)), the Commission's decision in the prior case would be controlling. The parties also agreed that if Issues No. 3 and 4 (as set forth in the Commission's Order of Investigation) were technical in nature and did not change the ultimate amount of the bunker surcharge, they would not be considered as issues in this proceeding.[3]

10. On September 21, 1979, the Initial Decision in Docket No. 79-55 was served. As to the issue common to the instant case, the Administrative Law Judge[4] held that:

(1) Matson's allocation methodology using special sugar and molasses contracts is not shown to be reliable or valid. . . . I conclude therefore that Matson's use of the direct assignment of costs to sugar and molasses shippers under its peculiar fixed formula is unreasonable and unjustified because, by abandoning the G.O. 11 tonnage allocation methodology, Matson relies upon untested, unarticulated bases for direct assignment of costs and casts an additional cost burden on non-sugar and molasses shippers. . . .

11. By order served on November 23, 1979, the Commission adopted the Initial Decision.

12. The parties agree that in filing for the increased bunker surcharge, Matson excluded the fuel cost of the vessel *KOPAA* from the calculation of

[3] Oscar Mayer reserved the right to further argue this issue on other grounds.

[4] Administrative Law Judge Norman D. Kline.

expense but included the tonnage carried by the *KOPAA* in the trade tonnage figure utilized for allocating fuel consumption between the Hawaii and Marshall Islands Services. This was an error which has no effect on the amount of the bunker surcharge in this proceeding and which has been corrected in the filing for the subsequent 6.66 percent increase.

13. In filing for the increased bunker surcharge, Matson, in allocating fuel costs for the months of April and May, relied on a percentage based on a four-month period that included February and March as well. Whether or not February and March was used to allocate fuel costs in this proceeding, the amount of the bunker surcharge would be the same. Matson has used the four-month period specified by the Commission in the subsequent filing for the 6.66 percent increase.

14. The Hawaii Trade encompasses the carriage by Matson of cargo in the Domestic Offshore Trade between the United States Pacific Coast and Hawaii under the terms of tariffs applicable to that movement.

15. Matson transports cargo bound for the Marshall Islands in conjunction with trade cargo in vessels serving the Hawaii Trade. This cargo is transshipped in Honolulu to a Matson barge for carriage to its ultimate destination.

16. Cargo bound for the Marshall Islands does not move in the Domestic Offshore Trade of the United States. This cargo is transported from the United States to a foreign country.

17. Matson has admitted that in order to ascertain the amount of revenue that should be recovered by its proposed bunker surcharge, increased fuel cost must be allocated to foreign cargo carried in conjunction with trade cargo in vessels serving the Hawaii Trade.

18. Matson transports mail and cargo moving pursuant to tariffs on file with the Interstate Commerce Commission (ICC cargo) in conjunction with Trade cargo in vessels serving the Hawaii Trade.

19. The United States Pacific Coast/Hawaii Service (Hawaii Service) includes all voyages undertaken by Matson vessels between the United States Pacific Coast and Hawaii in which cargo moving in the Hawaii Trade is carried.

20. Included in the category of non-trade cargo moving in the Hawaii Service are foreign cargo, mail and ICC cargo.

21. Matson has allocated increased fuel cost to foreign cargo transported in the Hawaii Service, but has failed to make a like allocation to the other non-trade cargo moving in that Service.

22. Hearing Counsel and Matson have both submitted adjusted calculations wherein Matson amends its filing for bunker surcharge from 5.90 percent to 5.88. Hearing Counsel arrives at a bunker surcharge of 5.73 percent. They have stipulated that (1) they reached different conclusions based solely on their different treatment of sugar and molasses; and that (2) neither computation is affected by whether non-trade cargoes (mail and ICC cargo) are allocated out from the Service before the surcharge is calculated. A comparison of their calculations using the information required by Form FMC-274 is as follows:

MATSON NAVIGATION COMPANY

CALCULATION OF BUNKER FUEL SURCHARGE ON MEASUREMENT TON BASIS

	Hearing Counsel (A)	*Matson (B)*
1. Average fuel cost per barrel purchased between December 25, 1978, and January 5, 1979	$10.59	$10.59
2. Present per barrel fuel cost	17.51	17.51
3. Difference (line 2 less line 1)	$ 6.92	$ 6.92
4. Estimated consumption for next 4 months (September–December 1979)—barrels	475,044	475,044
5. Estimated increase in fuel cost (line 4 times line 3)	$ 3,287,304	$ 3,287,304
6. Estimated measurement tons for the service (September–December)[5]	2,944,372	2,944,372
7. Estimated measurement tons of cargo not subject to surcharge or specific recoveries:		
Marshall Islands	26,234	26,234
Sugar and molasses	183,340	—
Mail and ICC	101,462	101,462
	311,036	127,696
8. Estimated measurement tons subject to surcharge or its own recovery formula (line 6 less line 8)	2,633,336	2,816,676
9. Measurement ton relationship (line 8 divided by line 6)	.8944	.95663
10. Fuel cost to be recovered by surcharge or specific formulas (line 9 times line 5)	$ 2,940,165	$ 3,144,734
Special recovery under sugar and molasses agreements	—	141,120
Balance to be recovered by surcharge	$ 2,940,165	$ 3,003,614
11. Revenue collected under fuel surcharges in April and May	$ 442,004	$ 442,004
Revenue collected under specific tariff formulas	—	34,307
Total revenue collected to offset added fuel cost	$ 442,004	$ 476,311
12. Service fuel cost (April and May)	$ 3,672,000	$ 3,672,000

[5] Matson does not concede that Marshall Islands cargo is included in the Hawaii Service. Column B includes that cargo as service cargo so that Columns A and B can be stated on a comparable basis.

	(A)	(B)
13. Service measurement tons (April and May)	1,530,087	1,530,087
14. Measurement tons not subject to surcharge or specific recoveries:		
Marshall Islands	15,050	15,050
Sugar and molasses	98,233	—
Mail and ICC	53,361	53,361
	166,644	68,411
15. Measurement tons subject to surcharge or specific recoveries (line 13 less line 14)	1,363,443	1,461,676
16. Measurement ton relationship (line 15 divided by line 13)	.8911	.95529
17. Fuel cost applicable to cargo subject to surcharge or its own recovery formulas (line 12 times line 16)	$ 3,272,119	$ 3,507,825
18. Fuel consumption for the Service (April and May)—barrels	257,598	257,598
19. Fuel consumption applicable to cargo subject to surcharge or specific recovery formula (line 18 times line 16)—barrels	229,546	246,081
20. Fuel cost applicable to cargo subject to surcharge or specific recoveries at base cost (line 19 times line 1)	$ 2,430,892	$ 2,605,998
21. Difference between base cost and cost incurred (line 17 less line 20)	$ 841,227	$ 901,827
22. Unrecovered fuel cost (line 21 less line 11)	$ 399,223	$ 425,516
23. Total fuel cost recoverable by surcharge (line 22 plus line 10)	$ 3,339,388	$ 3,429,130
24. Estimated revenue subject to surcharge (September-December)	$58,312,232	$58,312,232
25. Allowable surcharge (line 23 divided by line 24)	5.73%	5.88%

(A) Hearing Counsel's computation allocating added fuel cost to sugar and molasses and non-trade cargo on measurement ton relationship.

(B) Computation along the same lines as in (A), but using a specific recovery of added fuel cost per sugar and molasses tariffs as a credit.

ULTIMATE FINDINGS OF FACT

23. It is improper to compute the bunker surcharge by using a specific recovery of added fuel costs per escalation clauses in sugar and molasses

contracts. The allocation to sugar and molasses must be on the basis of measurement tons.

24. Allocation out of non-trade cargo in calculating the surcharge does not affect the amount of the surcharge in this case, and it is neither necessary nor desirable to decide the question as to whether or not it must be allocated out at this time.

25. Matson's exclusion of the fuel cost of the *KOPAA* from its calculation of expense while at the same time including the tonnage carried aboard the *KOPAA* when calculating the surcharge does not affect the amount of the surcharge.

26. Matson's allocation of fuel costs for the months of April and May was arrived at by relying on a percentage based on the four-month period which included February and March, as well as April and May. The use of February and March did not affect the amount of the surcharge, and the validity of the percentage used is no longer an issue in this case.

27. The correct amount of the allowable bunker surcharge is 5.73 percent.

DISCUSSION AND CONCLUSIONS

The issues presented in this case are basically factual in nature. To the extent that the Findings of Fact are not discussed in this portion of the decision, they are incorporated by reference.

In its Order of Investigation, the Commission listed four issues. They are treated separately in the following discussion.

Issue No. 1—Should fuel costs be allocated between general cargo and sugar/molasses on the basis of measurement tons carried?

We have already found as a fact that in deciding Docket No. 79-55, *supra*, Judge Norman D. Kline answered the above question in the affirmative, that the Commission has adopted Judge Kline's Initial Decision, and that the parties have all agreed to abide by the Commission's decision. Consequently, we will not undertake to repeat all that is contained in that decision except to say that it rejected Matson's methodology of using the escalation clauses in sugar and molasses contracts to arrive at increases in the bunker surcharge in the Hawaiian trade. However, it should be noted that in resolving the ultimate issue, the Initial Decision rejected the argument that Matson's application of the bunker surcharge was unfair because it falls disproportionately on westbound shippers and that therefore the allocation ought to be made on some basis other than round-voyage accounting. It held that any allocation which is based upon splitting legs of round voyages by assigning percentages of fuel costs to eastbound and westbound shippers using fuel consumed by leg or by applying measurement tons per leg is improper because it "marks a total departure from Commission case law and G.O. 11 methodology."[6] In adopting

[6] *Matson Navigation Company—Proposed Bunker Surcharge in the Hawaii Trade*, Docket No. 79-55, *supra*, page 50 of the Initial Decision, citing *Alcoa Steamship Co., Inc.—General Increase in Rates in the Atlantic Gulf Puerto Rico Trade*, 9 F.M.C. 220 (1966).

the holding, the Commission noted that there is a significant issue regarding Matson's overall rate structure which, in the Hawaii trade, appears to differentiate in favor of backhaul cargo based upon value-of-service principles at the expense of headhaul cargo. As in this proceeding, the Commission noted that such considerations were beyond the scope of the proceeding as defined in the Order of Investigation.

Issue No. 2—Should an allocation be made between trade and non-trade cargo carried between the West Coast and Hawaii?

This issue is the only real issue remaining in this proceeding. Matson's filing failed to make an allocation between trade and non-trade cargo carried between the West Coast and Hawaii. It argues that it need not do so because General Order 11 does not require such allocation when "other cargo" does not exceed 5 percent of the gross revenue derived from the "Service" (46 C.F.R. §512.6(c)). Further, it states that in recent years the Commission has made findings in general rate increase proceedings where Matson did not allocate between trade and non-trade cargo, citing *Matson Navigation Company—Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Offshore Trade,* Docket No. 75-57, served December 12, 1978, 18 SRR 1441 (1978), Order on Reconsideration served April 27, 1979, and *Matson Navigation Company—Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Offshore Trade,* Docket No. 76-43, served December 12, 1978, 18 SRR 1351 (1978), Order on Reconsideration served April 27, 1979. It points out that from September through December 1979, non-trade revenues will be 3.865 percent of "Service" revenues, well below 5 percent.[7]

Hearing Counsel argues that while Matson has admitted the necessity of allocating increased fuel costs between trade cargo and foreign cargo, Matson surprisingly takes the position that it is not required to allocate increased fuel cost between trade cargo and mail ICC cargo. Hearing Counsel states that given that mail, ICC cargo and foreign cargo are categorized by General Order 11 as non-trade or "other cargo," Matson's differing treatment of these cargoes in its calculation of the amount of revenue that should be recovered by its proposed bunker surcharge cannot be justified.

As to Matson's argument that it should not be required to allocate increased fuel costs to mail and ICC cargo because of the 5 percent of gross revenue exception contained in General Order 11,[8] Hearing Counsel asserts Matson "misunderstands" the Commission's rules and regulations. He points to pertinent portions of Domestic Circular Letter 1-79[9] as conflicting with General Order 11, which has to do with general rate increases and alleges they super-

[7] In its initial filing, Matson had misstated the percentage as 2.18 percent.

[8] "*Provided however,* That if gross revenue derived from the carriage of Other Cargo does not exceed 5 percent of the gross revenue derived from The Service, no segregation of revenue and expenses within The Service is required by this part." 46 C.F.R. §512.6(c) and (d).

[9] "The reporting requirements otherwise applicable to general increases in rates are suspended to the extent they apply to bunker surcharges and the reduced reporting requirements of the Circular Letter shall be filed in lieu thereof." 19 SRR at 407.

"The modified reporting requirements (set forth in the Circular Letter) are intended to ensure that bunker surcharges are set at levels which will recover only the increased costs of fuel and not result in windfall revenues to the carriers." 19 SRR at 407.

sede it. Hearing Counsel states that the intent of the Commission in sanctioning the use of bunker surcharges was to provide carriers with a means of passing through to shippers the increased fuel cost incurred in the carriage of their trade cargo.

Finally, Hearing Counsel avers that it is wrong for Matson to argue that this issue is moot because in this particular case, even if an allocation were made to non-trade cargo, it would not have any effect on the amount of the bunker surcharge. He states that the reason this proposed bunker surcharge is unaffected by the allocation of increased fuel cost to non-trade cargo is that Matson filed bunker surcharges with the Interstate Commerce Commission in similar amounts and at appropriate times and that there is no assurance that Matson or any other carrier would file such surcharges in every case.

Oscar Mayer agrees with Hearing Counsel that Matson should make an allocation between trade and non-trade cargo. It argues that unless this is done, Matson will be collecting twice for the increased cost of a portion of the same fuel. The State of Hawaii also agrees with Hearing Counsel.

Matson replies to the above arguments by taking issue with the fact that in six previous surcharge filings, Hearing Counsel never requested a trade/non-trade allocation. It expressed surprise that Hearing Counsel argues for the first time that Marshall Islands cargoes should be considered "Service" cargo, citing the holdings in Docket Nos. 75-57 and 76-43, *supra.* It argues that Hearing Counsel cannot now reasonably suggest that Matson's allocation out of Marshall Island cargoes should form a basis for concluding that Matson has agreed that non-trade cargoes should also be allocated out. It reiterates its view that a miniscule portion of the "Service" is non-trade cargo and that the intent of the Commission in publishing Domestic Circular Letter 1-79 was to permit carriers to quickly file rate adjustments imposing bunker surcharges in order to recover rapidly escalating fuel oil costs. It states that to require Matson to make the trade/non-trade allocations would delay such filings and serve no useful purpose.

It is clear that in promulgating Domestic Circular Letter 1-79, the Commission intended that increased fuel costs be "passed through" respecting cargo which is transported under those tariffs which are being amended to reflect the assessment of the surcharge. It is equally clear that if the non-trade cargo was meaningful in any particular situation as Hearing Counsel suggests, it would thwart the purpose of the Circular Letter if it was not allocated out.

The real question involved here is whether or not the Commission should adopt the 5 percent qualifying provision in General Order 11, in considering bunker surcharge applications. To do so would be to accept Matson's argument that the amount is "miniscule" and that it would "remove obstacles in the path of carriers recovering extreme increases in fuel cost," and to reject Hearing Counsel's argument that the issue transcends this particular case and might not be applied similarly by other carriers or even by Matson in other circumstances.

It has already been found as a fact that whether or not the non-trade cargo is allocated out in this particular case, the amount of the bunker surcharge increase will remain the same. While the question may not be moot as Hearing Counsel suggests, given the ambiguity of this record and the Commission's

Report and Order Adopting Initial Decision in Docket No. 79-55, *supra,* it is unnecessary and unwise to decide the matter or establish any precedent in this case. In its Report and Order, the Commission stated:

> The Domestic Circular Letter was promulgated on an emergency basis under crisis conditions. Under the circumstances the Commission could not reasonably anticipate all the potential operational difficulties that might arise with the application of the requirements of the Circular Letter. It is not surprising, therefore, that the application of the Circular Letter has shown a need for some revisions. Accordingly, while the Initial Decision in this case will be adopted, the Commission will undertake a review of the Domestic Circular Letter to determine what revisions may be necessary to bring the surcharge assessment procedures established in that Circular Letter in line with the principles enunciated in this decision.

In light of the above language and the posture of this proceeding, the Commission's alternatives should not be limited by an unnecessary holding in this case. It may wish to require an allocation between trade and non-trade cargo in every case; or it may wish to reconsider changes in the Domestic Circular Letter; or it may wish to rulemake. These alternatives, as well as any other the Commission wishes to consider, ought to be left open until the facts of a particular case demand otherwise. In this case they do not.

Issue No. 3—Should the fuel cost of the vessel KOPAA be excluded from the calculation of expense while tonnage carried aboard the KOPAA is included in the trade tonnage figure?

In its original submission, Matson included tonnage carried by the *KOPAA* in calculating the allocation percentage on a measurement ton basis, but excluded its fuel cost from the calculation of expense. Since the measurement tons carried on the *KOPAA* were originally unavailable, it was not possible to determine the exact allocation or surcharge percentage. Matson conceded that it had made the error in requesting the 5.90 bunker surcharge, but noted that when corrected on Form FMC-274, the reference figure on line 5 would be changed from 483,489 barrels to 483,245 barrels—an error of only 244 barrels.

All the parties have agreed that the error does not affect the amount of the bunker surcharge. In addition, in its revised computation in which it arrived at the 5.88 percent bunker surcharge, Matson exclude the *KOPAA* tonnage from the trade tonnage.

Matson's supplemental filing satisfied all other parties except that Oscar Mayer believes that even though the *KOPAA* has been completely excluded from the surcharge computation, the sugar contract escalator charge for the *KOPAA* will be short of projected increased cost by $46,700 for the period September through December 1979. It is concerned that the shortfall will become part of Matson's overall profit or loss figure and thereby a factor in determining their return on common equity or return on rate base. Matson answers by noting that the reasonableness of Matson's rate structure is not at issue in this proceeding and that the use of the *KOPAA* has no effect whatsoever on the computation of the bunker surcharge at issue here. It stresses that the scope of the Commission's order does not reach consideration of any future rate increase.

The arguments advanced by Matson are correct. Here, we are only concerned with the bunker surcharge and the Commission's order carefully frames an issue regarding the *KOPAA* which is limited to its effect on consideration of the surcharge itself. Having once determined that the *KOPAA* ought to be excluded entirely from the surcharge computation and that its exclusion does not alter the amount of the surcharge, nothing more remains for consideration in this proceeding.

Issue No. 4—Is it proper to allocate fuel costs for the months of April and May on a percentage which is based on a four-month period that included February and March?

It has already been stipulated by all parties that if the inclusion of February and March in calculating the percentage involved did not make any difference in the amount of the bunker surcharge, then this question would no longer be an issue in the proceeding. The evidence of record establishes and all parties have agreed that the use of February and March has no bearing on the amount of the surcharge and therefore it is held that the percentage used was proper.

CONCLUSION

After consideration of the issues set forth in the Commission's Order of Investigation, what remains is to determine the correct allowable bunker surcharge. As the Findings of Fact indicate, Matson revised its original 5.90 percent submission down to 5.88 and Hearing Counsel came to a figure of 5.73 percent. The only difference in their calculations was their treatment of the sugar and molasses cargo. Since they have made their computations, Docket No. 79–55, *supra,* which supports Hearing Counsel's position, has been promulgated. Therefore, it is held that in this proceeding the allowable bunker surcharge is 5.73 percent.

In so holding, note is taken of the computation submitted by Oscar Mayer in its reply brief where it arrives at a bunker surcharge of 4.86 percent. When one analyzes the computation and makes necessary corrections, it is identical with the 5.73 percent figure reached by Hearing Counsel and Matson. Oscar Mayer began by converting the tonnage carried by the *KOPAA* to measurement tons (94,000 × 95.24%). Actually, the 94,000 already represents the measurement tons carried by the *KOPAA*. Then the remaining measurement tons of sugar and molasses should total 183,340 not 187,814. As to adding back the 101,462 measurement tons of mail and ICC cargo, that is incorrect because the original figure of 3,012,138 already included it. After making these adjustments throughout Oscar Mayer's computation and allowing for under-recovery of $399,223, the total revenue on Hawaii Trade Cargo is $58,312,232, not $60,656,669, so the bunker surcharge is 5.73 percent ($2,947,539 ÷ $58,312,232), exactly the figure Hearing Counsel and Matson have computed.

Before concluding, there are some related matters which have been raised which should be addressed. In its initial protest and at various stages of the proceeding, Oscar Mayer has taken the position that the Commission should institute a rulemaking proceeding even though the Commission's Order of Investigation states, "an investigation is not the proper forum for discussion of the merits of Circular Letter 1-79, Form-274 and General Order 11." Oscar Mayer "specifically request the Commission begin such a proceeding and hold in abeyance the determination of this investigation until the conclusion of such a proceeding."

It is clear that given the Commission's Order of Investigation and the narrow parameters of the issues described in it, this decision cannot consider Oscar Mayer's arguments respecting rulemaking. In adopting the Initial Decision in Docket No. 79-55, *supra,* however, the Commission noted that the Domestic Circular Letter was promulgated "on an emergency basis under crises conditions" and that "the Commission will undertake a review of the Domestic Circular Letter." In its reconsideration of the Letter the Commission may, if it so desires, initiate a rulemaking proceeding. In any event, Oscar Mayer, or any other person for that matter, may petition for the issuance of a rule under the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.51, et seq.

Finally, it should be noted that in the argument of this case as well as in Docket No. 79-55, *supra,* the parties have referred to the meaning and import of Form FMC-274, line 7, which provides for adjustment of underrecovery or overrecovery of the bunker surcharge. On the one hand, the view is expressed that if a mistake is made it can be "adjusted" in a subsequent filing. On the other, there is concern that the adjustment provision will be misunderstood and used improperly to foster bunker surcharge filings which contain information that is not the best information then available or which is ambiguous and incomplete.

It is clear that the Commission's intent in allowing for an adjustment in bunker surcharge filings was to provide a practical mechanism to make an adjustment where the best information available in the first instance proves to be incorrect or unsatisfactory. It thereby prevents the carrier from being unjustly enriched or under-compensated and recognizes that the ultimate purpose of the bunker surcharge procedure is to arrive at the increase in the cost of fuel and to allow it to be properly passed through to the shipper. It is not meant to be an exploratory filing which, if discovered to be incorrect, can be adjusted. Such an adjustment may ultimately provide the proper relief for the carrier, but it may ignore the rights of the shipper who cannot recover for the overcharge that was applicable to the period during which he shipped his goods. It also is unfair to the Commission in that it wastes staff resources, encourages litigation and delays the prompt disposition of the bunker surcharge application.

In view of the above, when the Commission reconsiders the Domestic Circular Letter, it may wish to clarify the import and use of the adjustment mechanism so that there will be no question regarding it in future bunker surcharge filings.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

WASHINGTON, D.C.
December 21, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 79–61

RENE LOPEZ AND DAVID ROMANO D/B/A
UNITED DISPATCH SERVICES—INDEPENDENT OCEAN
FREIGHT FORWARDER LICENSE NO. 1381

Independent ocean freight forwarder license suspended for six months for violations of section 510.24(e) of General Order 4 and section 44(e) of the Shipping Act, 1916.

Carlos Rodriquez for Rene Lopez and David Romano d/b/a/ United Dispatch Services.
John Robert Ewers, Joseph B. Slunt and *Martin F. McAlwee* for Bureau of Hearing Counsel.

REPORT AND ORDER

February 25, 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 Order of Investigation and Hearing, served June 8, 1979, to determine whether Rene Lopez and David Romano, d/b/a United Dispatch Services (Respondent), violated General Order 4 and section 44(e) of the Shipping Act, 1916 and whether its independent ocean freight forwarder license should be revoked or suspended.[1] The Commission's Bureau of Hearing Counsel was made a party to the proceeding. In his Initial Decision, served October 19, 1979, Administrative Law Judge William Beasley Harris found the violations to have occurred and revoked Respondent's license. The

[1] Specifically, the Order alleged that Respondent received $2,360.47 in compensation for 85 shipments handled by an unlicensed forwarder, and set forth the following issues for determination:

1. Whether Rene Lopez and David Romano d/b/a United Dispatch Services has violated section 510.23(a) of General Order 4 by permitting its name and license number to be used by a person not employed by it for the performance of ocean freight forwarding services.

2. Whether Rene Lopez and David Romano d/b/a United Dispatch Services has violated section 44(e) of the Shipping Act, 1916, and section 510.24(e) of General Order 4 by falsely certifying to ocean carriers that it had performed forwarding services necessary to receive ocean carrier compensation and accepting ocean carrier compensation on such shipments for which it did not provide freight forwarding services; and

3. Whether Rene Lopez and David Romano d/b/a United Dispatch Services' independent ocean freight forwarder license should be revoked or suspended pursuant to section 44(d) of the Shipping Act, 1916, and section 510.9 of General Order 4 for failure to comply with any lawful rules, regulations or orders of the Commission and for conduct which renders the licensee unfit to carry on the business of forwarding.

proceeding is now before the Commission on Exceptions of Respondent, to which Hearing Counsel replied. For the reasons set forth below, the Commission has decided to suspend Respondent's license for six months.

BACKGROUND

Hearing Counsel alleges and Respondent admits that Respondent allowed Angel Romero and Foreign Freight Forwarders, Inc. (FFF) to use Respondent's name and license number in connection with FFF's forwarding activities pursuant to an oral agreement between Messrs. Lopez, Romano and Romero. Respondent admits collecting approximately $2,000 in freight compensation for 82 shipments handled by FFF under Respondent's name and license number.

Hearing Counsel argued for revocation of Respondent's license. Respondent, through David Romano, initially responded that it wished "to plead no contest on the charges brought against us," and argued by way of "mitigation of the sentence" that it was a first offense; that Respondent was ignorant of the law; that Respondent did not intend to violate the law; and that suspension or revocation would cause undue hardship on Respondent and its nine employees.

At a hearing held September 7, 1979, Respondent Lopez admitted all the violations and the factual bases for the allegations as set forth in the affidavit of Commission Investigator Miguel Tello. Mr. Lopez reiterated his request that Respondent's license not be revoked or suspended, citing the financial hardship severe sanctions would cause, and promised not to violate the law again. He also alleged that Respondent's violations were prompted by friendship with Mr. Romero, and not for monetary gain.

INITIAL DECISION AND POSITION OF THE PARTIES

In his Initial Decision, the Presiding Officer found that Respondent had committed each of the violations alleged in the Order of Investigation, and revoked Respondent's license.

In its Exceptions to Initial Decision, Respondent again admits its wrongdoing, although again offering mitigating facts to establish "the mental posture . . . as far as intent or willfulness is concerned."[2] Respondent argues that the Presiding Officer erred in imposing punitive rather than remedial sanctions; by failing to consider less severe sanctions which would nevertheless redress the violations; and by basing his decision to revoke Respondent's license on its "financial difficulties." Respondent also argues that the Presiding Officer acted arbitrarily and capriciously by departing excessively from previously applied, less severe sanctions.

Hearing Counsel's Reply to Exceptions emphasizes the seriousness of the violations, and makes the point that revocation was a proper remedy, not a punitive sanction. Hearing Counsel notes that Respondent has had eight years experience in the freight forwarder business, and is therefore appropriately

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[2] Specifically, Respondent notes that its intent was only to help a friend; that the violations were based on ignorance; and that it will not do it again.

charged with knowledge of the law. Hearing Counsel also denies that the Presiding Officer's comments on the financial difficulties of Respondent were a basis for the determination to revoke its license. It argues that exact uniformity in the application of sanctions is unnecessary, and that mere unevenness in sanctions is not arbitrary and capricious unless excessive.

DISCUSSION

The Commission concludes, upon careful and thorough review of the record, that Respondent's violations can be redressed by a six-month suspension of its freight forwarder license. In view of Respondent's six-year violation-free history, the Commission is satisfied that a six-month suspension will serve a remedial public interest purpose,[3] and that a more severe sanction is unnecessary to achieve this end in this particular case. On the other hand, no lesser sanction would ensure that similar violations will not occur. Respondent's violations were willful and numerous, and its claims of ignorance of law and lack of intent are of little mitigating effect.[4]

Hearing Counsel has cited the Commission's revocation of a freight forwarder license in *John C. Grandon d/b/a/ Consulspeed Independent Ocean Freight Forwarder License No. 2011,* 19 SRR 1080 (1979), as support for its position that Respondent's license should be revoked. Although *Consulspeed* also involved unauthorized use of a license, the number of violations involved in that case and the fact that Consulspeed was, in effect, a sham operation prompted the Commission to revoke its license to ensure a remedy of the situation.

THEREFORE, IT IS ORDERED, That the Exceptions of Rene Lopez and David Romano d/b/a United Dispatch Services, are granted to the extent indicated above and denied in all other respects; and

IT IS FURTHER ORDERED, That Independent Ocean Freight Forwarder License No. 1381 of Rene Lopez and David Romano d/b/a United Dispatch Services, is suspended for six months effective February 27, 1980; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

[3] *See Independent Ocean Freight Forwarder License—E.L. Mobley, Inc.,* 19 SRR 39, 41 (1979).

[4] Although reducing the sanction imposed by the Presiding Officer, the Commission is not endorsing Respondent's suggestion that revocation of a license for this type of violation is necessarily improper, punitive, or unprecedented. Revocation is not warranted in this particular proceeding, however. Sanctions under section 44 must be tailored to the facts of each individual case.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-70

E.I. DU PONT DE NEMOURS AND COMPANY

v.

SEA-LAND SERVICE, INC.

NOTICE

February 26, 1980

Notice is given that no exceptions have been filed to the January 18, 1980 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79–70

E. I. Du Pont de Nemours and Company

v.

Sea-Land Service, Inc.

Finalized February 26, 1980

Du Pont, a shipper of chemical products, tendered four shipments of herbicidal and related products which were carried by respondent Sea-Land Service, Inc., from Houston, Texas, to Bangkok, Thailand, during July through September 1977. Du Pont claims that the rate charged for the bulk of these shipments ($134 WM) should be declared void and ineffective because of the fact that there had been a filing in May of 1977 which attempted to increase the previous rates on these items on less than the 30-days' notice period required by section 18(b)(2) of the Shipping Act, 1916. Du Pont seeks an award of $17,782.70, in reparation as the difference between the rate charged and two previous rates which had been in the tariff prior to the filing of May 1977, claiming an overcharge and a violation of section 18(b)(2). It is held that:

(1) There is no basis in law, fact, or equity in this case on which to find that the rate which was on file and charged by Sea-Land should now be declared void and ineffective;

(2) Principles of tariff law hold that a tariff must be given force and effect at the time of shipment and that filed rates do not become void until after rejection by the Commission under section 18(b)(4) of the Act;

(3) If a rate has been filed on short notice contrary to section 18(b)(2) of the Act and it is not rejected by the Commission, the better view is that the defective filing cures itself after the 30-day period established by that law runs out; however, in this case the rate under attack is not even the same rate which had allegedly been filed on inadequate notice;

(4) Declaring a rate on file void *ab initio* because of an old defect in tariff filing would render the validity of the filed rates uncertain and could open the door to multiple suits alleging overcharges even when shippers had suffered no real harm;

(5) Granting reparation in this case might indirectly contravene the special-docket law set forth in section 18(b)(3) since a special-docket application had been filed for Du Pont which had to be rejected because it did not meet the 180-day requirement of that law.

Don A. Boyd, William R. Rubbert, and *Raymond Michael Ripple,* for complainant.
John M. Ridlon, for respondent.

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

This proceeding commenced with the filing of a complaint by E. I. Du Pont de Nemours and Company, a company which manufactures and exports chemicals and related products. In its complaint, which was filed on July 13, 1979, Du Pont alleges that respondent, Sea-Land Service, Inc., a common carrier by water operating in the foreign commerce of the United States, transported four shipments of herbicidal preparations, insecticides, and fungicides during the period July through September 1977 under an intermodal tariff from Houston, Texas, to Bangkok, Thialand, and overcharged Du Pont by assessing improper tariff rates for the commodities in question. Du Pont further alleges that the reason for the overcharge was the fact that Sea-Land, as a member of the Pacific Westbound Conference and a party to that Conference's intermodal tariff, committed an error in May 1977 by publishing increased rates on these commodities without giving 30-days' notice as required by section 18(b)(2) of the Shipping Act, 1916. Therefore, as complainant later explained, it is alleging that Sea-Land violated both sections 18(b)(2) and section 18(b)(3) of the Shipping Act, 1916 (the Act), which require carriers to provide 30-days' notice of rate increases in their tariffs and to charge only the rates specified.

Du Pont claims that it was entitled to rates of $134 W and $145.50 W for the herbicides, fungicides, and insecticides for each of the four shipments which moved under bills of lading dated July 16, August 11, August 20, and September 9, 1977. These rates were the last effective rates which could be applied to the commodities prior to certain rate changes which took place in May 1977, when the rates increased to $146 W for Sea-Land initially and later to $134 WM on June 19, 1977. Sea-Land rated the commodities in question under the $134 WM rate because the shipments took place after June 19, 1977, when that rate went into effect. The essence of the dispute, therefore, is the question whether these items should have been rated at $134 W and $145.50 W or at $134 WM. Since the commodities produced more measurement tons than weight tons per shipment, the latter rate results in higher freight. A determination of which rate should have applied furthermore, depends upon an interesting and perhaps unprecedented question of tariff law, namely, if a carrier publishes a rate increase on less than statutory notice and also increases the rate on proper notice, can either the first increased rate or the second increased rate be applied lawfully to subsequent shipments? In other words, if a rate is filed with the Commission upon less than statutory notice, but the rate is not rejected under section 18(b)(4) of the Act, under what circumstances can the rate be charged and the shipper required to pay the full amount of freight with no right to future freight refunds?

In its answer Sea-Land admits the essential facts concerning the four shipments and concedes that in May of 1977 there had been a short-notice rate increase applicable to the commodities in question. Sea-Land denies that it assessed rates other than those lawfully in effect at the time of the shipments,

[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).

however. Nevertheless, Sea-Land states in its Reply to Complaint that it "acquiesces in a Federal Maritime Commission determination that, whether for reasons of tariff publication error alleged by Complainant, or because of effectuation of an increased cost to the shipper on less than the notice required by statute, Complainant has been overcharged, as claimed. . . ." Reply, last page, paragraph XX.

Notwithstanding Sea-Land's apparent willingness to acquiesce in a judgment against it, which would have required it to pay Du Pont over $17,000 as reparation, it was apparent that the record was insufficiently developed to enable me to determine whether there was any basis in fact or law for such action to be taken. As originally submitted, the complaint was supported by no evidence other than relevant bills of lading and packing lists which were attached. Despite the fact that the complaint relied upon several critical tariff changes and alleged tariff-filing errors, no tariff pages were furnished. Moreover, the complaint did not specify which provisions of section 18 of the Act were allegedly violated. It referred merely to "46 U.S.C. § 817," as the law which allegedly had been violated, without specifying which of the many paragraphs of section 18 of the Act, which corresponds to 46 U.S.C. § 817, were involved. Furthermore, the complaint referred to a rate increase to $141 W, supposedly effective on July 1, 1977, and sought reparation calculated on that rate as the base, although there was no evidence that such a rate increase ever took place affecting the trade route to Bangkok. Moreover, although seeking $17,330.38, in reparation, Du Pont furnished no exhibit with its complaint showing how that sum was calculated. The complaint also referred to several tariff item numbers without adequate explanation as to the commodity descriptions to which they applied, did not mention the date when the freight was paid, and referred to a misdescription in part of the bill of lading dated September 9, 1979, the significance of which was unclear. Finally, the complaint was rather confusing on the theory of the case, i.e., whether it relied upon short-notice tariff filing, a bill of lading misdescription and overcharge, or a reliance on a tariff rate which had been erroneously deleted from the tariff. Thus it could not be determined whether section 18(b)(2) or 18(b)(3) of the Act was allegedly violated or even whether this case should have been brought under the special-docket provisions of section 18(b)(3) on the grounds that there was an error in tariff filing which caused the shipper to suffer additional costs. The latter possibility could not be dismissed in view of the fact that the Commission's Secretary's files show that a special-docket application was indeed filed by the Conference on behalf of this shipper but had to be rejected because it was time barred. *See* letter dated March 29, 1978, from Mr. Hurney to Mr. Edmund P. Webber of the Pacific Westbound Conference. If the present complaint constituted an attempt to circumvent the 180-day provisions governing the special-docket law, the complaint would be subject to dismissal.

I called the parties' attention to the various problems described above and instructed them to furnish me with appropriate explanations. See my letter to Messrs. Boyd and Ridlon, dated September 6, 1979. In response to this letter, both Du Pont and Sea-Land furnished detailed affidavits and all pertinent tariff pages. *See* letter from Mr. Ripple representing Du Pont, dated October 5, 1979, and letter from Mr. Ridlon representing Sea-Land, dated October 5, 1979. These affidavits and attached tariff pages were ultimately admitted into evidence together with supplementary testimony and a further exhibit at a hearing held on November 14, 1979. The latter exhibit showed Du Pont's revised calculation of alleged overcharges.

The factual submissions made on October 5, 1979, explained many of the discrepancies and ambiguities in the complaint. However, a number of problems remained. Therefore, a prehearing conference and a hearing were held on November 14, 1979, in order to provide a full and clear factual record. *See* Notice of Prehearing Conference and Hearing, October 30, 1979; Notice of Rescheduling of Hearing, November 5, 1979. At the hearing the positions of the parties were clarified and Du Pont explained that it was basing its case upon the theory that a short-notice tariff filing had occurred in May of 1977, in violation of section 18(b)(2) of the Act, which means that Du Pont was consequently overcharged, a violation of section 18(b)(3) of the Act. Respondent Sea-Land understood the nature of these allegations and consequently did not contend that it had not been provided with sufficient notice and opportunity to defend itself.

As the evidentiary submissions, testimony, and argument made clear, the essential facts in this case are not disputed and the issue to be determined is one of law relating to the effect of an admittedly short-notice tariff filing which occurred in May of 1977. To determine that issue it is necessary to have a thorough understanding of the rather complicated facts surrounding the relevant tariff changes occurring prior to the time of the shipments. These facts are as follows.

FACTUAL BACKGROUND

At one time Sea-Land published its own intermodal tariff covering the ports involved in this proceeding, namely, Houston, Texas, and Bangkok, Thailand. In that tariff Sea-Land had published a special rate to Bangkok on "Weed Killer," amounting to $121.50 per 2,000 lbs., as Item 931. *See* Sea-Land Joint Container Freight Tariff 201-A. However, on or about February 1, 1977, Sea-Land joined the Pacific Westbound Conference's tariff and this weed killer rate was brought forward in the conference tariff as Item 599.2080.00 under the description "Herbicidal Preparations" in the amount of $139.50 per 1,000 kgs. This rate, however, had been incorrectly converted from the imperial to the metric system and was adjusted to the proper metric equivalent of $134 W (i.e., per 1,000 kgs.), effective April 1, 1977. *See* PWC tariff, 4th rev. page 518. The Conference tariff also published a rate on "fungicidal preparations" as Item 599.2075.20 to Bangkok in the amount of $145.50 per 1,000 kgs. *See* tariff, 5th rev. page 518. The Conference had still another rate on agricultural chemical preparations as Item 599.2090.00, in the amount of $160.50 per 1,000 kgs. *Id.* All of these rates had been published during April and for most of May 1977.

On May 17, 1977, the Conference issued two critical tariff notices in two different pages which changed the situation on these items. On one page the

Conference deleted the three items (599.2075.20, 599.20080.00, and 599.2090.00) described above and replaced them with a single item (599.2000.00) which had already been published elsewhere in the tariff. This change was to become effective on May 23, 1977, i.e., on six-days' notice. *See* tariff, 6th rev. page 518. Item 599.2000.00 was described in the tariff as "Insecticides, Fungicides, Disinfectants & Similar Products—N.O.S. . . ." *See* tariff, 8th rev. page 516. The effect of this first tariff notice, as far as Sea-Land's rates were concerned, was to increase the rates on the commodities covered by the previous items 599.2075.20 and 599.2080.00, from $145.50 W and $134 W, respectively, to $146 W on only six-days' notice.[2] The second notice issued by the Conference on May 17, 1977, announced further changes. By this notice, those shippers who had been informed that the three previous items were now lumped into Item 599.2000.00, effective May 23, 1977, were also informed on a separate tariff page on which that Item was published, that the special rate of $146 W, applicable to Sea-Land and certain other carriers was going to be deleted on June 19, 1977. *See* Tariff, 8th rev. page 516. This additional notice did provide at least 30-days' notice that the rates would increase from $146 W to $134 WM as of June 19, 1977, as far as Sea-Land was concerned because cancellation of the special rate of $146 W caused reversion to the general Conference rate of $134 WM. (As noted above, the change was an increase because the relevant cargo was a measurement-type cargo rather than weight, for rating purposes.) This last increase was confirmed by the Conference which published a subsequent tariff page on which the rate on Item 599.2000.00 was published showing only the $134 WM rate for all Conference members carrying the item to Group 6 destination ports (i.e., Bangkok, Thailand). *See* Tariff, 9th rev. page 516, issued June 23, 1977, effective June 24, 1977. The rate on Item 599.2000.00 ("Insecticides, Fungicides, Disinfectants & Similar Products—N.O.S. . . .") remained at $134 WM until it was reduced to $146 W on September 7, 1977. *See* Tariff, 10th rev. page 516.

To summarize, the picture was as follows. Any shipper such as Du Pont shipping "herbicidal preparations" and "fungicidal preparations" via Sea-Land under previous Items 599.2080.00 and 599.2075.20, respectively, were given notice on May 17, 1977, that in six days the rate for these products would increase from $134 W and $145.50 W to $146 W, and also that in 33 days the rate would be $134 WM. In other words, on May 17, 1977, shippers were notified that as of June 19, 1977, the rate would be $134 WM but they were also told that on May 23, 1977, there would be an interim rate increase to $146 W.

As of June 19, 1977, therefore, the applicable rate was $134 WM. Therefore, when the four shipments were tendered and carried by Sea-Land, between July and September, 1977, insofar as the fungicide and herbicide rates were applicable to the commodities shipped, Sea-Land rated them at $134 WM. The first shipment moved under a bill of lading dated July 16, 1977, and was shown on the bill of lading as "Herbicidal Preparations." The second shipment

[2] The tariff page in effect at the time of the May 17 notice shows that a number of lines also charged a special rate of $146 W but that the general Conference rate was $134 weight or measure. *See* Tariff, 8th rev. page 516.

moved under a bill of lading dated August 11, 1977, and was shown as "Fungicides N.O.S." and "Herbicides N.O.S." The third shipment moved under a bill of lading dated August 20, 1977, and was described as "Insecticide, Dry, N.O.S." with further indication that the product was a "poison." The fourth shipment moved under a bill of lading dated September 9, 1977, and was described as "Fungicides" and "Weed Killers." Du Pont furnished evidence showing that the weed killers were in fact herbicidal preparations.[3] However, that portion of the shipment described as "Fungicides" on the bill of lading, according to evidence furnished by Du Pont, consisted of a particular type of fungicide, a product known as "Tersan 75" which consists of "Dithiocarbamic acid fungicidal preparations, except household and industrial." This portion of the fourth shipment was rated by Sea-Land under Item 599.2065.00 of the tariff ("Dithiocarbamic Acid, Fungicidal Preparations, Except Household and Industrial") which published a rate of $145 WM. *See* Tariff, 11th rev. page 517. Du Pont does not contest the rating of this portion of the shipment. *See* Affidavit of Mr. Frank E. Baldwin, Supervisor, Liner Rates and Services, Ex. 1, at 4.

Except for that portion of the fourth shipment which consisted of "Tersan 75" (where there is no dispute between the parties) Sea-Land rated the herbicides, fungicides, and insecticides, which comprised the bulk of the shipments, under Item 599.2000.00 ("Insecticides, Fungicides, Infectants & Similar Products—N.O.S. . . .") at $134 WM and they were rated on the M (measurement) basis. In each instance, Du Pont claims that the correct rates should have been the rates applicable before the notices of increases were issued on May 17, 1977. These rates were $134 W for "herbicidal preparations" (Item 590.2080.00) and $145.50 W for "fungicidal preparations" (Item 599.2075.20) which items, as noted, were deleted and consolidated into Item 599.2000.00. In a special exhibit, Du Pont shows that it paid Sea-Land additional freight in the amount $17,782.70, under the $134 WM rate as compared to what it would have paid under the earlier rates. Ex. 3.[4]

Therefore, Du Pont seeks an award of reparation in that amount, and according to its original complaint, "interest and/or such other sums as, in view of the evidence, the Commission shall determine that Complainant is entitled to receive." Complaint, at 4.

Discussion and Conclusions

As noted earlier, the issue for determination concerns the effect of the two tariff notices of rate increases issued on May 17, 1977, on the application of rates for shipments occurring during July through September 9, 1977. In other

[3] See Exhibit 1 (Affidavit of Frank E. Baldwin, Du Pont's Supervisor, Liner Rates and Services, at 4, 5). Sea-Land does not dispute the fact that the commodity was a herbicidal preparation. Tr. 29–30.

[4] Exhibit 3 shows that Du Pont has revised its earlier claim for reparation, which was $17,330.38, as shown in the complaint, and now seeks $17,782.70. The reason for the revision relates to Du Pont's earlier failure to rate a portion of the second shipment under previous Item 599.2075.20 ("Fungicidal Preparations") whose rate was $145.50 W, rather than $134 W, which Du Pont is seeking to have applied for the remainder of the shipments except for that portion of the fourth shipment containing "Tersan 75," as discussed above. Moreover, Du Pont had to recalculate its original claim which had been based mainly upon a rate of $141 W, which Du Pont mistakenly believed would have been the applicable rate after a July 1, 1977, general rate increase. Tr. 10–18. No such increase affected these rates for the destination ports involved, however. Tr. 12.

words, does the fact that on May 17, 1977, the Conference (and Sea-Land) gave short notice (six days) of a rate increase when deleting Items 599.2080.00 and 599.2075.20 and incorporating them into Item 599.2000.00, and at the same time gave notice that the rate on Item 599.2000.00 would increase effective June 19, 1977, to $134 WM, make it unlawful for Sea-Land to assess that $134 WM rate on later shipments?

As clarified at the hearing, it appears that Du Pont is claiming that the proper rates that should be applied to the four shipments (except for that portion of the fourth shipment consisting of "Tersan 75") should be the rates applicable to Items 599.2080.00 ("Herbicidal preparations") and 599.2075.20 ("Fungicidal preparations") which had been deleted by the first tariff notice of May 17, effective May 23, 1977. Du Pont believes that the short-notice deletion of these items makes application of the $134 WM rate for Item 599.2000.00, which had gone into effect on June 19, 1977, unlawful. This is because, as Du Pont views the matter, the two items were deleted on only six-days' notice, not on 30 days, as required by section 18(b)(2) of the Act.[5] In making this argument Du Pont made clear at the hearing that it was relying solely upon a question of tariff law and was not claiming that it had relied on the earlier rates or any representations to Du Pont prior to shipment that the earlier rates would be charged on the shipments. In other words, Du Pont is not making a claim for equitable relief under the special-docket provisions of section 18(b)(3) and is not claiming that it had been quoted the earlier rates on which it had relied or that it had believed the earlier rates would apply before booking the shipment. Tr. 40. On the contrary, counsel for Du Pont stated that the alleged overcharge was uncovered through normal auditing procedures some time after the shipments took place and that no one at Du Pont who booked the shipment had a daily familiarity with the tariff rates. Tr. 39–40. Counsel for Du Pont made clear that Du Pont paid the rate filed at the time of the shipments ($134 WM), as it believes it was required to do, but believes that it now has the right to sue for recovery of the allegedly unlawful charges, under section 22 of the Act, as a matter of law. Tr. 40–41. In short, Du Pont is contending that it was overcharged unlawfully because of Sea-Land's deletion of the earlier rates on Items 599.2080.00 and 500.2075.20 on short notice on May 17, 1977, effective May 23, 1977, and that it is now entitled to recover the overcharge, in effect returning the rate to those rates in effect prior to May 23, 1977. Du Pont concedes that it has been unable to find much case law in support of its position (Tr. 35, 36) but does rely upon one case, namely, *Chicago, M., St. P. & P. R. Co. v. Alouette Peat Products,* 253 F.2d 449 (9th Cir. 1957), and another more recent I.C.C. case which cited *Alouette Peat,* namely, *Shobe, Inc. v. Bowman Transportation, Inc.,* 350 I.C.C. 664 (1975). Du Pont contends that in *Alouette Peat,* the Court allowed shippers to

[5] Although not clearly articulated by Du Pont at the hearing, one could conceivably argue that the charging of a rate other than $134 W, which Du Pont believes to be the only rate lawfully applicable to the four shipments, violated section 18(b)(3) of the Act because Sea-Land charged a rate other than that lawfully applicable. This argument is somewhat theoretical assuming as it does that the only rates properly specified in the tariff were the earlier rates of $134 W and $145.50 W, and that any departure from them (by charging $134 WM) was an act of charging a rate greater than that specified in the tariff. Since this contention, however, rests upon a determination of the effect of the short notice filing in May on the effectiveness of tariff rates in July through September, the critical issue remains whether the earlier short notice has any effect on the later rates, i.e., whether a violation of section 18(b)(2) which requires 30-days' notice of rate increases, requires that the later rate be held void.

recover overcharges because rail carriers had published increased rates on less than required statutory notice as well as exceeding permissible rate levels and that the recovery was allowed although the shipments took place some time after the short-notice increases had gone into effect. Tr. 33–38. In *Shobe,* Du Pont contends that the I.C.C. asserted that a statutory violation in filing tariffs would form the basis of relief for shippers. *See* letter from Raymond Michael Ripple, attorney for Du Pont, dated November 21, 1979, addressed to me. Although the rate on file might have been legal and therefore had to be paid by Du Pont, Du Pont claims that it was not lawful because of the defective filing in May, and therefore that Du Pont is now entitled to recovery. Tr. 45–46.

At the hearing, counsel for Sea-Land rebutted Du Pont's arguments on the law. Tr. 46–51. Counsel conceded that there was indeed a lack of case law on the particular point. However, he argued that *Alouette Peat* case did not merely involve a carrier's filing rate increases on short notice but rather filing rate increases at unlawfully high levels as well as on short notice, in violation of a specific order of the I.C.C. which had fixed a permissible level of rate increases as well as the particular notice period to be followed by the carriers. By violating the order of the I.C.C., according to counsel, the carriers had committed an act that was void and unlawful and the increased rates were, in effect, already rejected by the I.C.C. In the present case, however, the carrier rate filings were not rejected by the Commission under section 18(b)(4) of the Act (which authorizes rejection under certain circumstances). Therefore, according to Sea-Land's counsel, the filing was not void at the outset, although filed on short notice, and although the statutory violation cannot be excused, once the statutory notice period has run, the filed rates may become legal and lawful. Tr. 51.[6] Counsel stated furthermore that *States Steamship Company Far East/USA Household Goods Tariff No. 2FMC–9,* 19 F.M.C. 793 (1977), a case which I cited to both counsel and requested their views, is more pertinent than *Alouette Peat,* as establishing that an unrejected tariff is not void even if filed defectively.

After considering arguments of counsel and consulting case law, I find that Du Pont's contentions are not tenable either in fact or in law and that Sea-Land's views as to the correct legal conclusions to be drawn in this case are more reasonable. Although the Conference and Sea-Land did in fact file a defective tariff notice in May 1977, not only was this filing never rejected by the Commission but it had long since expired and receded into history by the time of the four shipments in question. To hold that a short-notice filing in May 1977 should render rates applicable to shipments in July through September ineffective would introduce a dangerous and unsound concept into tariff law, something akin to corruption of blood, i.e., a permanent taint running through the tariff many months after the 30-day notice period required by law had expired. Such a doctrine could expose a carrier to claims for many years after a short-notice filing had been made even if there were absolutely no

[6] In counsel's exact words: "In my view, conceivably passage of time alone and the expiration of the 30 day statutory requirements would be adequate to accomplish that purpose." Tr. 51.

equities on the side of the shipper, i.e., even if the shipper had no idea and did not care what the rate had been when it booked the shipment and consequently suffered no loss in profits because of payment of the applicable tariff rates. Moreover, to give shippers awards of money for short-notice tariff filings occurring months before their shipments would, in effect, be giving them even greater protection than the statute, which limited the notice period to 30 days, intended. Finally, this is not even a case in which the assailed rate which had been applied by the carrier to the shipments was the same rate which had been filed on short notice, since the rate filed on short-notice was $146 W, and the rate which was applied was $134 WM. Had Sea-Land attempted to charge the $146 W rate to shipments occurring within the first 30 days of the May 17 tariff filing, Du Pont might well claim the protection of the 30-day period established in section 18(b)(2) of the Act. In this case, however, I find no grounds for extending such protection well beyond the 30-day period and for voiding another rate which had been filed on statutory notice.

Principles of Tariff Law

Du Pont does not dispute the legal principle that a tariff rate which is filed and not rejected is legally applicable and must be paid by the shipper. This is a correct statement of applicable tariff law. Du Pont is also correct in asserting that a shipper, after paying the legal rate on file, may sue thereafter to seek recovery of damages where there is a violation of law. The Commission has acknowledged these principles. Thus, in *States Steamship Company Far East/USA Household Goods Tariff No. 2 FMC-9, supra,* the Commission was called upon to render a declaratory judgment regarding the effect of an allegedly defective tariff cancellation notice. In that case the carrier (States Steamship Co.) had at one time been a party to a mutual transhipment agreement with another carrier (Lykes Bros. Steamship Co., Inc.) by which the two carried military household goods from Far Eastern ports to U.S. West Coast and Gulf ports. The agreement was canceled on January 10, 1976, but the implementing tariff (FMC-9) was inadvertently not canceled by the parties. States finally noticed the failure to cancel the tariff and sent a telex to the Commission on May 21, 1976, announcing the cancellation of Tariff FMC-9. Under the Commission regulations then in effect (46 C.F.R. §536.6(c)(5)), States was supposed to follow the telex with a permanent tariff page in 15 days. This was not done. The permanent page was not filed until July 29, 1976.

The shipper, Military Traffic Management Command of the Department of Defense (MTMC) argued, among other things, that the May 21 tariff filing was a "nullity" because it caused an increase in rates on less than 30-days' notice and because States violated the Commission's regulation requiring the followup permanent page. Alternatively, MTMC argued that the tariff was not legally canceled until August 29, 1976. The Commission, however, found that the May 21 filing effectively canceled the tariff notwithstanding the failure to file the permanent page within the time required by the regulation. Moreover, the Commission found that the May 21 notice did not result in an increase in cost to the shipper but rather a cancellation of a service. The Commission rejected the "nullity" or "void *ab initio*" theory as to the May 21 filing. The Commission followed the general rule that once accepted for filing, a tariff rate becomes the legal rate which must be applied by the carrier notwithstanding defects in the filing and that this situation prevails until the Commission cancels the tariff after an appropriate proceeding, in which event the tariff is void thereafter. Relief for shippers injured by defective tariff filings are determined in section 22 proceedings after the tariff has been applied, not by declaring the tariff void retroactively. In pertinent part the Commission stated:

> A tariff has one major purpose—to prevent rebates and other types of unjust discrimination by publicly stating the rates to be charged all eligible shippers. Tariff filings are neither adjudicatory matters nor finally determinative of individual rights or privileges. Once accepted by the Commission, a tariff must be adhered to by publishing carrier and shipper alike. (Citation omitted.) Damage actions for illegal tariff provisions arise after the fact and are resolved by means of section 22 proceedings. (Footnote omitted.) To *retroactively* declare a duly accepted tariff *void* for noncompliance with section 536.6(c)(5) would contravene the regulatory scheme established by most Federal common carrier statutes, including the Shipping Act. Once accepted, a tariff may be canceled only after the Commission has, after appropriate proceedings, found it to be inconsistent with some other provision of the Shipping Act or the Commission's Rules. . . . Once the temporary filing was accepted by the Commission, (Footnote omitted) it became legally binding upon States Line, Lykes, and any shippers of military household goods employing the service described therein.

19 F.M.C. at 797–798

To emphasize that the Commission did not accept MTMC's argument that a defective tariff filing is void *ab initio,* the Commission explained that some times the Commission is unable to reject a tariff as soon as it is filed because of lack of opportunity to take immediate action, for example, when the tariff telex is received after hours as happened in *States.* But when the Commission finally rejects the tariff, this does not mean that the tariff was void *ab initio.* Rather it means that the tariff was never accepted.[7]

The principle that filed rates are legally applicable and must be applied at the time of shipment notwithstanding defective filings or inherent unlawfulness of the rates, subject to possible claims for recovery of damages in appropriate proceedings, is well established in the law. See the discussion of the Court in *Alouette Peat,* 253 F.2d at 455 n. 5, citing *Louisville & N. R. Co. v Maxwell,* 237 U.S. 94, 97 (1915); and *Davis v. Portland Seed Co.,* 264 U.S. 403, 425 (1924). In short, the rate on file must be observed even if it does not conform to all requirements of substantive law, until the finding of unlawfulness is made because, whatever its defects, it is the only legal rate. See also *Valley Evaporating Co. v. Grace Line, Inc.,* 14 F.M.C. 16, 19, 20 (1970) ("a rate may be legal in the sense that it is the regularly published rate and yet be unlawful if it violates other provisions of the act."); Docket Nos. 73–17/74–40, *Sea-Land Service, Inc.—Rule on Containers,* 18 SRR 553, 556 (1978); *Cincinnati,*

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[7] Thus, the Commission explained:

> It is generally assumed that a tariff which is not rejected by the close of business on its stated effective date has been accepted for filing. Difficulties arise in the case of after hours telex filings such as State Line's May 21, 1976 cancellation notice. In such situations, the Commission must have a reasonable opportunity to review the filing, and a "rule of reason" has been applied. If the tariff submission is in proper form it is *accepted retroactively.* If significant errors exist, then the tariff is *rejected* as expeditiously as possible on the theory that it was never accepted and not on the theory that it was "void *ab initio.*"

19 F.M.C. at 798 n. 15.

N.O.O. & T. P. Ry. Co. v. Chesapeake & O. Ry. Co., 441 F.2d 483, 488 (4th Cir. 1971) ("[e]ven if the Commission later determines that the tariff is not mandatory . . . the tariff, so long as it is in effect, must be treated as though it has the force of law"; 13 Corpus Juris Secundum, Carriers § 302, at 699–700.

The principle that a rate on file is the only legally applicable rate at time of shipment and that rejection of the tariff by the Commission renders use of the rate unlawful for the future but does not make it void *ab initio,* is supported by other authorities. Section 18(b)(4) of the Act, for example, which is similar to provisions in the Interstate Commerce Act, states:

> The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published and filed; and the Commission is authorized to reject any tariff filed with it which is not in conformity with this section. . . . *Upon rejection by the Commission, a tariff shall be void and its use unlawful.* (Emphasis added.)

It has been held, therefore, under similarly drafted statutes, that the filed tariff rates are applicable and do not become unlawful if not rejected. Thus, in *Phillips Petroleum Co. v. Akron, C. & Y. R. Co.,* 308 I.C.C. 257 (1959), the Interstate Commerce Commission dismissed a complaint filed by a shipper who alleged that railroads had increased rates on less than statutory notice and sought a refund of alleged overcharges in an amount approximating $75,000, plus interest. The rate filing had been done pursuant to a court order but nevertheless had the effect of increasing costs on short notice. The I.C.C. did not reject the filing even though the court's order did not require the railroads to file the increases on less than statutory notice. The I.C.C. noted that its rejection authority under former section 6(6) of the Interstate Commerce Act, which is similar to section 18(b)(4) of the Shipping Act, is not mandatory, i.e., that the Commission was not required to reject defective tariffs but if those tariffs were rejected, they become void prospectively, not retroactively. Interestingly, the I.C.C. refused to follow the decision in *Alouette Peat,* upon which Du Pont in this case relies and the shipper in that case had relied in attempting to return to the previously filed lower rates, finding that the carriers in *Alouette Peat* had not merely filed rates on less than statutory notice but had also violated the Commission's order imposing a maximum rate level so that the Court had refused to give effect to the rate increases which were not found to have been changed legally. 308 I.C.C. at 259. In commenting upon its discretionary rejection authority, the I.C.C. stated:

> Under section 6(6) the Commission is authorized to reject a schedule which does not comply with the provisions of section 6 or the regulations prescribed thereunder, and section 6(9) provides that the Commission "may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date. . . ." Both of these paragraphs provide that any schedule so rejected by the Commission "shall be void and its use shall be unlawful." It should be noted that the Commission is not required to reject any schedule, and that *a schedule becomes void and its use unlawful only upon its rejection by the Commission.* (Emphasis added.)
>
> 308 I.C.C. at 260

The I.C.C. went on to say that since the tariff rates were not rejected by the Commission, they had to be applied and were "valid" even if they violated section 6 or regulations prescribed thereunder. 308 I.C.C. at 260. Then the Commission stated that "the assailed rates could not be found inapplicable, or unjust and unreasonable, solely because they were filed on less than statutory notice without the prior consent of the Commission." *Id.* Finally, the Commission noted that there was no evidence that the assailed rates were "inherently unjust or unreasonable" or otherwise unlawful and dismissed the complaint. *Id.*

In *Shobe, Inc. v. Bowman Transportation, Inc.*, 350 I.C.C. 664 (1975), a case which Du Pont furnished and claims to support its position, the I.C.C. similarly dismissed a complaint in which a shipper had alleged that the carrier had improperly charged rates which had been increased without utilizing the proper tariff symbol required by pertinent regulations. The I.C.C. reversed the initial decision of the Administrative Law Judge who had recommended that the shipper be awarded reparation plus interest in reliance upon *Alouette Peat.* The I.C.C., however, reiterated that a tariff is not void automatically even if it was filed defectively but only void when rejected by the Commission under former section 217(a) of the Interstate Commerce Act (comparable to former section 6(6) of the Act). 350 I.C.C. at 670. Furthermore, the I.C.C again refused to follow *Alouette Peat* in deciding the complaint case before it in *Shobe.* It stated that the court in *Alouette Peat* had found that the rates filed in the tariff had to be collected by the carrier and "did not hold that the tariff was void but, rather that the rates were unlawful because not made effective in the proper manner." *Id.* The I.C.C. also distinguished *Alouette Peat* and the complaint case, which involved a violation of I.C.C. regulations rather than statutory notice provisions, by stating that there was no specific administrative remedy for the statutory violation in *Alouette Peat* whereas in *Shobe* there was an exclusive remedy for violation of the I.C.C.'s regulations, namely, rejection by the Commission and the voiding of the tariff. *Id.* Again, as in *Phillips Petroleum,* the I.C.C. found no reason for a reparation award and found that the assailed rates had not been shown to be unjust, unreasonable, or otherwise unlawful. *Id.*

In other cases the I.C.C. has dismissed complaints alleging tariff filing errors and adhered to the principle that the tariff rates, unless otherwise unreasonable or unlawful, should be charged and become void only after the Commission actually rejects the tariffs under the appropriate statutory provisions cited above. See, e.g., *Heavy and Spec. Carriers Tariff Bur. v. U.S.A.C. Transport,* 302 I.C.C. 487 (1957), and cases cited therein. Cf. also *Aaacon Auto Transport v. State Farm Mut. Auto Ins.,* 537 F.2d 648, 656 (2d Cir. 1976), *cert. den* 429 U.S. 1042 (1977) and *Aluminum Products Dist. v. Aaacon Auto Transport,* 549 F.2d 1381, 1385 (10th Cir. 1977), indicating the courts' views that tariffs are void after rejection by the I.C.C.

Notwithstanding this case law which demonstrates that reparation awards in cases involving old defects in tariff filing are virtually non-existent, Du Pont relies upon the aforementioned *Alouette Peat* case in support of its claim. As already mentioned, that case has consistently been distinguished by the I.C.C. itself and in this case, as counsel for Sea-Land has contended, the distinctions must be considered. In *Chicago, M. St. P. & P.R. Co. v. Alouette Peat Products, supra,* 253 F.2d 449, the Court of Appeals for the Ninth Circuit affirmed a lower court decision directing the I.C.C. to award recovery of overcharges which had been collected by railroads under rates which had been increased by the railroads on short notice in violation of an I.C.C. order limiting the level of the rates. The court was impressed with the fact that the railroads had exceeded the maximum rate levels which the I.C.C. had twice found to be reasonable and had therefore "exacted a greater increase than the Commission had found they were entitled to. . . ." 253 F.2d at 457. It found that the case was one of overcharges because shippers had been required to pay "cash out of pocket that should not have been required of them," and the Court added that "it would be unthinkable if . . . they could not recover. . . ." 253 F.2d at 457. The Court, however, went beyond the fact that the rates had exceeded maximum permissible levels and agreed with the District Court that the recovery should be based on the last rate in effect prior to the rate increases which the Court felt had been instituted illegally and which therefore could be given no effect. 253 F.2d at 453, 456. As counsel for Sea-Land views this situation, the Court, in effect, rejected the tariff filing because of its violations of the I.C.C.'s orders regarding notice and the proper rate level, although the I.C.C. itself had not rejected the tariff. (Tr. 48). In other words, the Court believed the filing should have been rejected at the outset and took steps to ensure that shippers would be treated just as if the tariff had been rejected and therefore made void *ab initio*.

As far as the parties are aware, *Alouette Peat* is the only case which went so far as to invalidate filed rates from the moment of their filing when the agency did not reject such rates and to award recovery on the basis of the last rates which had been filed properly. As noted, the prevailing view is that filed rates are applicable until rejected and recovery under filed rates is limited to cases in which there is something unreasonable, discriminatory or otherwise inherently unlawful with the rates. Certainly, on the basis of the statements made by the Commission in *States, supra,* this Commission, as well as the I.C.C., does not hold to the view that a tariff filed with some defect that would justify rejection is void *ab initio* and that shippers are entitled to file claims against the filed rate seeking reparation awards during the time the rate was on file without showing that there was something unreasonable or unlawful about the rate itself. Analysis of the void *ab initio* theory which Du Pont, in effect, seems to advocate and which the Court in *Alouette Peat* seems to have followed reveals great dangers and potentials for abuse.[8]

The Problems With the Void Ab Initio *Theory*

The problem with the theory that a defective tariff filing can never be cured with passage of time and can never be given effect is that carriers' tariff rates become uncertain and the carriers may be exposed to liability and innumerable

[8] Occasionally courts will find a filed tariff to be ineffective or void even retroactively but in cases in which there is a fatal violation of law that cannot be cured by the mere passage of time. For example, a carrier's rates may be increased by a tariff filed by an association which failed to obtain the carrier's consent required by law, or a tariff provision may restrict liability of the carrier unlawfully, or the carrier may not have the requisite operating authority under law. See, e.g., *Axinn & Sons Lbr. Co., Inc. v. Long Island R. Co.,* 466 F. Supp. 993 (E.D.N.Y. 1978) (association filed tariff without carrier's consent); *Boston & Maine Railroad v. Piper,* 246 U.S. 439, 445 (1918) (unlawful limitation of liability provision in tariff); *W. J. Dillner Transfer Co. v. U.S.,* 214 F. Supp. 941 (W.D. Pa. 1962) (tariff filed outside scope of carrier's certificate of authority); *So. Pac. Co. v. U.S.,* 272 U.S. 445 (1962) (tariff filed contrary to statute granting Government special discounts). The present case, however, concerns a tariff filing on less than 30-days' notice rather than some type of defect that time can never cure.

claims for refunds of overcharges with no time limitation. For example, suppose a carrier in January 1960 inadvertently publishes a rate change on widgets which, no one notices, results in an increase and suppose the increase takes effect in one week but the tariff is not rejected. Ten years later the rate on widgets may have been increased ten or more times to keep pace with inflation and each rate increase may have been filed on proper 30-days' notice. Nevertheless, some enterprising shipper notices that there had been a short-notice filing ten years ago and argues that the tariff rate on widgets has been corrupted by the ancient defective filing. Therefore, the shipper seeks reparation measuring his damages as the difference between the 1970 rate, say $150 per ton, and the 1959 rate (before the short-notice increase) of, say, $50 per ton. Such a claim is obviously absurd. Or take another example. Let us suppose that the increased rate on widgets was filed on short-notice in January 1969 and never increased since that time. In late 1970 the enterprising shipper notices that almost two years ago there was a short-notice increase which was never rejected. Can he therefore argue that the defective filing was never cured by the passage of time? In other words, is it reasonable to permit him to claim an overcharge and seek to return to the 1968 rate level on the grounds that the rate was void *ab initio?* Should carriers be exposed to multiple suits and claims by shippers whenever they pay the freight because of an error occurring long before they booked the shipment and which caused them no loss of profits or other special financial harm? What doctrine of law holds that shippers are entitled to that much protection against tariff-filing errors? Section 18(b)(2), upon which Du Pont relies, limits protection to 30-days' notice only and furthermore states that rate increases "shall become effective not earlier than thirty days after the date of publication and filing thereof with the Commission." As counsel for Sea-Land argued, it is reasonable to conclude that a short-notice rate increase cannot be given effect within the first 30 days, but once that statutory period has expired, there is no reason to deny the validity of the rate.[9] After all, the 30-day period is all the notice that shippers are entitled to have by law. Hence, there is no compelling reason in law or logic to invalidate a rate which had been filed on short notice months or years ago and to award refunds of freight to shippers on the basis of a previous lower rate filed long ago. Such action would not only afford far greater protection to shippers than the law intended but would even award shippers refunds in cases such as this one where the shippers do not claim any special financial injury caused by a mistaken impression that an earlier, lower rate was still in effect. Such action by the Commission might also invite an industry of rate filing auditors who would search old tariff pages looking for defective filings so that they could recommend that shippers file complaints seeking recovery of alleged "overcharges" although shippers had felt no injury at the time of shipment.[10]

[9] The idea that a rate increase filed on less than 30-days' notice may become valid after the 30 days have expired but should not be given effect within the first 30 days, in other words, that the defect cures itself with the passage of time, finds support in *States, supra.* In that case the Commission held that a tariff cancellation notice filed on May 21, 1976, effective immediately, was valid. However, in its decision the Commission commented that had the tariff notice resulted in a rate increase, it could not have taken effect until June 20, 1976. See 19 F.M.C. at 797.

[10] Since payment of an alleged overcharge can constitute the beginning of a cause of action, a shipper could conceivably pay an alleged overcharge years after the defective filing of a rate increase and file a complaint within two years after payment under section 22. See *Aleutian Homes, Inc. v. Coastwise Line et al.,* 5 F.M.B. 602, 611 (1959). I do not mean to imply that Du Pont

In the Present Case the Rate Under Attack Was Not the Rate Filed on Short Notice

The previous discussion demonstrates that rates which had been increased at one time in the past by defective notice should nevertheless be held applicable to shipments occurring many months in the future and, as I have suggested, applicable to shipments occurring more than 30 days after the original defective filing. The discussion assumed that the rates which were applied to later shipments and which were attacked were the same rates which had been filed defectively in the past. In the present case, however, as the factual discussion showed, the rate which was applied to the shipment and which is under attack ($134 WM) is not the same rate which had been published on short notice ($146 W). Under Du Pont's theory, then, not only should the Commission hold a rate to be ineffective or void *ab initio,* which had been defectively filed months before, but it should also hold a subsequent rate invalid as well. Carried to its logical conclusion, this could mean that any present rate could be invalidated if it was part of a chain of increases in which the first rate increase had been filed on less than 30-days' notice.[11]

It will be remembered that prior to May 23, 1977, the rates for herbicidal and fungicidal preparations were $134 W and $145.50 W, respectively. However, on May 17, 1977, two tariff notices were published and filed by the Conference. One canceled the two previous rates and referred shippers to another commodity item. The other announced that Sea-Land's special rate on that item, which was $146 W, would expire on June 19, 1977, in favor of the Conference's general rate of $134 WM. This latter notice was published on more than 30-days' notice. The first notice, however, attempted to effectuate a rate increase on only six-days' notice. Clearly, under the doctrines discussed above, no effect could be given to the first notice as regards a rate increase to $146 W, and no one is attempting to apply such a rate in any event. But the second notice announced an increase on Item 599.2000.00 on full statutory notice, resulting in the rate of $134 WM which was applied to Du Pont's shipments from July through September. Nevertheless, Du Pont seeks to have this $134 WM rate declared void and ineffective for purposes of this case.

Since the $134 WM rate had been filed on full statutory notice but the $146 W rate had not been, it seems clear that it is the $146 W rate which should be declared ineffective and void, not the $134 WM rate. In other words, shippers like Du Pont had a right to consider the special $146 W rate to be defectively filed and subject to reparation action if Sea-Land had attempted to charge it. Moreover, since that special rate was announced as expiring on June 19, 1977, there is no way in which that rate could have been given effect 30 days after publication under the theory that a short-notice filing can correct itself with the passage of time. However, the second notice gave shippers more than 30-days' notice that on July 19, 1977, the rate on their commodities would

[11] In all fairness to Du Pont, I should mention that Du Pont does not seem to be urging such an extreme principle and is not supporting the idea of indefinite exposure of carriers to claims because of old tariff-filing errors. Counsel for Du Pont explained at the hearing, in response to my comments on such doctrines, that his contention was much narrower and rested upon the notice provisions of section 18(b)(2) and the doctrine enunciated in *Alouette Peat.* Moreover, he specifically asked that the case be limited to the facts involved herein so that Du Pont could be awarded reparation and he did not seek to establish open-ended carrier liability. See discussion at 51–54 of the hearing transcript.

increase to $134 WM, and there is no basis to hold that this rate should not be held applicable because of the other filing, especially since the shipments did not even commence until July 16, 1977. Whatever the merits of *Alouette Peat,* at least the rates which were assailed and held ineffective by the Court were the same rates which had been published on inadequate notice and which had violated a specific order of the I.C.C. In short, I find no basis in law by which I can find that the $134 WM rate under attack here should be held to be ineffective or void *ab initio.*

A Grant of Du Pont's Claim in This Case May Indirectly Contravene the Special-Docket Law

There is another reason why acceptance of Du Pont's contentions in this case may lead to possible abuse in addition to the problem of creating uncertainty about the validity of carriers' filed rates for an indefinite period of time whenever there had once been a defective tariff filing. This relates to the fact that there had been a special-docket application filed on behalf of Du Pont by the Conference which had to be rejected because it was filed beyond the 180-day period permitted by section 18(b)(3), as amended by P.L. 90–298. If, in fact, there was a tariff-filing error in May and Sea-Land would have preferred to assess a rate other than $134 WM to the commodities shipped during July through September had the error been detected prior to the time of the shipments, the law did provide a special equitable remedy. However, that special-docket application could not be considered because of its untimeliness and the Commission should be careful not to circumvent the jurisdictional requirements which the application failed to meet by granting the same claim under a strained theory of law. Such a result is also unwarranted when the shipper, such as Du Pont here, makes clear that it is not basing its claim on reliance on a lower quoted rate or carrier's misrepresentation but rather on a strict construction of tariff law.[12]

I conclude therefore that there is no basis in law for me to find that the rate which Du Pont paid for the four shipments during July through September, namely, $134 WM, should be declared ineffective, invalid, or void *ab initio* because of certain tariff filings in May of 1977. I also find that the subject rate was filed on full statutory notice and that the rate which was not applied and could not have been given effect was the special rate of $146 W, which expired on June 19, 1977. Moreover, I find that there is no basis in equity and no showing of unlawfulness or unreasonableness in connection with the $134 WM rate which could support a finding that Du Pont suffered financial injury for which it now deserves reparation under section 22 of the Act.

[12] As I mentioned above, a special-docket application was rejected by the Commission's Secretary because it was filed beyond the permissible time limit as prescribed by law. Counsel for Du Pont, at the hearing, expressed no knowledge of the facts contained in the application and deemed them to be irrelevant because his case was based upon principles of tariff-filing law, not upon equitable doctrines found in the special-docket cases. Tr. 38 41.

ULTIMATE CONCLUSIONS

Du Pont is seeking to have the Commission declare a rate on file during July through September 1977 to be ineffective and void as regards four shipments made during that period of time. It bases its claim on a theory of law that because there had been a short-notice filing of one rate ($146 W) the subsequent rate which was charged and which was filed on adequate statutory notice ($134 WM) was also ineffective and void. The overwhelming view of the authorities in tariff law is that a tariff rate on file is the only legal and effective rate that can be charged by the carrier and that it remains so until after rejection by the agency concerned under the rejection authority conferred by law. Furthermore, if any shipper has suffered harm because of the rate, the shipper cannot merely claim that the rate had once been filed on short notice and should now be declared ineffective or void *ab initio.* Rather the shipper must show that there is something inherently unreasonable or unlawful about the rate and that the shipper suffered injury as a consequence. Otherwise if refunds of freight are awarded in complaint cases merely because of old defective filings, carriers' tariff rates become uncertain and subject to attack for an indefinite period of time even when shippers have not suffered any special injury and had not been misled prior to shipment regarding the fact that the rate charged was filed and in effect. The only exception to this rule of tariff law is the special-docket procedure authorized by section 18(b)(3) of the Act in which shippers have been injured when relying on a tariff which contains an error. This is not that case.

Du Pont relies upon one court case, *Alouette Peat, supra,* in support of its claim. However, in that case the court invalidated a rate increase which had violated not only the notice provisions of law but also a specific order of the I.C.C. as to rate levels. Moreover, in that case the rates under attack by the shippers were the same rates which had been filed improperly. In this case the rate attacked by Du Pont is not the same rate which had been affected by a short-notice filing in violation of section 18(b)(2) of the Act. Even if the rates were the same, however, the more reasonable rule would seem to be that a short-notice filing corrects itself after 30 days, i.e., that the rate can be given no effect for the first thirty-day period but becomes effective thereafter. To declare filed rates void retroactive to the date of filing would not only create great uncertainty as to the validity of carriers' filed rates but might well invite an industry of rate-filing auditors seeking to locate old defects in tariffs which caused no harm to any shipper at the time of shipment but could now serve as the basis for complaints alleging "overcharges."

A final cautionary word is warranted in this case because of the fact that relief for Du Pont had once been sought in the form of a special-docket application which had been filed by the Conference but had to be rejected because it was filed beyond the 180-day period permitted by the special-docket provisions of section 18(b)(3) of the Act. Should Du Pont's arguments be accepted and it be granted the same relief that was sought in the special-docket application, the Commission may be circumventing the requirements of the special-docket law on the basis of a strained theory of law in a case in which Du Pont does not even claim relief on equitable grounds.

I conclude therefore that there is no basis in law, fact, or equity for me to find that the rate which Du Pont paid for the four shipments should be declared ineffective, invalid, or void *ab initio* and no showing that Du Pont suffered financial injury for which it now deserves reparation under sections 18(b)(2) and 22 of the Act.

(S) NORMAN D. KLINE
Administrative Law Judge

WASHINGTON, D.C.
January 18, 1980

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-64

FIAT-ALLIS FRANCE MATERIELS
DE TRAVAUX PUBLICS S.A.

v.

ATLANTIC CONTAINER LINE

NOTICE

February 26, 1980

Notice is given that no exceptions have been filed to the January 21, 1980 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79–64

FIAT-ALLIS FRANCE MATERIELS
DE TRAVAUX PUBLICS S.A.

v.

ATLANTIC CONTAINER LINE

Finalized February 26, 1980

Complaint was not filed within the two-year period required by section 22 of the Shipping Act, 1916, and is therefore dismissed.

J. Ethan Jacobs for complainant.
John A. McFarlane for respondent.

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

Complainant Fiat-Allis France Materiels De Travaux Publics, S.A. (Fiat-France) charges Atlantic Container Line (ACL) with violations of section 18(b)(3) on a shipment of "wheelloaders" from New York to Le Havre, France. Generally, the complainant alleges that "on various dates in 1976, Fiat-Allis Construction Machinery Inc. (Fiat-Illinois), a manufacturer, shipped wheelloaders" via ACL from New York to Le Havre. "Through clerical error the shipper declared the full cube of each wheelloader as if shipped with tires and buckets at 2958 CU. FT. . . . Since tires and buckets were not shipped on the machines the correct cube of each wheelloader was 2547 CU. FT." Overcharges are claimed in the amount of $8,004.00.

In a letter dated July 11, 1979, ACL submitted a "sworn statement" as its answer to the complaint. In its statement ACL says that but for a conference tariff rule it "would have settled this claim when first presented based on the corrected dimensions as substantiated by documents from claimant."[2] Aside

[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 tariff rule referred to provides: "claims for adjustment of freight charges, if based on alleged errors in weight or measurement will NOT be considered unless presented to the member line in writing before the shipment involved leaves the custody of the member line. . . . All other claims for adjustment of freight charges must be presented to the Member Line within six (6) months after the date of shipment." North Atlantic French Atlantic Freight Conference, Tariff No. (3) FMC 4.

from some mathematical errors which would reduce the amount of the claim to $7,999.00, ACL does not now dispute the claim. Further ACL expresses the hope that its response "is sufficient so that a hearing and oral testimony will not be required."

Initial consideration of the complaint and answer brought to the fore the need for the actual dates of payment of the freight charges, since the complaint stated that "All payments were made by claimant within two years of the original date of filing of these proceedings."

I telephoned counsel for complainant on July 31, 1979, and requested that he supply the dates of payment for each shipment. He said he would supply them as soon as possible. I received no response from counsel and on October 11, 1979, I wrote counsel a letter reminding him of the telephone call and giving him until October 30, 1979, to submit:

> [t]he actual payment dates on the shipments in question. These should be supported by some documentary evidence.

On October 12, 1979, I received a letter from Fiat-Allis of Illinois [3] stating that the dates of payment were coming from France. On November 9, 1979, I received the dates of payment.[4]

After receipt of the payment date a complete analysis of the complaint revealed the very definite possibility that the complaint was barred by the 2-year statute of limitations set out in section 22 of the Act. The analysis showed that the complaint was first filed on February 26, 1979, and was "amended" on June 21, 1979; that the shipments were made on various dates in 1976; and that the complaint was intended to be a "continuation of proceedings originally filed as informal proceedings filed in February 3, 1979." Further, there was the statement already noted that "claimant" had paid the freight charges "within two years of the original date of filing of these proceedings."

By order of November 7, 1979, I required complainant to submit the following:

1. An explanation of the statement in paragraph I of the complaint that it "is a continuation of proceedings originally filed as informal proceedings on February 3, 1978." This explanation should be accompanied by copies of the "informal" filing and any other evidence supporting the assertion.
2. An explanation of the statement that "All payments were made by Claimant within two years of the original date of the filing of these proceeding," i.e., to what date does the statement refer?
3. A memorandum showing why the return of the complaint by the Assistant Secretary on June 4, 1979 and the refiling of the complaint on June 21, 1979, does not establish the latter as the filing date for the purpose of tolling the statute of limitations.

The submission of counsel for complainant in response to the order shows the following sequence of events.

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[3] The letter was obviously in the mails when I wrote counsel for complainant.

[4] Contrary to my specific request no documentary evidence was submitted in support of the dates given in the letter.

On February 3, 1978, Inter-Maritime Forwarding Co. (IMF) wrote a letter to the Secretary of the Commission. IMF said that Fiat-Allis of Illinois had made a mistake in the cube of the wheelloaders and had asked IMF to obtain a refund on the ocean freight. The letter went on to set out IMF's inability to recover from ACL because of the tariff rule cited above and concluded:

> However, it is our understanding that you have the authority to review such a case on a special docket and within the time limit of two years. Consequently we hereby request of you a special docket in this matter and for which we will be presenting to you within a few days, complete documentation to these errors.
>
> Trusting this request will receive a favorable reply and that our claim will become effective as of today, we remain. . .

By letter dated February 7, 1978, IMF submitted (1) a letter from Fiat-Allis explaining "their error and outlining the exact cube," (2) the original manifest giving the incorrect measurements, (3) a corrected manifest showing measurements without bucket and tires and (4) ten sets of documents comprising freight bills, bills of lading, and shipping manifests. In the letter IMF said that documents from its file 07/22867 would be sent later because the file had been "temporarily misplaced." IMF concludes:

> We sincerely hope that we have supplied you with sufficient information to clearly indicate the error made by the shipper on his original manifest and we sincerely hope that you shall be able, very quickly to authorize Atlantic Container Line to amend their manifest to clearly assess the freight on 2,542 cubic feet per unit so that in turn they will advise their Le Havre office of this change and accomplish the necessary refund to:
>
> SETI INTERNATIONAL
> 79–81 Rue du. Fg. Poisenniere
> Paris 9 e France
>
> who paid the ocean freight for the consignee and for which they have not been reimbursed for the overpayment since the consignee has refused to pay same due to the wrong cube on which the freight was originally assessed.

Finally, by letter dated February 9, 1979, IMF, submitted the documents from its file 97/22867 and concluded:

> You now have the complete file and we look forward to your early reply and to settlement of this claim regarding wrong assessment of freight based on an incorrect cube.

Now in possession of the "complete file," the Secretary, on February 17, 1978, wrote IMF explaining that it was correct in its basic understanding that the Commission could review a claim for overcharges and order a carrier to make a refund. However, the Secretary pointed out that the Commission had established specific procedures for obtaining review none of which had been met by IMF. The Secretary went on to explain the various ways in which such a claim could be put before the Commission and cited the specific Commission rules governing them. The Secretary returned the letters and documents and sent copies of the pertinent rules to IMF.

Sometme between February 17, 1978 and November 8, 1978 ACL apparently filed some special docket applications. Counsel for Fiat-France alludes to them in his memorandum but does not attach them to it. They are evidenced by a letter dated November 8, 1979 from the Secretary to a "John A. McFarlane, Manager, Conferences & Ocean Pricing, Atlantic Container Line." In the letter the Secretary returned "several recently submitted special docket application" because they were time-barred. The Secretary went on to point out that it appeared that what ACL was really seeking was authorization from the Commission to refund overcharges resulting from misdeclaration of measurement and if this was so the proper procedure was to file a complaint either formal or informal depending on the amount of the claim.

Finally on February 26, 1979, the original complaint was filed. As already noted that complaint contained no allegation of a violation of the Shipping Act, and on June 4, 1979, the Assistant Secretary wrote counsel for complainant the following letter:

> Returned herewith is a formal complaint which you filed in February of this year. Upon receipt of this complaint I telephonically advised you that it could not be processed because it failed to allege a violation of a specific section of the Shipping Act as required by 47 CFR 502.67. You indicated that you would submit a supplement to correct this defect. I subsequently called again to remind you that we had not received such a supplement.
>
> In view of the amount of time that has passed since our last conversation, I am now returning your complaint for whatever further action you choose to take in this matter. You are reminded, that a two-year statute of limitations applies to complaints seeking reparation.

On June 21, 1979, the Commission again received the original complaint only this time it had attached to it a cover page which stated:

> Section VII of the Complaint attached hereto which was submitted and received by the Federal Maritime Commission February 26, 1979 is amended to replace original Section VII as follows:
>
> > VII. The section of the Shipping Act, 1916, as amended, alleged to be violated is 46 U.S.C. 817(b)(3) inasmuch as the carrier charged or received a greater compensation than the rates in its tariffs on file with the Commission.

Discussion and Conclusions

Before the merits of this claim can be considered, it must first be determined that the complaint is not time-barred. Section 22 provides in relevant part:

> The Commission, if the complaint is filed within two years after the cause of action accrued, may direct the payment, . . . of full reparation to the complainant for the injury caused by such violation.

The crucial question is whether the "filing" of the "informal proceedings" on February 3, 1978, constitutes the filing of a complaint within the meaning of section 22. Complainant's entire argument on this issue consists of the following:

> [t]he filing with the Commission on February 3, 1978 of a request for a Special Docket in this matter . . . was the first application made to the Commission on behalf of Fiat-Allis and specifically requested at page 2 that the claim with the Commission would be effective as of that date thereby tolling the limitation period. The original claim was supplemented by letters of February 7, 1978 and February 9, 1978 . . . A response was received from the Secretary of the Commission . . . The continued contact between Fiat-Allis and the Commission ultimately resulted in the filing of the formal complaint with the Commission, which, as amended is the basis of the claim herein.

Counsel cites no authority and other than the suggestion that the letter of IMF and the formal complaint are all of a piece, no reasoning or argument is offered to support what is obviously counsel's theory, i.e. that the IMF letter of February 3, 1978, constituted the filing of a "complaint" which tolled the statute of limitations and all the other pleadings filed in the proceeding are but amendments or supplements to that "complaint." Counsel is wrong on a number of counts which are fatal to his theory.

First it is claimed that the February 3rd letter of IMF "was the first application made to the Commission on behalf of Fiat-Allis. . . . ." This is simply not correct. The only mention of Fiat-Allis anywhere in the letter is to Fiat-Allis Construction Machinery Inc. and the only specific reference to it is as the perpetrator of the error which led to the alleged overcharge. However, Fiat-Allis Construction Machinery Inc. is not the complainant here. It is the letter of February 7, 1978, which clearly indicates on whose behalf the "application" was made. In that letter IMF expresses its sincere hope that:

> [the Commission] shall be able very quickly, to authorize Atlantic Container Line to amend their manifest to clearly assess the freight on 2,542 cubic feet per unit so that they in turn will advise their Le Havre office of this change and accomplish the necessary refund to:
>
> Seti International . . .
> Paris France
>
> who paid the ocean freight on behalf of the consignee since the consignee has refused to pay same due to the wrong cube on which the freight was assessed.

Thus, the application was not on behalf of Fiat-France the complainant here and indeed it could not have been. In order to seek reparation in an 18(b)(3) overcharge case, complainant must either show tht he has paid the freight charges or has a valid assignment of the claim from the person who did. *Trane Co. v. South African Marine Corp.,* 16 SRR 1497, 1501 (1976); *Ocean Freight Consultants Inc. v. Bank Line Ltd.,* 9 F.M.C. 211, 212–213 (1966). *Oakland Motor Car Co. v. Great Lakes Transit Corp.,* 1 U.S.S.B. 308, 311 (1934). Here not only was there not a valid assignment on behalf of Fiat-France, it could not have obtained one since Fiat-France had no claim to assign—it had refused to pay the freight charges. If the claim could be said to be on behalf of anyone it could only be on behalf of Seti-International, whoever they may be. However, it could, I suppose, be argued that the claim was not for an 18(b)(3) overcharge but for special docket relief. To do so would only reach the same result. In special docket cases refunds may be granted only to the person who has actually paid the freight charges. Additionally, even if the letter were considered an application for a special docket the application itself was time-barred under the provisions of section 18(b)(3) which requires that the application be filed within 180 days of the date of shipment. Thus, whether the IMF letter of February 3, 1978 was considered a complaint or an application for special docket relief it was fatally defective, and in neither case could the defect be cured by amendment. See *Carton-Print v. Austasia Container Express,* 20 F.M.C. 30, 39–41 (1977).[5]

The problem of the real party in interest, or the person who actually paid the freight charges raises yet another question—or rather puzzle—concerning the allegations of the formal complaint filed on February 26, 1979. It will be

[5] This says nothing about the other deficiencies if the letter were considered a "complaint." Aside from not naming the real party in interest, it was not sworn to; *Reliance Motor Car Co. v. Great Lakes Transit Corp.,* 1 U.S.M.C. 794 (1938); and it did not allege a violation of the Act as required by Rule 62 of the Commission's Rules of Practice and Procedure.

recalled that the complaint states that "All payments were made by the claimant within two years of the original date of filing of these proceedings." Although somewhat inscrutable, the sentence is meaningful only if it intends to assert that no payment of the freight charges was made earlier than two years prior to the February 3rd letter of IMF. This is borne out by the dates of payment submitted pursuant to my request. The earliest date was March 3, 1976, and the latest was said to be made December 21, 1977. Thus, all the payments would have been made within 2 years of what complainant calls "the original date of filing of these proceedings." It is asserted, however, that the payments were made by "claimant." By even the most charitable construction "claimant" can only be IMF or Fiat-France the complainant here.[6] Yet it is patently clear that neither IMF nor complainant made any payments to ACL for freight charges on the dates submitted. IMF's letter of February 7, 1978, clearly shows that it was Seti-International which had paid the freight charges on the shipments in question and that complainant had so far refused to pay the charges.[7] There is even now nothing in this record to show that complainant has as yet paid the freight on the shipments in question and even has the right to bring the action. However, since the action is time-barred there is no need to determine whether complainant has the legal right to bring this action for reparation.

Complainant points out that ACL has at no time raised the statute of limitations and states, "in fact, it is agreed among all concerned with this action that ACL has no defense to the claim and the refund is currently due to Fiat-Allis." It is a uniformly accepted principle, says complainant, "that it is essential to plead the statute of limitations in order to render it available for a defense." While it is true that there are some cases where it is necessary to plead the statute of limitations, it is not so in cases arising under the Shipping Act. Under that Act the statute of limitations is "jurisdictional." The failure to file a complaint within the two-year period of limitation extinguishes not only the right of a complainant—which could perhaps be revived by the acquiescence of respondent—but it also extinguishes the Commission's jurisdiction. *Reliance Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.M.C. 794 (1938); *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602 (1959). Respondent's failure to plead the statute of limitations in section 22 is irrelevant to the Commission's power to award reparations if the complaint is time-barred. Failure to comply with section 22 leaves the Commission without the power to order a respondent to pay reparations. However, complainant argues that the question of whether the action is time-barred cannot be settled on the present record.

Complainant's argument is that section 22 of the Act starts the limitations period running from the time at which "the cause of action accrues," but since "Fiat-Allis has not been requested to provide any information as to when the cause of action accrued . . . this is a factual question not yet considered." This is especially true, says complainant, "in the light of the fact that the mistake

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[6] Claimant could possibly refer to IMF which filed "the first application to the Commission on behalf of Fiat-Allis."

[7] Either counsel for complainant is ill served by his client or his use of the word claimant is far too inexact.

which gives rise to this cause of action was not capable of discovery by Fiat-Allis until significant time had elapsed after shipment of the equipment."

Counsel for complainant is incorrect when he says that the evidentiary question of when the cause of action accrues cannot be resolved on this record. It can be. However, there seems to be some confusion as to just what transaction or element in the total act of transportation starts the two-year period running.

In *Sun Company v. Lykes Bros.,* 20 F.M.C. 67 (1977), it is said in footnote 7 at 69:

> By judicial decision and Commission rulings, the two-year period starts either upon delivery of the cargo to the carrier or *upon payment* of the freight charges, whichever is later. *Southern Pacific v. Darnell-Taenzer Lumber Co.,* 245 U.S. 531, 534 (1918); *Commercial Solvents Corp. v. Moore-McCormack Lines, Inc.,* 16 SRR 1631, 1632, fn. 3 (Jan. 4, 1977).

In *Commercial Solvents, supra,* footnote 7 of the Commission's Order on Remand read:

> It is well settled that a cause of action accrues at the time of shipment or upon payment of the freight charges whichever is later. *Aleutian Homes, Inc. v. Coastwise Line,* 5 F.M.B. 602, 611 (1959); *United States v. Hellenic Lines, Ltd.,* 14 F.M.C. 254, 260 (1971); *U.S. ex rel Louisville Cement Co. v. I.C.C.,* 246 U.S. 638 (1918).

In the 1971 *Hellenic* case, cited in the Order on Remand, the Commission adopted the initial decision of Judge Levy in which he said:

> Whether the claim is barred by the statute of limitations is dependent upon whether the cause of action accrued at the time the shipment was received or delivered by the carrier . . . at the time of billing . . . or at the time when the freight charges were paid . . . If it accrued at the time the shipment was tendered or delivered or at the time of billing, the claim is barred by the 2-year period within which the statute requires claims to be filed. If it occurred at the time when the freight charges were paid, then the claim is not barred . . . The rule of law is that "the cause of action of the shipper . . . shall be held not to have ocrued (*sic*) until payment is made of the unreasonable charges" . . . *U. S. ex rel Louisville Cement Co. v. I.C.C.,* 246 U.S. 638, 644 (1918). See also *Aleutian Homes, Inc. v. Coastwise Line,* 5 F.M.B. 602, 611 (1959).

In *Aleutian Homes, supra,* and the Order of Remand, the Commission's predecessor, the Federal Maritime Board, said:

> Coastwise's contention that the cause of action accrued at the time of delivery of the shipments is untenable. In *Oakland Motor Car Co. v. Great Lakes Transit Corp.,* 1 U.S.S.B. 308, 310, 311 (1934), our predecessor said:
>
> > [Complainant] was injured the moment he *paid* the charges . . . *His claim accrued at once. . . .* (Emphasis supplied).[8]

From the foregoing it seems clear that originally a cause of action accrued under section 22 only upon the payment of the freight charges. See *Oakland, Aleutian* and *Hellenic, supra.* However, since at least the 1977 Order on Remand in *Commercial Solvents, supra,* the cause of action can accrue at the time of shipment or the time of payment of the freight charges whichever is later. And finally since *Sun Company v. Lykes Bros.,* 20 F.M.C. 67 (1979), the cause of action can accrue at the time of delivery of the cargo to the carrier,

[8] The full sentence quoted here read: "His claim acerued at once and the law administered by the Department does not inquire into later events. *Southern Pacific Co. v. Darnell-Taenzer Lumber Co. et al.,* 245 U.S. 531."

the time of shipment or the time of payment of the freight charges whichever is later.

In suits brought under section 22 to recover reparation or damages for injury caused by a violation of the Act the rationale behind the time of payment of the freight charges is easily understood—the shipper has not been injured until he has paid the unlawful charges. See *U.S. ex rel Louisville Cement Co. v. I.C.C.,* 296 U.S. 638 (1917). In the admittedly limited research I have conducted, I have been unable to find the rationale behind the time of delivery to the carrier or the time of shipment. Fortunately, the selection of one of the three possible events would make no difference to the outcome of this case.

Even if the complaint filed on February 26, 1979, is taken as valid, all of the claims contained in it are barred by the statute of limitations. Paragraph V of the complaint states that the shipments in question were made on various dates in 1976. Thus even if the last shipment was made on December 31, 1976, it would be barred. That delivery to the carrier had to precede the time of shipment seems inescapable. However, even if complainant would define "time of shipment" as date of delivery to the carrier, this could have happened no later than December 31, 1976, by its own admission. Finally it is obvious from the record here that the last event in the total transaction was the payment of the freight charges. Since the last date of payment on a shipment included in the complaint was October 19, 1976, the complaint is clearly barred by section 22 of the Act.[9]

Finally, complainant would point out that for the Commission to hold that these claims are time-barred would be "to work a great injustice to the parties, all of whom recognize their obligations and merely await the authorization of the Commission to rectify the mistake which is the basis for the claim herein." It may be that a "great injustice" will be done to the parties,[10] however, the Commission is without the power and authority to authorize the refund sought here. *Reliance Motor Car Co. v. Great Lakes Transit Corp.,* 1 U.S.M.C. 794 (1938); *Aleutian Homes Inc. v. Coastwise Line,* 5 F.M.B. 602 (1959); and *Carton Print v. Austasia Express,* 20 F.M.C. 30 (1977).

The complaint is time-barred and the case is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

January 21, 1980

[9] Curiously, it would seem that originally a refund was sought on 14 shipments. See IMF letter of February 3, 1978. However, the complaint claims refunds on only 10. Finally, when the request for dates of payment was answered, the number was back up to 14. It is too late now of course for Fiat-France to file a complaint on the 4 omitted shipments.

[10] For an exhaustive discussion of statutes of limitations, their purpose and effect, see *Carton Print v. Austasia Container Express, supra,* at 39–41.

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

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[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

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*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

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[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]

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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 overexpanded 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 deliberately 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 regulations, 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

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[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).

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[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.

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[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.

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[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

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[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 Counsel 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.

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[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. These 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.

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[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

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[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

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[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 Basis	RATE 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	106.00
				[101.25]	[109.25]
	Unitized (Palletized) Shipments	W[2]	112.00	95.25	102.85
				[97.50]	[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	57.00
				[53.50]	[57.50]
		W	69.00	58.00	64.00
				[71.25]	[65.00]
470	Footwear	M	57.00	50.00	53.00
				[50.50]	[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	72.00
				[63.25]	[68.00]
580	Hemp				
	In standard bales	Bale	17.50	15.00	16.00
				[16.50]	[15.10]
	In high density bales	Bale	16.50	13.50	15.00
				[13.75]	[15.25]

Far Eastern Shipping Company Tariff FMC–23—Continued

From: Ports in the Philippines
To: United States Ports

Tariff Item No.	Commodity	RATE			
		Rate Basis	Atlantic Ports	Overland Common Point	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	W	43.00 [43.25]	
	In 40 Ft. CY/CY Containerloads (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 CORPORATIÓN

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).

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[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.

525.1 Purpose and Scope
525.2 Definitions
525.3 Exemption

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

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[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

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[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 contracts 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

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* 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

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[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

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[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]

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[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 filings 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

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* 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

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 <u>description</u> 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.

* 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

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[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 agreements (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

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[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

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[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

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[6] This holding parallels that in *Midland Metals Corp. v. Lykes Bros. Steamship Co., Inc.*, 19 S.R.R. 475 (1979), where an informal complaint 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]

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[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	at $ 106.00/KT	at $ 76.00/KT	
30.360 KT			
0. Freight	$ 3,218.16	$2,307.36	
b) Alundum Powder: Base Rate	at $ 106.00/KT	at $ 132.00/M3	
0.307 KT/0.714 M3			
0. Freight	$ 32.54	$ 94.25	
c) Camphor: Base Rate	at $ 140.00/M3	at $ 140.00/M3	
0.968 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	at $ 106.00/KT	at $ 76.00/KT	
34.408 KT			
0. Freight	$ 3,647.25	$2,615.01	
b) Alundum Powder: Base Rate	at $ 106.00/KT	at $ 166.00/KT	
0.307 KT/0.166 M3			
0. Freight	$ 32.54	$ 50.96	
c) Camphor: Base Rate	at $ 140.00/M3	at $ 140.00/M3	
0.968 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	at $ 106.00/KT	at $ 76.00/KT	
108.284 KT			
0. Freight	$11,478.10	$8,229.58	
b) Alundum Powder: Base Rate	at $ 106.00/KT	at $ 166.00/KT	
0.256 KT/0.149 M3			
0. Freight	$ 27.14	$ 42.50	
c) Camphor: Base Rate	at $ 140.00/M3	at $ 140.00/M3	
1.613 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	at $ 106.00/KT	at $ 76.00/KT	
50.600 KT			
0. Freight	$ 5,363.60	$3,845.60	
b) Alundum Powder: Base Rate	at $ 106.00/KT	at $ 166.00/KT	
0870 KT/0.505 M3			
0. Freight	$ 92.22	$ 144.42	
c) Camphor: Base Rate	at $ 140.00/M3	at $ 140.00/M3	
1.530 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$) (Item No. 2520–05)			Rates (US$) (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	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	"	12%	8,418.70	"	12%	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									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		at $ 113.00/KT	at $ 81.00/KT	
35.015 KT				
O. Freight		$3,956.70	$2,836.22	
b) Alundum Powder: Base Rate		at 113.00/KT	at $ 174.00/KT	
0.410 KT/0.269 M3				
O. Freight		$ 46.33	$ 71.34	
c) Camphor: Base Rate		at $ 148.00/M3	at $ 148.00/M3	
3.302 M3				
O. 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 fròm 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$) (Item No. 2520–50)			Rates (US$) (Item No. 1945–00)			Balance (US$)	Exchange Rate (Y)	Exchange Rate (YUS$)
*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(1), 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 bunk 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 hus 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

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(1) 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]

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[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?

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[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]

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[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

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[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.

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[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

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[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. (S) JOSEPH N. INGOLIA
April 9, 1980 *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]

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*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