

DECISIONS OF THE  
FEDERAL MARITIME COMMISSION

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**FEDERAL MARITIME COMMISSION**

**WASHINGTON, D.C.**

**June 30, 1981**

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**Thomas F. Moakley, Member**

**James V. Day, Member**

**Leslie Kanuk, Member**

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# FEDERAL MARITIME COMMISSION

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DOCKET NO. 78-14  
CELANESE CORPORATION, ETC.

v.

THE PRUDENTIAL STEAMSHIP COMPANY

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## NOTICE

*July 2, 1980*

Notice is given that no appeal has been taken to the May 30, 1980 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

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DOCKET NO. 78-14  
CELANESE CORPORATION, ETC.

v.

THE PRUDENTIAL STEAMSHIP COMPANY

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## SETTLEMENT APPROVED; COMPLAINT DISMISSED

*Finalized July 2, 1980*

By joint motion, the complainant, Celanese Corporation, a shipper,<sup>1</sup> and the respondent, Prudential Steamship Company, a common carrier by water between United States Atlantic Ports and West Coast Ports of South America, seek approval of their agreement to settle this proceeding and ask further, that, upon approval, the complaint be dismissed.

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

On April 28, 1978, Celanese filed a complaint against Prudential alleging that the respondent violated section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3),<sup>2</sup> in connection with nine shipments of a commodity described in the bills of lading for those shipments as "Kimpac filter material" transported from Charleston, South Carolina, to Buenaventura, Colombia, during the period from January 23, 1976 through September 7, 1976. The complainant asks for reparation in the amount of \$21,765.80, with interest pursuant to the provisions of section 22 of the Shipping Act, 1916, 46 U.S.C. 821.<sup>3</sup>

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<sup>1</sup> The shipper shown on the bills of lading is Celanese Fibers Co., a division of the complainant.

<sup>2</sup> Section 18(b)(3) provides as pertinent:

No common carrier by water in foreign commerce or conferences of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

<sup>3</sup> Section 22 provides, as pertinent:

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 reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. 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.

BACKGROUND

To place the settlement agreement in perspective it will be helpful to summarize the matters which led up to the motion for approval as disclosed in the various pleadings, memoranda and other material furnished either orally or in writing.

During the period from January 23, 1976 through September 7, 1976, there were nine separate shipments of the filter material. Inadvertently, Celanese's freight forwarder described those shipments on the bills of lading by trade name—Kimpac filter material—rather than by the commodity's generic name "Cellulose Wadding." Relying on the descriptions shown on the bills of lading and the rules and regulations of its tariff, Prudential charged the Cargo, N.O.S. rate for the shipments, instead of the "Wadding, Cellulose" rate.<sup>4</sup>

The following table provides relevant data concerning each shipment:

Shipment No.	Date of Bill of Lading	Measurement 14 cubic feet (CFT)	Cargo N.O.S.* Rate Per 40 CFT	Cellulose* Wadding Rate Per 40 CFT	Amount Paid**	Amount to be Paid at Cellulose Wadding Rate	Difference
1.	1/23/76	1344	\$ 93.00	\$59.75	\$ 3,124.80	\$2,007.60	\$1,117.20
2.	2/26/76	1928	93.00	61.75	4,482.60	2,976.35	1,506.25
3.	3/10/76	1874	96.00	61.75	4,497.60	2,892.98	1,604.62
4.	4/29/76	1811	96.00	61.75	4,346.40	2,975.73	1,370.67
5.	4/29/76	1811	96.00	61.75	4,346.40	2,975.73	1,370.67
6.	6/25/76	1862	96.00	61.75	4,468.80	2,874.46	1,594.34
7	7/25/76	3168	101.75	61.75	8,058.60	4,890.60	3,168.00
8.	8/25/76	3050	144.75	61.75	11,037.19	4,708.44	6,328.75
9.	9/7/76	3050	144.75	61.75	11,037.19	4,708.44	6,328.75
Sub Total							\$24,389.25

The complaint, when filed, contained a request for reparation in the amount of \$24,322.05. Subsequently, Celanese recognized that the causes of action concerning two of the nine shipments accrued more than two years before the complaint was filed and were time barred by section 22's jurisdictional statute of limitations. See *Carton-Print, Inc. v. Austasia Container Express Steamship Co.*, 20 F.M.C. 31, 35-38 (1977) (The Commission determined not to review, July 7, 1977); *U. S. Borax & Chem. Corp. v. Pac. Coast European Conf.*, 11 F.M.C. 451, 471-472 (1966); *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602, 612 (1959). As a result, as set forth in the text, *infra*, Celanese withdrew its request for reparation for those two shipments.

The complaint does not explicitly ask for interest, but requests "such other sums as the Commission may determine to be proper as an award of reparation." The quoted language has been construed as a prayer for interest. See *Consolidated International Corporation v. Concordia Line, Boise Griffin Steamship Company, Inc. as Agents*, 18 F.M.C. 180, 181, n. 3 (1975).

<sup>4</sup> Prudential is a member of Atlantic & Gulf/West Coast of South America Conference. Rule 2(r) of the Conference's Tariff, F.M.C. No. 1, p. 10, provides: "Bills of lading describing articles by trade name are not acceptable for commodity rating. Shippers are required to describe their merchandise by its common name, to conform to merchandise description appearing herein. Bills of lading reflecting only trade names will be automatically subject to application of the rate specified for Cargo, N.O.S. as minimum."

## FEDERAL MARITIME COMMISSION

Shipment No.	Date of Bill of Lading	Measurement 14 cubic feet (CFT)	Cargo N.O.S.* Rate Per 40 CFT	Cellulose* Wadding Rate Per 40 CFT	Amount Paid**	Amount to be Paid at Cellulose Wadding Rate	Difference
Less Shipments Nos. 1 & 2 .....						2,623.45	
Total.....						\$21,765.80	

\*No separate computation has been made for Bunker, Port Congestion or Port Delivery Charges which would be the same whether the Cargo, N.O.S. rate or the Cellulose, Wadding rate were applied.

\*\*Payment for Shipment Nos. 1 & 2 was made on or before April 1, 1976. Payment for the other shipments was made after May 1, 1976.

As the table and accompanying notes disclose, the shipments identified as Shipments Nos. 1 and 2 were delivered to the carrier and the freight charges thereon were paid by the shipper more than two years before the complaint was filed. Section 22 provides that reparation claims must be filed "within two years after the cause of action accrue[s]." It is well settled by Commission decisions that "A cause of action arises under section 18(b)(3) of the Act upon delivery of the cargo to the carrier or upon payment of the freight charges whichever is later." *United States of America v. Hellenic Lines Limited*, 14 F.M.C. 255, 260 (1971); *Commercial Solvents Corporation International, Inc. v. Moore-McCormack Lines, Inc.*, 19 F.M.C. 424, n. 3 (1977); *Sun Company Incorporated v. Lykes Bros. Steamship Company, Incorporated*, 20 F.M.C. 67, 69 (1977). Cf. *U. S. ex rel Louisville Cement Company v. I.C.C.*, 246 U.S. 638, 644 (1918).

In recognition of the fact that the causes of action for Shipment Nos. 1 and 2 were time barred, Celanese later amended its request for reparation to the shipments identified as Shipment Nos. 3 through 9, inclusive, in the table. This effectively reduced the claim from \$24,389.25 to \$21,765.80.

Prior to the time the complaint was filed, Prudential rejected Celanese's claims because of the Conference's tariff rule barring consideration of claims requiring verification of cargo description before the cargo leaves the carrier's possession.<sup>8</sup> In apparent awareness that a tariff rule of this type, which, in effect, infringes on the rights granted by section 22 is invalid insofar as it governs filing of claims before the Commission, *Kraft Foods v. Federal Maritime Commission*, 538 F. 2d 445 (D.C. Cir. 1976), Prudential does not rely on this rule in its defense of the complaint.

<sup>8</sup> Atlantic & Gulf/West Coast of South America Conference Tariff F.M.C. No. 1, p. 12, Rule 7(b).

Nevertheless, Prudential vigorously defended against the complaint. At first, it filed an answer denying any violation of section 18(b)(3) and a motion for partial summary judgment alleging that the shipments which were made between January 23, 1976 and April 29, 1976, were time barred.<sup>6</sup>

Afterwards, in a reply brief, Prudential made a three pronged defense against the seven remaining causes of action. It continued to assert that the shipments, identified in the table as Shipment Nos. 3, 4 and 5, were time barred.<sup>7</sup> Reinforcing its trade mark argument based upon Rule 2(r) of the Conference's Tariff, Prudential noted that affidavits filed by Celanese did not show that Kimpac filter material is, in fact, Cellulose Wadding, and, in effect, suggested that this issue could not properly be resolved without an evidentiary hearing to test the validity of the affidavits. Third, Prudential expanded its trade mark argument, urging that it was obligated to follow the Conference's tariff rules by applying the Cargo, N.O.S. rate, for if it did not do so it might be subject to sanctions imposed by this agency. In other words, Prudential is simply saying it should not be "faulted"<sup>8</sup> for relying on the bills of lading descriptions even if the commodity shipped is later shown to be Cellulose Wadding.

### THE SETTLEMENT AGREEMENT

Faced with the uncertainty and expense of further litigation, including a potential evidentiary hearing on the commodity description, the parties agreed to settle the proceeding. Following the conditions laid

<sup>6</sup> Prudential subsequently opted to withdraw the motion for partial summary judgment in favor of addressing the issue in a reply brief.

<sup>7</sup> The argument made by Prudential is that there was a partial payment of freight charges more than two years before the complaint was filed. Insofar as Shipment Nos. 4 and 5 are concerned, payment was made well within two years prior to filing the complaint. With regard to Shipment No. 3, 5% of the freight charges were paid more than two years before the complaint was filed, but the remaining 95% was paid within the two year period. There is no evidence that Prudential considered payment of the 5% to be satisfaction of the indebtedness. The law is well settled that "'payment' means tender by the debtor with the intention to satisfy the debt coupled with its acceptance as satisfaction by the creditor [citations omitted]." *United States v. Isthmian S.S. Co.*, 359 U.S. 314, 318-319 (1959).

<sup>8</sup> The Commission has recognized this non-fault approach. In *Sun Company, Incorporated v. Lykes Bros. Steamship Company, Incorporated*, *supra*, the Commission said, 20 F.M.C. at 10:

In cargo misdescription cases, where the shipment has left the custody of the carrier and the carrier is thus prevented from personally verifying the complainant shipper's (new) description the Commission has held that the complainant has a "heavy burden of proof" and must establish, with reasonable certainty and definiteness, the validity of the claim. *Western Publishing Co. v. Hapag Lloyd A.G.*, 13 S.R.R. 16, 17 (1973); *Johnson & Johnson Int'l. v. Venezuelan Lines*, 16 F.M.C. 87, 94 (1973); *Colgate Palmolive Peet v. United Fruit Co.*, 11 S.R.R. 979, 981 (1970). It is usually the case, as it is here, that the carrier in classifying and rating a shipment must look to the information supplied him by the shipper or freight forwarder. Accordingly, we cannot "fault" the carrier for relying on descriptions set forth on the subject bill of lading. However, in determining whether reparation should be awarded in a given case, i.e., whether section 18(b)(3) has been violated vis-a-vis the filed tariffs, "a tariff is a tariff" and the controlling test is finally what the complainant shipper can prove was actually shipped. [Footnote omitted.]

down by the Commission for settlement of section 18(b)(3) complaint proceedings in *Organic Chemicals (Glidden-Durkee) Division of SCM Corporation v. Atlantrafik Express Service*, 18 S.R.R. 1536a (1979) (*Organic Chemicals*), the parties submitted a signed settlement agreement entitled Agreement of Settlement and Mutual Release<sup>9</sup> and a Joint Affidavit<sup>10</sup> setting forth the reasons for the settlement and attesting that the settlement is a bona fide attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, as amended.

Under the terms of the settlement agreement, Prudential will refund to Celanese the difference between freight charges based on the Cargo, N.O.S. rate and the Cellulose Wadding rate for Shipment Nos. 3 through 9, inclusive. This amounts to \$21,765.80. In addition Prudential agrees to pay Celanese the sum of \$1,000 as liquidated interest charges.<sup>11</sup> In sum, Prudential agrees to pay \$22,765.80, in full satisfaction of the claim, without admitting liability or admitting to any violation of law.

#### DISCUSSION

In *Organic Chemicals*, the Commission reaffirmed the principle that the law encourages settlements and that every presumption is indulged in that favors their correctness, fairness and validity. However, in section 18(b)(3) cases the Commission insisted upon a balancing of the policy of settlement against the possibility of discriminatory rating practices which might result if settlements are conditionally approved in the absence of a finding of violation. Nevertheless the Commission enunciated a policy that parties should have the opportunity to settle disputes but emphasized that in order to prevent abuses, certain criteria had to be met. The Commission put it this way, *Organic Chemicals, supra*, 18 S.R.R. at 1539-1540:

The Commission recognizes the well-established principle that the law encourages settlements [footnote omitted] and that "every presumption is indulged in that favors their correctness, fairness and validity." [footnote omitted.] But, in considering the settlement of claims arising under section 18(b)(3), the policy favoring the settlement of controversies must be balanced against the possibility of discriminatory rating practices which might result therefrom. For this reason, the Com-

<sup>9</sup> The Agreement of Settlement and Mutual Release is attached as Appendix I.

<sup>10</sup> The Joint Affidavit is attached as Appendix II.

<sup>11</sup> On May 8, 1980, the Commission announced its policy to grant interest on awards of reparation in cases arising under section 18(b)(3) of the Shipping Act, 1916, at the rate of 12%, accruing from the date of payment of freight charges. The Commission authorized exceptions from this general policy on a case by case basis. See 46 C.F.R. 530.12 Policy Statement - Interest on Awards of Reparation. The \$1,000 in interest agreed to by the parties lies well within the 12% rate.



mission has held in the past that approval of the settlement of claims under section 18(b)(3) could be made only upon a finding of a violation of that section. This policy appears to be unnecessarily restrictive. We believe that, even where section 18(b)(3) claims are involved, parties to the dispute should, under certain circumstances, have the opportunity to settle their disputes. To that end, and to insure that the Commission's processes are not used to circumvent the requirements of the statute [footnote omitted] and that settlements and compromises do not serve as a means for carriers to disregard their obligations under the tariff, [footnote omitted] we will permit the settlement of a claim arising under section 18(b)(3) of the Act if the following conditions are met:

1. A signed agreement is submitted to the Commission;
2. The parties file with the settlement agreement an affidavit setting forth the reasons for the settlement and attesting that the settlement is a bona fide attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, or of the Intercoastal Shipping Act, 1933, as amended, as the case may be;
3. The complaint on its face presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable.

The signed agreement and affidavit, of course, meet the technical standards of *Organic Chemicals, supra*. More importantly, I find that the agreement reflects a rational, valid and fair solution of the dispute and obviates the need for further extensive and expensive litigation. The complaint presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable without such further litigation. Moreover, it appears that the settlement is a bona fide attempt by the parties to terminate the controversy and not a device to obtain transportation at other than the applicable rates or charges or otherwise circumvent the requirements of the Shipping Act, 1916, as amended.

Accordingly, it is ordered that the settlement be approved and the complaint be dismissed with prejudice. It is further ordered that within ten (10) days after this order becomes final the parties file an affidavit of compliance with the terms of the settlement.

(S) SEYMOUR GLANZER  
*Administrative Law Judge*

**APPENDIX I**  
**AGREEMENT OF SETTLEMENT AND MUTUAL RELEASE**

**IT IS HEREBY AGREED**, by and between the undersigned, Celanese Corporation (Celanese), Complainant in Federal Maritime Commission Docket No. 78-14 and Prudential Steamship Company (Prudential), Respondent in said Docket that Docket No. 78-14 shall be terminated by mutual accord on the terms and conditions hereinafter set forth and for the reasons set forth in the accompanying Joint Motion for Approval of Agreement of Settlement and Mutual Release and for Dismissal of Proceeding and Joint Affidavit of the parties:

1. Prudential shall pay to Celanese the sum of Twenty-Two Thousand, Seven Hundred Sixty-Five and 80/100 (\$22,765.80) Dollars.

2. Celanese shall, in consideration of the action of Prudential as provided in paragraph 1 above, withdraw its Complaint in Federal Maritime Commission Docket No. 78-14 and shall refrain from further pursuing its claim in this proceeding.

3. Neither Celanese nor Prudential, or any successor in interest of either such party, shall initiate any new claim against the other party arising in connection with the complaint of this proceeding except for enforcement of any provision of this Agreement.

4. It is understood and agreed that this Agreement of Settlement and Mutual Release is in full accord and satisfaction of all disputed claims in the proceeding.

5. This Agreement shall be submitted for any necessary approval to the appropriate governmental authorities, and shall become effective and binding upon the parties when such approval is obtained.

6. It is further understood and agreed that this Agreement of Settlement and Mutual Release is in no sense to be understood as constituting any admission of liability of either party or of any admission of any violation of law by either party.

7. This Agreement of Settlement and Mutual Release, constitutes the entire Agreement between the parties.

Dated: New York, New York  
October 30, 1979

**CELANESE CORPORATION**  
**(S) EDWARD L. KANTER**  
*Assistant Secretary*  
**PRUDENTIAL STEAMSHIP COMPANY**  
**(S) JOHN F. MCHUGH**  
*Secretary*

APPENDIX II  
BEFORE THE FEDERAL MARITIME COMMISSION

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CELANESE CORPORATION, ETC.,  
Complainant  
v.  
PRUDENTIAL STEAMSHIP COMPANY,  
Respondent.  
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Docket No. 78-14

JOINT AFFIDAVIT

We, the undersigned Edward L. Kanter and John F. McHugh, being respectively the Assistant Secretary of Celanese Corporation and the Secretary of Prudential Steamship Company, and being each first severally sworn, depose and say for and on behalf of our respective corporations:

We believe the attached Settlement Agreement in FMC Docket No. 78-14 is a reasonable commercial settlement of this case which will avoid the substantial costs of further litigation.

Said Settlement Agreement is a bona fide attempt by the parties to terminate this controversy and is not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, or of the Intercoastal Shipping Act, 1933, as amended.

Sworn to before me this  
29th day of October 1979.

(S) John J. Purcell  
Notary Public

(S) NAME: JOHN F. MCHUGH  
*Title: Secretary*

Sworn to before me this  
30th day of October, 1979.

(S) J. David McCalmont  
Notary Public

(S) NAME: EDWARD L. KANTER  
*Title: Assistant Secretary*

# FEDERAL MARITIME COMMISSION

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INFORMAL DOCKET NO. 705(1)

3M

v.

TORM LINE

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## REPORT AND ORDER

*July 2, 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 Donald T. Pidgeon, served April 7, 1980, denying reparation.

Complainant 3M alleges that Torm Line applied an incorrect rate on a shipment of "Mixed Commodities"<sup>1</sup> in that the carrier placed the cargo on deck and applied the rate for "Dangerous or Hazardous Cargo NOS restricted to on deck stowage only." 3M argues that there was no reason for Torm Line to have placed the shipment on deck and applied the "on deck stowage" rate. Even though the shipment included Ethylene Oxide, which carries a "flammable liquid" label, 3M points out, this item can be stored either on or under deck. 3M argues that Ethylene Oxide is a surgical supply and should have been assessed the lower "Special Rate" of \$55.25 W/M. Accordingly, 3M claims that it was overcharged \$1,205.71, in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817).

Torm Line did not respond to 3M's overcharge claim nor to the Settlement Officer's letter of July 16, 1979 inviting a response to the informal complaint.

Although the Settlement Officer concluded that \$55.25 W/M rate sought by 3M applied to the shipment, he denied reparation on the ground that 3M "failed to establish that 'under deck' space was available."

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\* Chairman Richard J. Daschbach did not participate.

<sup>1</sup> The bill of lading describes the shipment as "Mixed Commodities per Item Page 93-B of North Atlantic Portugal Freight Tariff #2." This tariff lists "Special Rates" of \$55.25 W/M, any quantity, for certain "commodities in carrier's containers and breakbulk," including "Surgical Supplies."

**DISCUSSION AND CONCLUSION**

The Commission is satisfied that the shipment in question should have been assessed the "Special Rate" rather than the rate for "Dangerous Cargo." Although placement of the cargo on deck may have been appropriate if there had been no room under deck, the availability of under deck stowage is a matter particularly within the realm of the carrier's knowledge. It is therefore inappropriate to require 3M to establish this element in meeting its burden of proof, especially where, as here, the carrier has declined to participate in the proceeding or to provide any information whatever.

**THEREFORE, IT IS ORDERED,** That the decision of the Settlement Officer is reversed; and

**IT IS FURTHER ORDERED,** That Torm Line pay reparations in the amount of \$1,205.71 to 3M, with 12% interest accruing from date of payment of freight charges; and

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

(S) FRANCIS C. HURNEY  
*Secretary*

# FEDERAL MARITIME COMMISSION

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INFORMAL DOCKET NO. 766(1)  
DOW CORNING CORPORATION

v.

ATLANTIC CONTAINER LINE

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## PARTIAL ADOPTION OF DECISION OF SETTLEMENT OFFICER

*July 2, 1980*

This proceeding is before the Commission upon its determination to review the decision of Settlement Officer Alan J. Jacobson awarding reparation without interest to Dow Corning Corporation for violation by Atlantic Container Line of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817).

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*, 22 F.M.C. 679 (1980). See also, Policy Statement - Interest on Awards of Reparation, 46 C.F.R. 530.12. This policy is applicable here.

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

**IT IS FURTHER ORDERED**, That Atlantic Container Line pay to Dow Corning Corporation 12 percent interest on the award of reparation, accruing from date of payment of freight charges; and

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

By the Commission.\*

(S) FRANCIS C. HURNEY  
*Secretary*

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\*Chairman Richard J. Daschbach did not participate.

# FEDERAL MARITIME COMMISSION

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INFORMAL DOCKET NO. 766(I)  
DOW CORNING CORPORATION

v.

ATLANTIC CONTAINER LINE

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DECISION OF ALAN J. JACOBSON, SETTLEMENT OFFICER <sup>1</sup>

*Partially Adopted July 2, 1980*

## REPARATION GRANTED

Dow Corning Corporation (Dow), a company engaged in the manufacture and distribution of synthetic resin, silicon rubber compounds and various chemicals, filed a complaint against Atlantic Container Line (ACL) seeking reparation in the amount of \$3,516.92 for alleged overcharges on two shipments of Polysiloxane. The complaint states that the tariff rate for "General Cargo, NES" was applied to the two shipments but that the cargo should have been rated as "Resin Synthetic" and assessed the corresponding lower rate. Complainant, Dow, seeks reparation in the amount of the difference between the assessed rate and the lower rate which it contends is applicable.

The two shipments moved from New York, New York to Southampton, England pursuant to ACL bills of lading nos. A63406 and A63404 dated December 16, 1977, aboard the vessel ATLANTIC CHAMPAGNE. The descriptions appearing on the bills of lading describe the cargo as "DRMS: Polysiloxane\* Item 5811062 Flammable Liquid Flammable Label 65° F." Each shipment, according to the bills of lading, consisted of a house to house container containing 80 drums of Polysiloxane weighing 35,840 pounds and measuring 857 cubic feet.

Charges were prepaid by Dow in the amount of \$3,652.96 on each shipment, or a total of \$7,305.92. Charges were assessed under Item 931.0001, General Cargo, NES, value \$1,000 to \$2,000 per ton, under the North Atlantic United Kingdom Freight Conference Tariff No. 48 FMC 3, and rated at \$170.50 per measurement ton.

Claimant contends that charges should have been assessed under Item 581.0001, Resin Synthetic, with minimum weight of 40,320 pounds at a

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<sup>1</sup> 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.

rate of \$105.25 per 2,240 pounds or \$1,894.50 each shipment, making a total of \$3,789.00. Thus, Dow requests reparations of \$7,305.92 (assessed and paid charges) minus \$3,789.00 (proper charges) or a total of \$3,516.92.

ACL does not dispute that Polysiloxane is synthetic resin, but first disputed Dow's claim by citing tariff rule 4.J.2 dealing with dangerous and hazardous cargo. Under rule 4.J.2 such cargo shall be assessed the General Cargo rate, unless otherwise provided. Dow, however, correctly noted that Item 581.0001, Resin Synthetic, Note (A), allows labeled cargo to be included in that item, thus taking precedence over Rule 4.J.2.

ACL conceded that claimant's reasoning is sound, but rather than affirmatively respond to Dow's claim, it declined to honor the claim under its tariff Rule 20 which requires that all claims for adjustment of freight charges not presented to the carrier within six months after the date of shipment be denied.

Dow has submitted sufficient evidence to show that the goods transported in the two shipments were Polysiloxane which should have been rated under North Atlantic United Kingdom Freight Conference Tariff No. 48 (FMC-3), Item No. 581.0001. Dow submitted copies of the bills of lading, freight statements, packing lists and Intermodal Export Master Set.

Based on all the evidence submitted, Dow has sustained its burden of proof that the goods transported in the two shipments were Polysiloxane and should have been rated as "Resin, Synthetic." Dow is entitled to reparation from ACL in the amount of \$3,516.92.<sup>2</sup> Upon evidence of payment of the amount awarded, this record will be complete.

(S) ALAN J. JACOBSON  
*Settlement Officer*

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<sup>2</sup> ACL's reference to its tariff rule No. 20 (the six month rule) does not, of course, affect the Commission's ability to order reparations under section 22 of the Shipping Act, 1916. *Kraft Food v. Federal Maritime Commission*, 538 F.2d 445 (D.C. Cir. 1976). It is a shame that time and effort must be expended processing claims opposed only because of the six month rule.



# FEDERAL MARITIME COMMISSION

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## TITLE 46 - SHIPPING

### CHAPTER IV - FEDERAL MARITIME COMMISSION

#### SUBCHAPTER B - REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

#### [GENERAL ORDER 26: DOCKET NO. 80-23]

#### PART 541 - FREE TIME AND DEMURRAGE CHARGES ON EXPORT CARGO REVOCATION

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July 2, 1980

**ACTION:** Final Rule

**SUMMARY:** The Federal Maritime Commission revokes Part 541 of Title 46, Code of Federal Regulations, which provides for regulation of free time, consolidation time, and demurrage charges on export cargo at the Ports of New York and Philadelphia. Improved congestion conditions at those ports would appear to have eliminated the necessity for these regulations.

**DATE:** Effective July 9, 1980

#### SUPPLEMENTARY INFORMATION:

Part 541 of Title 46, Code of Federal Regulations, prescribes regulations governing free time, consolidation time, and demurrage charges at the Ports of New York and Philadelphia. The rules were established following hearings in Docket No. 68-9, *Free Time and Demurrage Charges on Export Cargo*, 13 F.M.C. 207 (1970). Evidence in that proceeding demonstrated that regulations were necessary because of the congested conditions of those ports.

The rules generally provide for a maximum free time period of ten days, with certain cargo being allowed up to 15 days upon request. Provision is also made for restrictions on the time allowed for consolidation of shipments and the assessment of demurrage charges.

The Port Authority of New York and New Jersey and the New York Terminal Conference have petitioned the Commission to rescind Part 541. Petitioners state that the congested conditions giving rise to the rules no longer exist. In the alternative, petitioners request that the coverage of the rules be extended to all Atlantic and Gulf Coast ports because the existence of the rules places them at a competitive disadvantage.

The Commission solicited comment on the proposal to revoke Part 541. We have reviewed these comments and found the majority of the commentators to be in favor of eliminating Part 541. The remaining comments expressed a neutral position. Two comments favored partial revocation only to eliminate the ten day maximum free time restriction. Of these two comments, one felt that the specific ten day prescription should be replaced by wording that would require free time at New York and Philadelphia to be compatible with the free time provisions maintained at other ports in the North Atlantic. The other is concerned that total revocation of Part 541 may result in free time of less than ten days and provide no guarantee that other protections to exporters will be retained. The majority of the comments expressed objection to Petitioners' alternative request that the coverage of the rules be extended to all Atlantic and Gulf Coast ports. The comments contain no strong objection to the revocation of Part 541. The rule is based on circumstance not in existence today. The modern technique of containerization which started in the late 1960's has replaced much of the traditional bulk-cargo method of delivering small lots of cargo that are assembled at the pier.

Only one comment expressed concern over the possibility of free time periods of less than ten days and the removal of other detailed restrictions, such as, granting an additional five days of free time on consolidated shipments, assessing demurrage against the vessel when it fails to meet its sailing date, assessing first-period demurrage against the vessel in the event of the vessel cancellation, granting of additional free time when loading of cargo is prevented by any factor immobilizing the pier and requiring the piers to issue dock receipts. We are not concerned that the revocation of Part 541 will lead to reinstatement of these practices or others that gave rise to the rule. Carriers and ports have a responsibility to operate in a non-discriminatory manner and specifically to promulgate reasonable regulations and practices for the receipt of cargo. The Commission will continue to monitor free time and demurrage practices to ensure that practices do not offend the requirements of section 16 and 17 of the Shipping Act, 46 U.S.C. § § 815, 816 (1916).

**NOW, THEREFORE, IT IS ORDERED,** That, effective upon publication in the *Federal Register*, Part 541 of Title 46, Code of Federal Regulations is rescinded.

By the Commission.

(S) FRANCIS C. HURNEY  
Secretary

# FEDERAL MARITIME COMMISSION

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SPECIAL DOCKET NO. 683

APPLICATION OF FLOMERCA LINE TO BENEFIT  
U.S. DEPARTMENT OF AGRICULTURE

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## ORDER OF REMAND

*July 3, 1980*

The Commission has before it the February 7, 1980 Initial Decision of Administrative Law Judge Seymour Glanzer in the above-captioned matter. This decision denied the petition of Flomerca Line to waive collection of freight charges totalling \$25,415.03 for the account of the United States Department of Agriculture (USDA). Notice of Determination to Review was served by the Commission on March 10, 1980.

### BACKGROUND INFORMATION

Flomerca Line is the trade name of Flota Mercante Gran Centroamericana, S.A., a common carrier controlled by the Government of Guatemala for purposes of section 18(c) of the Shipping Act, 1916. (46 U.S.C. 817(c)).<sup>1</sup> The freight charges in question were incurred on two USDA shipments of bagged corn carried between Galveston, Texas and Puerto Cortez, Honduras commencing July 2, 1979. A rate of \$42.00 for "Corn (100 lb. bags)" was allegedly agreed to on May 25, 1979 when the cargo was booked, but Flomerca neglected to file the rate with the Commission. On July 10, 1979, Flomerca billed USDA at its then applicable tariff rate of \$58.00 per short ton.<sup>2</sup> USDA questioned the higher rate and on October 19, 1979 a special docket application was timely filed pursuant to section 502.92 of the Commission's Rules. (46 C.F.R. 502.92). The application, as subsequently supplemented, shows that Flomerca amended its tariff to include a rate for bagged corn effective October 7, 1979. This tariff amendment left the previous \$58.00 rate for "Corn" in effect and added a new \$42.00 rate for "Corn in Bags, in Minimum Lots of 500 Tons."

Section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)) permits the Commission to allow a waiver of freight charges when there has been a:

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<sup>1</sup> By letter dated November 28, 1978 from William Jarrel Smith, Jr., the Commission advised Flomerca of its classification as a controlled carrier.

<sup>2</sup> The shipments weighed 1,165,039 and 2,012,837 pounds, respectively, for a total of 3,177,876 pounds. A bunker surcharge of \$3.50 per short ton and lighthouse dues of \$1.35 per metric ton were also applicable. Flomerca Tariff F.M.C. No. 17, at 4th Rev. 74, 1st Rev. 4-B and 4th Rev. 16.

tariff error of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such waiver would not result in discrimination among shippers.

The error relied upon by Flomerca was the inadvertent failure to file the necessary tariff amendment prior to July 2, 1979 due to the confusion caused by its change in steamship agents from the Tilston Roberts agency to Kerr Steamship Company, Inc., on June 1, 1979.

USDA arranged for the transportation on May 25, 1979 by contacting Associated Shipping Agencies, a Washington, D.C. freight brokerage firm, and did not deal directly with Tilston Roberts. USDA booking confirmation forms were issued for both shipments May 31, 1979 and signed by Associated as Flomerca's agent. They quote a \$42.00 rate for "Corn (100 lb. bags)," indicate that a tariff amendment was contemplated, and do not specify a 500-ton minimum. Both confirmation forms plainly show, however, that USDA reserved space for 525 metric tons for shipment on July 6, 1979 (Form No. 9896) and for 910 metric tons for shipment on June 22, 1979 (Form No. 9898) — sufficient cargo to cover the minimum in each instance.<sup>3</sup>

Associated also advised Tilston Roberts of the bookings by separate letters dated May 25, 1979, in which Associated requested a 2½% brokerage commission. Between June 1 and June 8, 1979, Associated wrote to Kerr Steamship concerning the bookings and sent duplicate copies of the USDA confirmation forms showing the need to amend Flomerca's tariff prior to shipment.<sup>4</sup> Neither Tilston Roberts nor Kerr arranged for the agreed upon \$42.00 rate to be included in Flomerca's tariff.

The Presiding Officer denied Flomerca's application on two grounds:

- (1) Flomerca's corrective tariff filing did not conform exactly to the originally negotiated arrangement with USDA because the tariff contained the 500 ton minimum lot requirement and the booking confirmation documents did not; the tariff amendment did not contain the requisite "intended rate." *United States Lines, Inc. to Benefit Merck & Co., Inc.*, 19 S.R.R. 788 (1979); *Sea-Land Service, Inc. to Benefit Munoz y Cabero*, 20 F.M.C. 152 (1977).
- (2) Section 18(c) conflicts with section 18(b)(3) and bars state controlled carriers from obtaining special docket relief.<sup>5</sup> In order to prevent predatory price cutting by controlled carriers, section 18(c)(3) prohibits them from reducing their rates on less than 30

<sup>3</sup> There was originally a period of 28 and 42 days, respectively, between the booking date and the intended shipment dates, but both shipments ultimately left Galveston on July 2, 1979.

<sup>4</sup> The record copy of this letter bears a stamp reading "Received June 8 A.M." which obliterates the date the letter was written.

<sup>5</sup> Section 18(c) took effect on November 17, 1978 pursuant to the "Ocean Shipping Act of 1978," P.L. 95-483, 92 Stat. 1607.

days' notice without special permission from the Commission. Congress intentionally imposed this 30 day delay to provide the Commission an opportunity to make an initial assessment of the reduced rate's reasonableness. In contrast, the relief afforded shippers by section 18(b)(3) is premised on the theory that, but for the unintended error, the carrier could have implemented the agreed upon rate reduction immediately. It would therefore defeat the purpose of section 18(c) if controlled carriers could retroactively implement rate reductions via the special docket process.

#### DISCUSSION AND CONCLUSION

The Commission has reviewed the record and concluded that further evidence is required to evaluate aspects of Flomerca's application found deficient by the Presiding Officer. A limited remand is therefore ordered in accordance with the following discussion.

This is the second recent proceeding which raised questions concerning the relationship between the Ocean Shipping Act of 1978 (hereafter "Controlled Carrier Law") and section 18(b)(3).<sup>6</sup> Upon review of the legislative history of both provisions, the Commission concludes that mere classification as a controlled carrier should not negate the possibility that such a carrier can correct an inadvertent failure to implement a good faith undertaking to secure a timely rate reduction for the benefited shipper.

The present situation is analogous to that in *Compagnie Nationale Algerienne de Navigation to Benefit D. F. Young, Inc.*, 21 F.M.C. 730 (1979), where relief was granted when the carrier employed a conference tariff, but did not notify the conference of the desired tariff amendment prior to shipment.<sup>7</sup> Just as no reduction in a conference carrier's rates can occur unless the conference is aware of the desired change, under normal circumstances no reduction can occur in a controlled carrier's rates upon less than 30 days' notice without a grant of special permission. In both situations the carrier inadvertently neglected an action prerequisite to the implementation of the specially negotiated rate which would otherwise have taken effect exactly as the parties intended.<sup>8</sup>

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<sup>6</sup> In *Neptune Orient Line to Benefit Stauffer Chemical Company*, 19 S.R.R. 451 (1979), waiver of collection was denied on two legally distinct grounds, one of which was the Presiding Officer's finding that the controlled carrier did not actually intend to implement the rate reduction stated in the booking contract because of instructions it had given its agents concerning rate reduction filings.

<sup>7</sup> See also, *Waterman Steamship Corporation to Benefit Hermann Ludwig, Inc.*, 20 F.M.C. 670 (1978).

<sup>8</sup> Because of the possibility that the Controlled Carrier Law's advance notice requirements may be shortened by a grant of special permission, there is no reason for distinguishing between cases where the negotiated rate was intended to take effect within 30 days and those where it was not. This does not mean, however, that the time between the date of the alleged agreement and the date of shipment may not be relevant in ascertaining whether the carrier actually intended to implement the rate reduction in question. See *Neptune Orient Line, supra*.

The critical question presented by Flomerca's application is whether Congress intended to preclude all opportunity for special docket relief by shippers using controlled carriers. The Presiding Officer believed this to be the case,<sup>9</sup> but review of the Controlled Carrier Law's legislative history leads the Commission to a different conclusion. Congress's awareness of the *Baltic Shipping Company* proceeding, *supra*, the authority given the Commission to shorten the 30-day advance notice period, and the failure to write an express prohibition against special docket applications by controlled carriers into the new law, are best interpreted as evidence of an intention to permit such applications in appropriate circumstances.<sup>10</sup>

This conclusion is further supported by the canon of statutory construction which disfavors repeals by implication. When different provisions of the same statute are construed together, each provision should be given effect whenever possible. *Rawls v. United States*, 331 F. 2d 21, 28 (8th Cir. 1964); *Malatico v. United States*, 302 F. 2d 880, 886 (D.C. Cir. 1962). *Cf.*, *United States v. Borden Company*, 308 U.S. 188, 198-199 (1939). In the instant case, section 18(b)(3) was added to the Shipping Act in 1968 to provide equitable relief from the application of provisions requiring strict adherence to published tariffs which would otherwise penalize innocent shippers for a carrier's errors.<sup>11</sup> This objective can be reconciled with the basic purpose of the 1978 Controlled Carrier Law, which amended the Shipping Act in order to curtail predatory rate cutting practices of certain ocean carriers. The Controlled Carrier Law was directed at a particular type of unfair competition and was not intended to generally punish or discriminate against controlled carriers or their shippers.

The Controlled Carrier Law also empowers the Commission to require a controlled carrier to justify any of its proposed (filed, but not yet effective) or existing rates and authorizes the suspension of rates suspected of being unreasonable. These protective procedures fully apply to rates filed for special docket purposes and provide the Commission with sufficient tools to deal directly with the problems which

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<sup>9</sup> See discussion of the Senate Commerce Committee's reference to Special Docket No. 589, *Baltic Shipping Company to Benefit AM General Corporation*, 19 S.R.R. 1091 (1979) — a proceeding involving a carrier controlled by the Soviet Union which was pending before the Commission during consideration of the Controlled Carrier Law — at pages 15-16 of the Initial Decision.

<sup>10</sup> See Sen. Rep. No. 95-1260 [to accompany H.R. 9998], 95th Cong., 2d Sess. 14, 18-19, 24 (1978). The pertinent Committee reports indicate that the Commission is expected to waive section 18(c)(3)'s 30-day notice requirement in at least those situations where the controlled carrier faces an immediate reduction by a competitor or a change in market conditions. H.R. Rep. No. 95-1381 [to accompany H.R. 9998], 95th Cong., 2d Sess. 9-10 (1978); Sen. Rep., *supra*, at 23-24.

<sup>11</sup> Section 18(b)(3) was enacted on April 29, 1968. P.L. 90-298, 82 Stat. 111. Its purpose is described in H.R. Rep. No. 920 [to accompany H.R. 9473], 90th Cong., 1st Sess. (1967), and Sen. Rep. No. 1078 [to accompany H.R. 9473], 90th Cong., 2d Sess. (1968).

could result from retroactive rate implementation under section 18(b)(3).

Flomerca's \$42.00 filed rate for bagged corn took effect on October 9, 1979, following the standard 30-day notice period. This rate was not protested at that time and the Commission has no information that a \$42.00 rate is now unreasonable within the meaning of section 18(c).<sup>12</sup>

Because of section 18(b)(3)'s retroactive effect, however, there is a possibility that special docket procedures could be employed to implement rates which would have been unreasonably low *at the time of shipment*, but were considered unworthy of challenge when they were later added to the controlled carrier's tariff. Assuming the \$42.00 rate for "Corn in Bags" was reasonable at the time it finally appeared in Flomerca's tariff, it was not necessarily reasonable on July 2, 1979. This possibility of unreasonableness during a prior period is an insufficient basis for a flat ban on special docket relief, but it does necessitate a showing by Flomerca that its application is not merely a device for evading the Controlled Carrier Law. Accordingly, the application will be remanded to provide Flomerca with an opportunity to demonstrate that conditions existed on or about July 2, 1979 which would have warranted the grant of a timely filed special permission request to implement a \$42.00 rate.<sup>13</sup>

Remand is also warranted for another reason. Special docket relief is unavailable when the tariff amendment finally published does not reflect the rate intended by the negotiating parties.<sup>14</sup> It is unclear to the Commission whether Flomerca's October 9, 1979 tariff filing actually differed from the intended rate or, alternatively, whether any deviation between the originally negotiated contract and the tariff page finally filed was material in light of the fact that USDA would have paid \$42.00 a ton under either arrangement. In order to resolve these questions, it is necessary to ascertain whether Flomerca handled any other shipments of bagged corn between July 2, 1979 and October 9, 1979, and, if so, whether the shipments were more or less than 500 tons.<sup>15</sup>

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<sup>12</sup> In March, 1980 Flomerca amended its tariff to place a \$46.25 "Corn in Bags" rate in effect on April 2, 1980. Tariff FMC No. 17, 6th Rev. 74. This rate has also been unchallenged to date.

<sup>13</sup> The burden is upon Flomerca to establish these facts and it is assumed that such proof can be readily made in affidavit form. It is not the Commission's intention to turn this or any other special docket proceeding into an elaborate rate investigation. If *prima facie* evidence of reasonableness or extenuating circumstances is not submitted when a controlled carrier's special docket application is filed, the application will be denied. Such evidence could be — but is not limited to — a favorable comparison with the charges of other carriers in the trade, a showing that market conditions were changing significantly, or a showing that the reduced rate was necessary to move the cargo or to maintain acceptable service to the affected ports.

<sup>14</sup> The "intended rate" is the "rate on which [the] refund would be based," in the words of section 18(b)(3)'s second proviso clause.

<sup>15</sup> Flomerca's application stated that no other shippers were "affected by" the \$42.00 rate. Because of the minimum tonnage condition, this does not establish that there were no other shippers of bagged corn during the period covered by the proposed retroactive rate decrease.

The possible existence of such shipments bears directly upon whether the 500 ton minimum was originally intended by the parties and whether retroactive implementation of the \$42.00 rate would discriminate among shippers.

The Presiding Officer previously encountered difficulties in obtaining complete and verified information from Flomerca. If Flomerca fails to produce the information requested by this Order in a timely fashion, the Presiding Officer should issue a brief further decision describing the procedures followed and denying the application for inadequacy of proof. If additional evidence is provided, the Presiding Officer should prepare findings of fact on the issues specified in this Order and refer the matter to the Commission for final decision.

**THEREFORE, IT IS ORDERED,** That this proceeding is remanded to the Presiding Officer to determine:

- 1) Whether there were conditions which existed on or about July 2, 1979 which would have warranted granting Flomerca special permission to file a \$42.00 rate on less than 30 days' notice?
- 2) Whether any shipments of bagged corn other than the two USDA shipments were transported by Flomerca from U.S. points specified in its Tariff FMC No. 17 between July 2, 1979 and October 9, 1979, and, if so, the weight and other transportation characteristics of each such shipment?

By the Commission.\*

(S) FRANCIS C. HURNEY  
*Secretary*

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\* Chairman Richard J. Daschbach concurs only with the determination that a controlled carrier is not prohibited from obtaining relief under section 18 (b) (3) of the Shipping Act, 1916 (46 U.S.C. 817 (b) (3)).

Commissioner Leslie Kanuk concurs only in that portion of the Order which remands the application for purposes of determining the intended rate agreed upon by the carrier and the shipper.



# FEDERAL MARITIME COMMISSION

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DOCKET NO. 79-10

RATES OF FAR EASTERN SHIPPING COMPANY

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## ORDER ON RECONSIDERATION

*July 10, 1980*

On April 1, 1980, the Commission issued an Order in which it found certain rates of the Far Eastern Shipping Company (FESCO) to be unjust and unreasonable and, accordingly, disapproved them. FESCO has submitted a Petition for Reconsideration of that Order. American President Lines, Ltd. (APL), Sea-Land Service, Inc., and the Commission's Bureau of Hearing Counsel have filed replies to FESCO's Petition.

### POSITIONS OF THE PARTIES

FESCO contends that the Commission's Order contains five substantive errors of material fact, in that the Commission disapproved five rates which were not subject to this proceeding. In addition, FESCO claims that changes in material fact which have occurred after the issuance of the Order *i.e.*, the lowering of rates by other carriers in the Philippines/U.S. trade - should result in the rescission of the disapproval of a number of its rates. FESCO identifies several rates which are allegedly equal to or lower than 19 of the rates disapproved by the Commission. Finally, FESCO again raises its earlier argument that rate comparisons under section 18(c)(2)(ii) of the Shipping Act, 1916 should not be limited to rates in effect on the date of the institution of a suspension and show cause proceeding, but should employ the most current information available. FESCO thus lists a number of rates disapproved by the Commission in this proceeding which it claims are the same as or similar to rates of other carriers in the same trade which were effective subsequent to the initiation of this proceeding but prior to the issuance of the Commission's decision.

Hearing Counsel agrees with FESCO that three rates were erroneously disapproved, but maintains that one was properly disapproved and that another should have been disapproved. Hearing Counsel further argues that the rate changes referred to by FESCO have no bearing on the reasonableness of FESCO's disapproved rates - that the rates in existence at the initiation of a proceeding are those most appropriate for rate comparison purposes.

APL and Sea-Land raise similar arguments in opposition to FESCO's Petition. They both question the validity of FESCO's rate comparisons

on the ground that several of the non-controlled carriers with which FESCO compares its rates do not offer a service similar to FESCO's. APL and Sea-Land also note certain inaccuracies in FESCO's presentation which allegedly result in meaningless rate comparisons. Sea-Land in particular emphasizes the need for inclusion of actual tariff pages for any rate comparison so that total transportation charges can be accurately ascertained. In addition, these carriers contend that the Commission's ruling concerning the time period to be used for rate comparisons (*i.e.*, rates in effect on the date of the order instituting a proceeding) is supported by policy, practicality, and Congressional intent and should not, therefore, be reversed. Although APL views the Commission's Order as not forever forbidding FESCO from instituting a rate the same as or lower than a disapproved rate, it does contend that FESCO should not be afforded immediate relief from the Order. It believes that the lower rates of FESCO's competitors, which allegedly are in response to FESCO's rate cutting, are a temporary aberration and will return to normal (higher) levels under the force of market conditions.

#### DISCUSSION

##### A. Alleged Errors of Material Fact

The Commission's Order of Suspension and to Show Cause, served on March 2, 1979, listed 305 freight rates as subject to this proceeding and, in addition, included any changes or amendments to these rates which were *filed* during the 60 days' notice period (March 2, 1979 - May 7, 1979). FESCO correctly points out that three of the rates disapproved by the Commission's April 1, 1980 Order were not put at issue in this proceeding. The local \$161.25 W rate for "nuts, almond shelled" (item 1838, FMC-20) and the \$106.50 W/M rate for "toys and parts" (item 3150, FMC-20) were both filed prior to the 60 days' notice period, and only became effective during that time. In addition, the \$229 W/M rate for "drugs and medicines, harmless" (item 2540, FMC-20) was deleted effective February 7, 1979. The Commission's disapproval of these rates will, therefore, be rescinded.

FESCO's assertions concerning the remaining two rates are incorrect. The \$95 W/M rate on "glassware, machine made" (item 3100, FMC-28) was in effect on March 2, 1979 and was included in Appendix A to the Order of Suspension and Show Cause. Its disapproval, therefore, stands. FESCO's local, per container rate of \$2500 for "books and pamphlets" (item 400, FMC-20) was filed during the notice period, contrary to FESCO's assertion. However, it was not included in Attachment A to the Commission's April 1, 1980 Order and was not thereby disapproved. Although filed within the notice period, this rate

was not clearly intended as a "replacement rate" for a suspended rate<sup>1</sup> and its disapproval will also be rescinded.

#### B. Alleged Changes in Material Fact

In its Order of April 1, 1980 the Commission concluded that ". . . the rates in existence at the time an Order institutes a proceeding are those most appropriate for any rate comparison."<sup>2</sup> Order at 13. Any rate changes occurring after the Order to Show Cause, or the Order of April 1, 1980, are not, therefore, "material" changes in fact for purposes of Rule 261(a)(1). 46 C.F.R. 502.261(a)(1). FESCO's arguments to the contrary are nothing more than elaborations on or repetitions of arguments which have already been fully considered and rejected by the Commission. Nothing presented here convinces us otherwise.

The Commission notes, moreover, that a continuation of its disapproval of most of FESCO's disapproved rates should not adversely affect FESCO's competitive position in these trades. FESCO is permitted to meet competition in the subject trades under the Commission's April Order. Indeed, the Commission recognized in that decision that in certain instances rates replacing disapproved rates may actually be *lower* than the rate disapproved. See Order at 17, n.16. Moreover, a rate replacing a disapproved rate may even be lower than the lowest rate of a national flag carrier in the trade for the same commodity, if it is ". . . necessary to assure the movement of the commodity or to effectively compete with some other carrier." Order at 17.

**THEREFORE, IT IS ORDERED,** That the Commission's April 1, 1980 disapproval of the following rates of the Far Eastern Shipping Company is hereby rescinded:

1. Item 1838, FMC-20, "nuts, almond shelled" - Local \$161.25 W;
  2. Item 3150, FMC-20, "toys and parts" - \$106.50 W/M;
  3. Item 2540, FMC-20, "drugs and medicines, harmless" - \$229 W/M;
  4. Item 400, FMC-20, "books and pamphlets" - per container \$2500;
- and

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<sup>1</sup> At the time of the Commission's Show Cause Order FESCO did not have a container rate for this commodity, but only a \$143 W/M rate. Following the Order, FESCO did file the \$2500 PC/20 rate, so it could arguably be considered a "replacement rate" for this commodity. It could also be considered a newly filed rate, however, especially because FESCO also filed a \$163.50 replacement rate for the \$143 rate and this replacement rate was subsequently disapproved.

<sup>2</sup> The Commission has indicated that it will not totally ignore rate changes occurring during the course of a proceeding. Rather, it has stated that such activity could be another "appropriate factor" for its consideration, but in so doing, it will closely scrutinize the reasons for any significant decreases in rates of comparative carriers. See Order at 14, n.11. The record in this proceeding, however, was not sufficiently developed to permit such a consideration.

IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by the Far Eastern Shipping Company 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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\* Commissioner Leslie L. Kanuk concurs only in that portion of the Order which rescinds the Commission's disapproval of the following rates in the Far Eastern Shipping Company's Tariff FMC-20: Items 1838, 3150, 2540, and 400.

Commissioner Peter N. Teige did not participate.

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-24**

**FORTÉ INTERNATIONAL SALES CORPORATION**

**v.**

**AMERICAN PRESIDENT LINES, LTD.**

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**NOTICE**

*July 10, 1980*

Notice is given that no appeal has been taken to the June 4, 1980 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

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DOCKET NO. 80-24

FORTÉ INTERNATIONAL SALES CORPORATION

v.

SEATRIN INTERNATIONAL, S.A.

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## (1) APPROVAL OF SETTLEMENT AND RELEASE

### (2) DISCONTINUANCE OF PROCEEDING

*Finalized July 10, 1980*

The complaint by Forté International Sales Corporation, a corporation organized under the laws of the State of Delaware, against Seatrain International, S.A., alleges the respondent failed to ship a container of complainant's goods on the vessel which respondent had advised was reserved for such containers and the respondent subsequently shut the container out of two other vessels, giving preference to other shippers in violation of section 14 of the Shipping Act, 1916. The complaint was served April 18, 1980.

On May 6, 1980, the parties advised the Presiding Administrative Law Judge that they had agreed to settle this matter, subject to the Commission's acceptance of such settlement. The parties asked and received an extension of time for the respondent to answer the complaint or for the parties to work out an appropriate settlement agreement. (See grant of request served May 14, 1980.)

On May 23, 1980, the parties submitted the following:

#### SETTLEMENT AND RELEASE

It is hereby agreed by and between Forté International Sales Corp. (Forté), Complainant in Federal Maritime Commission (FMC) Docket 80-24, and Seatrain International, S.A. ("Seatrain"), Respondent, that Docket No. 80-24 shall be terminated by mutual agreement subject to the following terms and conditions:

1. Seatrain shall pay Forté the sum of \$16,000.00 (but without admission of liability therefor).
2. Forté and any successor or assign will be barred from initiating any new claim against Seatrain in connection with the shipment of mohair pursuant to Seatrain bill of lading number 09-05550-2, except for the enforcement of any of the provisions of this Agreement.

3. It is understood and agreed that this Settlement and Release is in full accord and satisfaction of Forté's complaint against Seatrain, and is not an admission of liability or violation of law by Seatrain.

4. This Agreement will become effective and binding on the parties only upon approval of the Federal Maritime Commission and the issuance of an order terminating Docket 80-24.

5. This Settlement and Release constitutes the entire Agreement between the parties hereto.

IN WITNESS WHEREOF, the undersigned have executed this Agreement this 20th day of May, 1980.

FORTÉ INTERNATIONAL SALES CORP.

BY S/S JOHN H. FORTÉ

*President*

SEATRIN INTERNATIONAL, S.A.

BY S/S HARVEY M. FLETCHER

The parties also submitted the following:

#### JOINT MEMORANDUM IN SUPPORT OF SETTLEMENT AND RELEASE

Forté International Sales Corp. (Forté) and Seatrain International, S.A. (Seatrain) have entered into a Settlement and Release Agreement in an effort to terminate the captioned proceeding. This Joint Memorandum is submitted by the parties to provide the necessary legal and factual support for such settlement. The statements set forth herein are made for purposes of the settlement only and are without prejudice to either party should the settlement be disallowed by the Commission. In addition, this Joint Memorandum is made expressly with the understanding that Seatrain does not admit any liability to Forté nor does it admit in anyway that it has violated any law.

#### THE FACTS

Forté obtained from Seatrain a booking to ship a container laden with 119 bags of mohair to Genoa, Italy which were to be consigned to a Swiss company. On or about October 11, 1979, it was given Booking Number 957390 and was advised that the cargo would have to be received by the railroad in Houston on or before October 25, 1979, for movement by rail to Charleston, South Carolina and for carriage on the vessel SEATRIN LONDON.

Forté obtained Seatrain container number 126021 and delivered the loaded container to the participating railroad on October 25, 1979 and was given Bill of Lading No. 09-05550-2.

As far as Seatrain can determine, a computer entry activating the container number against the booking was not made. Such computer entry is necessary to keep track of the container within the Seatrain system. Since the computer entry was not made, no notification of arrival of the container was given and it apparently remained at the rail yard unknown to Seatrain representatives in Charleston.

In the meanwhile, the scheduled vessel the SEATRIN LONDON was redeployed by Seatrain management and the SEATRIN PEGASIA was substituted therefore. The SEATRIN PEGASIA sailed from Charleston on November 6, 1979 without the Forté mohair. At that time the container was apparently still at the rail yard in Charleston, unbeknownst to Seatrain.

Seatrain's next sailing was the SEATRIN ITALY on November 25, 1979. Seatrain has been unable to ascertain the reason why the container did not move on that vessel but notes that as a result of the redeployment of the SEATRIN LONDON and the substitution with the much smaller SEATRIN PEGASIA, the available vessel slot capacity was substantially lessened, thereby creating a back-up of containers generally.

At some time after November 21, 1979 Seatrain became aware of the fact that the Forté container had been "lost" within the system, but by the time it so determined, it was apparently too late to load it on the SEATRIN ITALY.

On November 29, 1979 the shipper, Forté, orally advised Seatrain to hold the container at Charleston because its customer in Italy had cancelled the order because of the delay in shipment. Subsequently, the container was returned to Houston and sold by the shipper to another buyer.

From available records it would appear that from at least October 25, 1979 to November 21, 1979 the shipper believed that the container had moved as scheduled and Seatrain having failed to make the computer entry, was unaware that the container was waiting movement.

Forté subsequently filed the complaint here involved charging Seatrain with discrimination under Section 14 Fourth.



## DISCUSSION

Seatrain does not believe that the failure to enter the container into its computer against the booking number constitutes discrimination under Section 14 Fourth of the Shipping Act, 1916. However, Seatrain recognizes that through no fault of the shipper the container was delayed in the system and missed two sailings, and that the shipper has suffered monetary damages.

Given the relative paucity of precedent under Section 14 Fourth, Seatrain and Forté both acknowledge that if this matter is not settled as proposed each could possibly be the loser in a full and complete adjudication. Both parties recognize that in the case of a full adjudication they will incur substantial costs in legal fees, travel expenses, transcript costs and the like. Both parties also recognize that an adjudication will take employees away from their day-to-day functions. Both parties further recognize that an adjudication will involve substantial efforts by the Administrative Law Judge whose efforts might be better employed on other matters. In view of all these factors the parties believe that the Settlement and Release is the most effective, efficient, cost-saving and time-saving resolution of this matter.

## THE APPLICABLE LAW

In FMC Docket No. 78-13, *Old Ben Coal Co. v. Sealand Service Inc.*, 21 F.M.C. 505 (1978) Administrative Law Judge Norman D. Kline extensively discussed the applicable law concerning settlements. The parties believe that the settlement here proposed fully meets the criteria set forth by Judge Kline.

First, it is well settled that the law and Commission policy favor settlements. *See, e.g. Merck, Sharp and Dohme v. Atlantic Lines*, 17 F.M.C. 244, 247 (1973).

Second, as long as the proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects, the settlement should be approved. As Judge Kline noted in *Old Ben*,

“[A] judicial officer, in reviewing a proffered settlement, may look to see if the settlement is fair, reasonable and adequate and may weigh the likelihood of complainant's success...against the estimated cost and complexity of continued litigation”. 8 S.R.R. at 1093.

Third, the issues here do not involve any departure from tariffs. Thus, unlike settlements which involve tariff departures which could have an impact on other shippers, (and upon

which the Commission still allows settlements), <sup>1</sup> this case involves, as far as can be determined a discrete occurrence which apparently affects no other shippers and requires no departure from the applicable tariffs.

### CONCLUSION

In view of the foregoing facts, discussion and law, Forté and Seatrain believe that the Settlement and Release Agreement is a fair, reasonable and appropriate method of terminating this litigation and respectfully request the Administrative Law Judge and the Commission to approve the Agreement and to terminate the proceeding.

RESPECTFULLY SUBMITTED,  
(S) DONALD FORTÉ, JR.  
*Attorney for Forté International  
Sales Corp.*

(S) NEAL M. MAYER  
*Attorney for Seatrain International, S.A.*

May 23, 1980

On May 29, 1980, the Presiding Administrative Law Judge telephoned counsel for the respondent who had submitted joint memorandum referred to above and who is in the D.C. area, the other counsel being in Massachusetts, anent substantiation by the complainant of the latter's claim for lost profits. Counsel promised to take the matter up with counsel for complainant. Counsel for complainant apparently was contacted the same date, because a letter dated May 29, 1980, was received June 2, 1980, from counsel for complainant, stating as follows:

Mr. Mayer called to say that you had requested background on market conditions surrounding the sharp decline in mohair prices between October and December 1979 that contributed to the loss in the subject case.

The mohair market historically has been a volatile one. Mohair is a luxury fiber used to impart luster and silky texture to fine fabrics and knitting yarns. Supply has been relatively stable in recent years, but demand, and thus prices, have fluctuated due to changes in fashions, consumer disposable income and exchange rates. Since February 1979 the price of adult Texas Mohair at the warehouse has fallen from \$6.00 per pound to \$2.90 per pound—52 percent. (See enclosed copies of *Market News* prepared by the Colorado Department of Agri-

<sup>1</sup> See, e.g. *Organic Chemicals v. Atlanttraffik Express Service*, 18 S.R.R. 1536 (1979).

culture in cooperation with the U.S. Department of Agriculture.) A decline from February 1979 prices was expected by some (see enclosed clipping from the 5/30/79 *San Angelo (Texas) Standard*: however, neither a dealer such as my client or its customers know how long or how far prices will fall.

My client's sale to Laines et Mohair on October 9, 1979 at \$4.55 per pound was made in the midst of a declining market to a customer with an immediate need for mohair, hence the customer's stipulation that the mohair be shipped on October 28, 1979, the date for which my client had booked cargo space with Seatrain. At that time, it was paying \$4.10 per pound at the warehouse for adult Texas mohair. By the end of November 1979, when my client's customer cancelled his purchase because of my client's failure to ship as prescribed, my client was paying \$3.50 per pound for mohair and, anticipating further price declines, was attempting to reduce its inventory. Consequently, my client was happy to be able to sell the mohair originally sold to Laines et Mohair to another customer on December 14, 1979 for \$3.75 per pound. (My client's current price for adult Texas mohair FOB Texas is \$3.20 per pound.) Copies of the October 9 and December 14 sales contracts are enclosed.

Please let me know if you require further information.

The respondent's May 29, 1980, letter and attachments have been filed in this proceeding.

**DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS**

The complainant alleged in its complaint a net loss of \$26,804.95 as being the amount of complainant's damage. The amount of loss on sale of contents of container STLU 126021 is set out as Exhibit 2 to complaint as follows:

difference in sales price 33,133 lbs. X (\$4.55 - \$3.75) =	\$26,506.40
less: 2% Commission to Italian agent	(530.13)
shipping from Mertzan to Houston, Texas 10/23/79	700.40
shipping from Houston to San Antonio 12/28/79	414.34
less: difference between shipping from Mertzan to Houston and from San Antonio to Houston	<u>(286.06)</u>
Net Lost Profits	\$26,804.95

Because as to lost profits the complaining party is required to submit sufficient proof of them so that the trier of fact can find with reasonable certainty the fact and amount of lost profits, upon having review of the record herein and finding more information was needed, the Presiding Administrative Law Judge telephoned counsel on May 29, 1980, as referred to above. The information supplied by the complainant in its

letter dated May 29, 1980, is *found* and *concluded* under the circumstances herein to be sufficient proof of the lost profits. If the lost profits are due to failure of the carrier to perform its duty properly in delivery of the goods, the claimant is entitled to recover such profits as an element of his full actual loss, damage or injury. Here, however, settlement has been reached at \$16,000. 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. *Pierpoint Management Co. and Retla Steamship Co. v. Holt Hauling and Warehouse System, Inc.*, Docket No. 78-44, 22 F.M.C. 324, 326 (1979).

In their joint memorandum set forth above, the parties discuss that given the relative paucity of precedent under section 14 Fourth of the Shipping Act, 1916, Seatrain and Forté both acknowledge that if this matter is not settled as proposed, each could possibly be the loser in a full and complete adjudication. Both parties recognize that in the case of a full adjudication, they will incur substantial costs in legal fees, travel expenses, transcript costs and the like. Both parties also recognize that an adjudication will take employees away from their day-to-day functions. The parties believe that the Settlement and Release is the most effective, efficient, cost-saving and time-saving resolution of this matter. The Presiding Administrative Law Judge shares this belief. There is sufficient justification offered for the \$16,000 payment by Seatrain. See *Washington Electric Corp. v. Sea-Land Service, Inc.*, Docket No. 79-15, 22 F.M.C. 267, 417, (1979).

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

(1) Circumstances exist to warrant the grant of relief as indicated hereinabove, i.e., approval of the Settlement and Release;

(2) Such Settlement and Release is consistent with the Commission's support of the policy which favors the settlement of disputes.

Wherefore, it is *ordered*, subject to review by the Commission, as provided in the Commission's Rules of Practice and Procedure, that:

(A) The Settlement and Release jointly executed by Complainant and Respondent be and hereby is approved.

(B) The parties shall at the proper time advise the Commission as to how and when the Settlement and Release was executed, submitting copies of any pertinent documents.

(C) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS  
*Administrative Law Judge*

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-27

CONNELL BROS. COMPANY, LTD.

v.

LYKES BROS. STEAMSHIP CO., INC.

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## NOTICE

*July 10, 1980*

Notice is given that no exceptions have been filed to the June 6, 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

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DOCKET NO. 80-27

CONNELL BROS. COMPANY, LTD.

v.

LYKES BROS. STEAMSHIP CO., INC.

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Complaint seeking reparations for freight charges based upon oral agreement with carrier representative which differs from charges assessed under existing tariff and time-barred under the special docket provisions of section 18(b)(3) cannot succeed when seeking remedy under section 18(b)(5) without Commission disapproval of involved rate and a showing of continued assessment after such finding. Complaint dismissed.

*Edward J. Martin and R. D. Vinick* for complainant.

*R. J. Finnan* for respondent.

## INITIAL DECISION<sup>1</sup> OF PAUL J. FITZPATRICK, ADMINISTRATIVE LAW JUDGE

*Finalized July 10, 1980*

Connell Bros. Company, Ltd., of San Francisco, California, by complaint served May 9, 1980, alleges that Lykes Bros. Steamship Co., Inc., assessed charges for ocean transportation which are so unreasonably high as to be detrimental to commerce in violation of section 18(b)(5) of the Shipping Act of 1916.<sup>2</sup>

The focus of the complaint involves a booking quotation of an all-inclusive rate of \$78.50 per kilo ton and \$5.00 per kilo ton as a bunker charge to be applied to a shipment of transformer oil for carriage during May 1979. Although complainant asserts that the respondent indicated two months earlier that it would take immediate steps to have the rate published (an allegation denied by the respondent), it was assessed freight charges at a higher rate. The shipment moved under respondent's Bill of Lading No. 019, dated May 13, 1979, aboard its NANCY LYKES at the tariff rates then in effect on lube oil at \$90.00 per kilo ton, including a bunker surcharge plus a \$6.50 per kilo ton C/Y receiving charge.<sup>3</sup> According to the bill of lading, the involved ship-

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<sup>1</sup> 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).

<sup>2</sup> 46 U.S.C. section 817(b)(5).

<sup>3</sup> Although the tariff was not provided, complainant indicates that the rates are published in "Lykes' Tariff FMC-12, 5th Revised Page 145, 2nd Revised Page 33 and Original Page 51."

ment represents 32 containers which contained 2,400 drums of transformer oil having a gross weight of 485.523 KGS and resulting in freight charges of \$46,852.97. According to complainant, these charges represent \$6,311.79 in excess of the quotation agreed upon prior to the shipment.

Absent any other factual considerations, it would appear at this point that respondent's consideration of utilizing the remedy provided by Congress in P.L. 90-298<sup>4</sup> might be appropriate since it was designed to provide recourse where possible inequities may result when shippers rely upon a carrier's representation that an agreed-upon reduced freight rate would be assessed. Indeed, the statute was designed to cover situations where there is "an error due to an inadvertence in failing to file new tariff" -- assuming this to be the case here. However, the complainant states that its claim was denied and that the "exchange" between the parties extended beyond the 180 days to effectuate any timely request for refund under that statute. On the other hand, respondent denies receipt of the claim and points to Rule 20 of its tariff which restricts the time for filing claims to six months. In any event, an examination of the circumstance surrounding the failure to file under section 18(b)(3) is not a factor for consideration here. However, assuming that all the requirements of section 18(b)(3) were met, complainant could have received the refund sought here. The determination not to file for permission to refund a portion of the involved freight charges on a timely basis effectively foreclosed the remedy provided under the statute. Furthermore, the statute does not require a carrier to pursue such a remedy.

Recognizing that any requested relief fails under section 18(b)(3), complainant views as its only refuge the provisions of section 18(b)(5).<sup>5</sup> It seeks relief in three forms: (1) that the Commission disapprove the higher rates and charges; (2) that the rates be found unreasonably high and the Commission award reparation in the amount of \$6,311.79 plus interest; and (3) that the relief sought be granted without a public hearing. Respondent "denies" the first and second but agrees that the complaint should be resolved without a public hearing. First, it is unnecessary to dwell at length about the statutory requirement of disapproval of any rate "after hearing" and what constitutes a "hearing," since the first and second requests for relief must be rejected. As to these requests, section 18(b)(5) is purely prospective in nature. *Wes- 10*  
*inghouse Electric Corp. v. Sea-Land Service, Inc.*, 22 F.M.C. 267, 268

<sup>4</sup> Section 18(b)(3) of the Shipping Act of 1916, 46 U.S.C. 817(b)(3).

<sup>5</sup> Section 18(b)(5) provides:

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.

(1979). If the rates here were shown to be so unreasonably high as to be detrimental to commerce, then the proper remedy would be for this Commission to disapprove those rates. But the considerations here involve an agreement to provide a reduced rate which ended with higher charges at the existing tariff rate, hardly the usual ground for a finding of a violation under this section. Furthermore, only after continued adherence to the rate which was found to be disapproved by the Commission could the respondent be considered in violation of section 18(b)(5) and penalties imposed, including the award of reparations. *Federal Maritime Commission v. Caragher*, 364 F.2d 709, 717-18 (1966); *Commodity Credit Corp. v. American Export Isbrandtsen*, 15 F.M.C. 173, 191 (1972). In this proceeding, none of these necessary elements are present, and complainant has failed to support its position and justify an award of reparations. Accordingly, the complaint is dismissed.

(S) PAUL J. FITZPATRICK  
*Administrative Law Judge*

Washington, D.C.  
June 6, 1980



# FEDERAL MARITIME COMMISSION

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INFORMAL DOCKET NO. 775(I)  
WILLIAM H. KOPKE, JR., INC.

v.

SEA-LAND SERVICE, INC.

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## ORDER PARTIALLY ADOPTING SETTLEMENT OFFICER'S DECISION

*July 10, 1980*

The Commission has undertaken a discretionary review of the April 15, 1980 decision of Settlement Officer Robert M. Skall in the above-captioned proceeding in order to consider the propriety of awarding a shipper damages which include the cost of reweighing cargo which had been erroneously weighed by an ocean carrier.

In this instance, William H. Kopke, Jr., Inc., was the consignee of two freight prepaid containerloads of chestnuts transported from Naples, Italy, to New York, New York, by Sea-Land Service, Inc. Upon being notified by Sea-Land that insufficient freight charges had been received in Italy for one of the two containers, the consignee was required to pay an additional \$894.11 to secure the release of its cargo. This amount was based upon Sea-Land's determination that the container in question weighed 812 kilos more than the weight stated on the bill of lading.<sup>1</sup>

Upon receiving the disputed container, the consignee made arrangements with the United States Department of Agriculture to weigh the contents of both containers and paid a total of \$102.15 for this service. The reweighing indicated that the cargo in the disputed container weighed at least 50 kilos less than the 15,000 kilos at which it was originally rated. The consignee then filed a complaint with the Commission to collect \$894.11 in excess tariff charges and \$102.15 for reweighing. Sea-Land did not dispute the allegation that it had misrated the cargo or the amount requested in damages, and the Settlement Officer proceeded to award the consignee \$894.11 plus \$72.15 -- an

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<sup>1</sup> The shipper was charged an additional freight rate of \$281.47 plus penalty charges provided for under Rule 26 of the West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Conference Tariff No. FMC-15, in the amount of two times the additional freight (\$562.74) plus the cost of reweighing (\$50.00). Sea-Land did not unpack the container and weigh its contents, but instead weighed the entire load and subtracted the "tare weight" of the empty container in accordance with figures from a container register.

amount found to be the cost of weighing the one container upon which excess tariff charges were collected. Interest was also awarded on these amounts, calculated from the date each payment was made.

Reparations were awarded for the consignee's reweighing expense because of the Settlement Officer's belief that, but for Sea-Land's Shipping Act violation, no reweighing would have been necessary. Although a chain of causation does exist between the violation and the reweighing, it is also clear that the consignee would not have incurred this expense if it had not pursued its legal claim against Sea-Land. Like attorneys' fees, reweighing expenses are considered to be a cost of litigation primarily within the independent control of the complainant rather than an economic loss flowing directly and without intervention from a misrating violation.

The Commission has determined that litigation costs are rarely proper subjects for an award of reparations, *Ace Machinery Company v. Hapag-Lloyd A.G.*, 16 S.R.R. 1531, 1534 (1976), and should not be considered by Settlement Officers in the context of nonprecedential informal docket proceedings. Accordingly, the Settlement Officer's decision shall be adopted except insofar as it permits the consignee to collect the costs of reweighing the cargo.

**THEREFORE, IT IS ORDERED**, That Sea-Land Service, Inc., pay to William H. Kopke, Jr., Inc., the sum of \$894.11, plus interest at the rate of 12% from October 12, 1979, to the date full reparation is made.

By the Commission.\*

(S) FRANCIS C. HURNEY  
*Secretary*

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\* Vice Chairman Thomas F. Moakley and Commissioner Leslie L. Kanuk dissent. In the circumstances of this case, they do not consider the consignee's reweighing expense as a cost of litigation, but rather as an expenditure necessarily incurred as a direct result of the carrier's failure to perform its duty to ascertain the proper weight of the cargo it transports.

# FEDERAL MARITIME COMMISSION

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INFORMAL DOCKET NO. 775(I)  
WILLIAM H. KOPKE, JR., INC.

v.

SEA-LAND SERVICE, INC.  
AND

WEST COAST OF ITALY, SICILIAN AND ADRIATIC PORTS,  
NORTH ATLANTIC RANGE CONFERENCE (W.I.N.A.C.)

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Decision of Robert M. Skall, Settlement Officer<sup>1</sup>

*Partially Adopted July 10, 1980*

Reparation awarded in part

## PARTIES

William H. Kopke, Jr., Inc. (claimant) is a New York corporation engaged in the business of importing and distributing fresh fruit and produce, including chestnuts from Italy. It maintains offices at 676 Longfellow Avenue, Bronx, New York.

Sea-Land Service, Inc. (Sea-Land) is a common carrier engaging in transportation by water and is a member of the West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Conference (W.I.N.A.C.). As a member of that conference, Sea-Land participates in W.I.N.A.C.'s Freight Tariff No. 15 - FMC 3 (tariff) on file with the Commission.

## CLAIMANT'S CASE

By complaint filed January 14, 1980, claimant states that on September 30, 1979, its shipper, Ditta Vito Cioffi, delivered to Sea-Land two containers loaded with fresh chestnuts, in bags, for transportation from Naples, Italy to the port of New York (i.e., Port Elizabeth, New Jersey) under Sea-Land Bill of Lading No. 944-713135.<sup>2</sup> The two containers were temperature controlled containers whereby the chestnuts were to be maintained at a temperature of from 35 to 37 degrees.

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<sup>1</sup> Claimant and carrier have consented to the informal procedure under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301-304). This decision, therefore, will be final unless the Commission elects to review it within 30 days from the date of service thereof.

<sup>2</sup> A review of a copy of this bill of lading, supplied by claimant, indicates that the actual number is 944-713135. This discrepancy is irrelevant to the decision herein in that the correct number appears on copies of other documents supplied by claimant, e.g., Sea-Land's corresponding freight bill.

On October 11, 1979, two days after it had paid Sea-Land's freight and accessorial charges, claimant intended to take delivery of the two containers of chestnuts at Sea-Land's Port Elizabeth, New Jersey, terminal. At the same time, however, pursuant to rule 26 of W.I.N.A.C.'s tariff, one of the two containers (container No. 22591) underwent a weight check by Atlantic Cargo Inspection Corporation (ACIC) on behalf of Sea-Land and W.I.N.A.C. Inadvertently, the second container (container No. 20781) was released by the terminal without a weight check by ACIC.

The weight of the chestnuts in container No. 22591 was found by ACIC to be 15,812 kilos -- 812 kilos over the weight of 15,000 kilos stated on the bill of lading. Since claimant's earlier payment of freight and accessorial charges had been based on the weight indicated on the bill of lading, ACIC notified claimant that container No. 22591 would be detained until payment of an additional sum in the amount of \$894.11. This amount, computed pursuant to rule 26 of W.I.N.A.C.'s tariff, included (1) the alleged additional freight and accessorial charges due, (2) the cost of ACIC's weight check, and (3) an amount equal to double such additional freight and accessorial charges due.<sup>3</sup>

Claimant states that since chestnuts are a perishable cargo necessitating immediate delivery, it was forced to make prompt (i.e., October 12, 1979) payment of \$894.11 to Sea-Land. Claimant made this payment under written protest wherein it invited representatives of Sea-Land and W.I.N.A.C. to attend the October 12 unloading of both containers at claimant's premises. This invitation was refused.

On October 12 the contents of each of the two containers was counted and weighed by a representative of the U.S. Department of Agriculture (USDA). As indicated on the two USDA inspection certificates, not only did the chestnuts in container No. 22591 not exceed the weight stated on the aforesaid bill of lading, the chestnuts in each container weighed slightly less than stated on the bill of lading.

Accordingly, claimant requests reimbursement from Sea-Land and W.I.N.A.C. of \$894.11, plus \$102.15 (i.e., the expenditure necessary to have the bags of chestnuts weighed and counted by the USDA), plus interest from October 12, 1979; a total of \$996.26 plus interest. Claimant states that "the sum of \$894.11 is an overcharge and, therefore, a violation of the...Conference's tariff and the Shipping Act of 1916, as amended." (Act).

In support of its claim, claimant has submitted copies of Sea-Land's short form bill of lading (prepared by the shipper), Sea-Land's corre-

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<sup>3</sup> Although ACIC's inspection report indicates that the contents of container No. 22591 weighed 15,812 kilos, for some reason not clear to the Settlement Officer, the additional sum was computed by ACIC on the basis of 15,820 kilos. Again, however, this seeming discrepancy is irrelevant to the decision herein.

ponding freight bill, evidence of payment of the freight and accessorial charges, ACIC's bill for \$894.11, ACIC's inspection reports, evidence of payment of ACIC's bill for \$894.11, the USDA's inspection certificates and evidence of payment of the USDA's inspection charges.

#### RESPONSE TO CLAIM

By response dated March 20, 1980, Sea-Land states that, while it appears that the claimant has met its "heavy burden of proof" in establishing the validity of its claim in connection with an overcharge, Sea-Land cannot unilaterally refund the charges, for to do so would present a violation of its Conference membership agreement."

By response dated March 25, 1980, counsel for the W.I.N.A.C. Conference states that:

In light of the pertinent regulations, it is unclear why WINAC was named as a respondent to the complaint. Nonetheless, we have reviewed the complaint and Sea-Land's response to it of March 20, 1980. The matter appears to be straightforward and WINAC has nothing to add to Sea-Land's response. <sup>4</sup>

#### DISCUSSION AND CONCLUSIONS

This matter involves a decision as to whether claimant has shown that it should be awarded the whole or any part of its claim for \$996.26 (\$894.11 plus \$102.15) and, if so, whether interest also should be awarded. Although 46 C.F.R. 502.301-304 specifically provides for reparation of only "overcharges" and "damages", the Commission considers interest to be one form of "damages" as defined in 46 C.F.R. 502.303: "damages"...means such violations of the Shipping Act, 1916,...other than overcharges[,] for which reparation may be granted."

As to its claim for the sum of \$894.11 (\$281.37 representing the alleged additional freight and accessorial charges due, plus \$562.74 representing a penalty of twice such additional freight and charges, plus \$60 representing ACIC's inspection expense), claimant states and the Settlement Officer agrees that that amount is an "overcharge." Section 18(b)(3) of the Act prohibits a common carrier by water in foreign commerce or a conference of such carriers from charging a greater compensation for the transportation of property than the rates and charges specified in the applicable tariff. Based upon ACIC's findings, the charge of \$894.11 was not an overcharge and thus did not violate section 18(b)(3), whereas, based on the USDA's findings, such charge was an overcharge and a violation of section 18(b)(3) has occurred.

<sup>4</sup> Although the Commission's rules governing informal docket procedure do not apply to conferences specifically, for obvious reasons W.I.N.A.C. was named by claimant as a joint party to the complaint. Accordingly, when the Settlement Officer served a copy of the complaint on Sea-Land he also served a copy on W.I.N.A.C. The question of whether or not W.I.N.A.C. was properly named as a respondent does not need resolution in this case; it is enough that Sea-Land is a respondent.

Should the USDA's findings be preferred over ACIC's findings? Without more, the answer is no. In this case, however, there is more. Specifically, a review of the respective inspection reports indicate that while ACIC neither weighed nor counted the contents of Sea-Land container No. 22591, the USDA did. ACIC merely weighed the sealed container and chassis and subtracted from that gross weight the "register" weight of the chassis and the "register" weight of the container. The remainder (i.e., 15,812 kilos, or 812 kilos more than the 15,000 kilos stated on the bill of lading) was presumed by ACIC to be the weight of the contents. The USDA, on the other hand, counted and weighed the contents of the container and found that the average weight of the bags of chestnuts was slightly under the stated per-bag-weight. Further, the USDA found that there were two bags less than indicated on the bill of lading for container No. 22591.<sup>5</sup>

In this case, therefore, it is concluded that the USDA's findings should be preferred over ACIC's findings and that claimant is entitled to a refund of overcharges in the amount of \$894.11. Further, since as a direct result of that overcharge claimant was wrongfully deprived of the use of its money, it also is concluded that, in accordance with Commission policy, claimant is entitled to interest at 12 percent. Again in accordance with Commission policy, and as requested by claimant, since claimant paid the amount of \$894.11 on October 12, 1979, interest will be awarded from that date until the date of the refund by Sea-Land.

As to the sum of \$102.15, which represents claimant's expense in having the USDA verify the amount and weight of the cargo, claimant does not use the term "damages" as the basis for the requested reimbursement. The Settlement Officer believes, however, that reimbursement for at least a portion<sup>6</sup> of such expense can be awarded in the form of damages, if it can be concluded that (1) such damages were suffered as a direct result of the above-found violation of the Act, and that (2) "reparation may be granted" within the meaning of 46 C.F.R. 502.303.

Did the damages (i.e., the cost of the USDA's verification service) occur as a direct result of the overcharge violation? Obviously so. To conclude otherwise would be to conclude that no part of the expenditure was necessary to prove claimant's case, and despite the record herein, that claimant would have requested an impartial weight and count check in any case. No such conclusion can be reached here.

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<sup>5</sup> The contents of container No. 22591 was said by the shipper to contain 600 bags weighing a total of 15,000 kilos, with each bag marked as weighing 25 kilos (600 x 25 = 15,000). The USDA, however, counted only 598 bags, with an average weight just under 25 kilos. Thus, the chestnuts in container No. 22591 could not have weighed 15,000 kilos, much less 15,812 kilos.

<sup>6</sup> The sum of \$102.15 represents the USDA's service charge in connection with both containers -- not just container No. 22591, which is the only container directly involved in this case.

May reparation for damages be granted in this case? The Settlement Officer is aware of no policy that would negate the literal meaning of the rules, and equity<sup>7</sup> certainly favors an affirmative answer. Further, Sea-Land's response to the claim simply ignored the matter of damages.

Accordingly, it is concluded that 46 C.F.R. 502.303 entitles claimant to damages for that portion of the \$102.15 applicable to container No. 22591.

As to the amount of damages to be awarded, a review of the USDA's inspection certificate for container No. 22591 clearly indicates that its charges, including overtime, amounted to \$72.15. A telephonic discussion with the USDA inspector who signed the certificate confirmed that \$72.15 does in fact represent the inspection and overtime charges<sup>8</sup> related only to container No. 22591, and that no other charges for any other services are included in that amount. It is concluded, therefore, that the amount of \$72.15 is the awardable amount of damages, exclusive of interest, to which claimant is entitled.

Although a viable argument can be made to the contrary, the Settlement Officer does not believe that he can consider the remaining amount of \$30, which represents the USDA's inspection fee for the second container, as damages *directly* related to the overcharge violation. While it is true that the USDA's weight and count check of the bags of chestnuts in the second container supplied strong evidence to support the findings as to the weight of the bags of chestnuts in container No. 22591, that supporting evidence was not necessary to prove claimant's contention that an overcharge occurred with respect to container No. 22591.

As to the question of whether interest should be awarded on the amount of \$72.15, it must be recalled that the underlying principal at work here is to make the injured party whole -- within the limits of the Act, the rules and Commission policy.<sup>9</sup> The injury suffered by claimant is the result of its outlay to the USDA is not limited simply to the amount of the outlay. Rather, just as in the case of the overcharge, this injury also involves the loss of the use of claimant's money. It is concluded, therefore, that claimant is entitled to interest at 12 percent,

<sup>7</sup> This is not to imply that the rules enable the Settlement Officer to completely satisfy equity in this case. The claimant will still be out-of-pocket for expenses such as attorney's fees and will receive no reparation for the aggravation suffered as a result of this incident.

<sup>8</sup> According to the USDA inspector, overtime begins at 4:30 p.m. The USDA's weight and count check of container No. 22591, as stated on the inspection certificate, began at 4:35 p.m., October 12, 1979. In that connection, the Settlement Officer notes that October 12, 1979 fell on a Friday. It was, therefore, all, ACIC who had detained the container on October 11 and held it until claimant could pay the additional charges on October 12. Only then could claimant arrange for delivery of the container to its warehouse in the Bronx. It is a distinct possibility, therefore, that the only way claimant could have avoided overtime charges was to wait for at least two more days before allowing the USDA inspection to begin.

<sup>9</sup> 46 C.F.R. 502.301-304 is based on section 22 of the Act. That section authorizes "full reparation to the complainant for the injury caused by such violation"(emphasis supplied).

but not from the date of October 12, 1979, as requested. The USDA's invoice to claimant is stamped "Paid" on a date which, although blurred, appears to be October 24, 1979. Since telephone discussions with claimant and its attorney could not elicit a different date, interest on the amount of \$72.15 will be awarded from the date of October 24, 1979.

Based on the foregoing, Sea-Land is hereby ordered to:

- 1) Refund to claimant the sum of \$894.11, together with interest at 12 percent from October 12, 1979, to the date refund is made; and
- 2) Reimburse claimant in the additional amount of \$72.15, together with interest at 12 percent from October 24, 1979, to the date such reparation is made.

Evidence of payment in accordance with this decision should be submitted by Sea-Land in order to complete this record.

(S) ROBERT M. SKALL  
*Settlement Officer*



# FEDERAL MARITIME COMMISSION

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DOCKET NO. 77-13

FIRST INTERNATIONAL DEVELOPMENT CORPORATION

v.

SHIP'S OVERSEAS SERVICES, INC.

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Freight charges collected by nonvessel operating carrier computed on the basis of the unfiled rate, found to be unlawful. Reparation awarded.

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

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

## REPORT

*July 17, 1980*

BY THE COMMISSION:\* (THOMAS F. MOAKLEY, *Vice Chairman*;  
JAMES V. DAY, *Commissioner*; PETER N. TEIGE, *Commissioner*)

This proceeding is before the Commission on Exceptions filed by First International Development Corporation (FIDCO) to the Initial Decision on Remand issued by Administrative Law Judge William Masley Harris on October 30, 1979. Ship's Overseas Services, Inc. (SOS) filed a Reply to the Exceptions.

## BACKGROUND

The matter began with the filing of a complaint by FIDCO charging SOS with violations of the Shipping Act, 1916 (46 U.S.C. 801, *et seq.*) and seeking reparation from SOS in the amount of \$553,484.71 for the injury caused by such violations. Specifically, the complaint alleged that whereas SOS had entered into an agreement with FIDCO to arrange for the transportation of a shipment of steel pipe from Houston, Texas, to Benghazi, Libya, at the best rate available at the time of shipment, SOS collected from FIDCO freight charges at the rate of \$227.50 per measurement ton (m.t.) while shipping the cargo on a vessel of the Jan C. Uiterwyk Company at the rate of \$125.00 per m.t.<sup>1</sup> The collection of charges at \$227.50 per m.t., which rate was never presented with the Commission, FIDCO contends, was unduly or unreasonably prejudicial and disadvantageous, unjustly prejudicial and unreason-

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Chairman Daschbach concurs in part and dissents in part. Commissioner Kanuk dissents. Commissioner Teige did not participate in the previous Commission decisions served in this proceeding. The rate of the Gulf-Mediterranean Ports Conference of which Uiterwyk was a member.

able in violation of sections 14 Fourth, 16, 17 and 18 of the Shipping Act, 1916.

In the Initial Decision served May 2, 1978,<sup>2</sup> the Presiding Officer determined that SOS was not a common carrier and dismissed the complaint for lack of jurisdiction. Because the Presiding Officer noted in his Initial Decision that Complainant's closing brief had not been received, the Commission on exceptions remanded the proceeding to the Presiding Officer for his consideration of the Complainant's brief.

On remand, the Presiding Officer reasserted the findings and conclusions of his earlier decision.

The Commission on review reversed the Presiding Officer's decision, finding that in arranging for the transportation of FIDCO's cargo SOS had acted as a non-vessel operating common carrier by water and that SOS's failure to file with the Commission a tariff covering such transportation violated section 18(b)(1) of the Shipping Act, 1916 (46 U.S.C. 817(b)(1)). The Commission, however, found the record insufficient for ruling on FIDCO's claim for reparation and again remanded the proceeding to the Presiding Officer for a determination of the amount of reparation, if any, to be awarded FIDCO.

#### PRESIDING OFFICER'S DECISION AND POSITIONS OF THE PARTIES

In his Initial Decision on Remand now under consideration, the Presiding Officer dismissed the complaint and discontinued the proceeding on the ground that FIDCO had failed to introduce any new evidence on remand and had not proven that SOS's violation of section 18(b)(1) was the cause of any injury to it. Moreover, the Presiding Officer expressed some doubts as to whether the parties had come in with clean hands so that the matter could be equitably resolved.

In its Exceptions to the Initial Decision on Remand FIDCO contends that the Presiding Officer failed, either in that decision or in his earlier Initial Decision, to consider:

- (1) FIDCO's arguments at law and equity on the question of the injury and of damages caused FIDCO by SOS's violation of the statute;
- (2) whether a rate 75% in excess of the rate paid SOS to the underlying carrier was unreasonable;
- (3) the purpose of section 18(b)(1) which is to prevent unreasonable charges and provide review of rates in order to protect "unknown members of the public from unscrupulous shippers [sic]";
- (4) the Commission's decision in *J. G. Boswell v. American Hawaiian S.S. Co.*, 2 U.S.M.C. 95 (1939), which requires an

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<sup>2</sup> *First International Overseas Corp. v. Ship's Overseas Services, Inc.*, 18 S.R.R. 415 (1978).

analysis of the reasonableness of the charge where there was a failure to file a tariff.

FIDCO also excepts to the doubt expressed in the Initial Decision on Remand on the parties' "clean hands" and contends that equity, in this instance, weighs heavily in FIDCO's favor. Finally, it is argued that if the Initial Decision is allowed to stand, carriers will be encouraged to violate the statute and avoid the filing requirements of section 18(b)(1).

SOS, in reply, maintains that damages are not presumed but must be proven. It submits that because the further hearings to determine the amount of damages were held at FIDCO's request, its failure to introduce any evidence on remand on that question amounts to a fraud on the Commission and to an abuse of the "judicial" process.

SOS insists that FIDCO has not shown that the rate charged was unjust or unreasonable or that it was in fact damaged. Citing *Carton-Print v. The Austasia Container Express*, 20 F.M.C. 31 (1977), SOS contends that the Commission has rejected claims for damages resulting from loss of business<sup>3</sup> and maintains that Complainant should have, but has not, shown that SOS's failure to file a tariff was the proximate cause of a specific injury to it, which it allegedly has not done. Finally, SOS again reasserts its position that it is not a common carrier subject to FMC regulation.

#### DISCUSSION

The Commission has previously found that SOS utilized the services of Charles Ragan to procure business and that it shipped FIDCO's cargo under its own name and assumed liability for the safe water transportation and delivery of the cargo at the port of destination.<sup>4</sup> On that basis it was determined that in arranging for the movement of FIDCO's cargo to Benghazi, SOS had acted as a non-vessel operating common carrier and that its failure to file a tariff covering the transportation was violative of section 18(b)(1).

On exceptions, SOS again denies that it is a common carrier subject to regulation and refers to arguments made in earlier pleadings. However, the matter of SOS's status has already been fully considered in an earlier opinion and will not be discussed further. SOS's exception to the contrary is therefore rejected. Accordingly, the only remaining issue before the Commission is FIDCO's claim for reparation and damages.

Section 22(a) of the Shipping Act, 1916, provides, in relevant part:

That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by

<sup>3</sup> That decision turned on the question of the standing of the shipper to claim reparation for freight overcharges paid by the consignee.

<sup>4</sup> The essential facts are as set forth in the Commission's decision served March 23, 1979, which is incorporated herein.

water, or other person subject to this Act, and asking 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 . . . of full reparation to the complainant for the injury caused by such violation. (Emphasis added) 46 U.S.C. 821(a).

As mentioned, the Initial Decision on Remand held that FIDCO had not proven any injury caused by the violation of the statute. FIDCO, however, claims that it was indeed injured and seeks reparation in the amount of \$553,484.71, \$500,000 of which is claimed for the loss of business and profits and as punitive damages, while \$53,484.71 represents the 75 percent difference in the amount SOS collected from FIDCO over the charges SOS paid the underlying ocean carrier.

With regard to the claim of lost business and profits, the Presiding Officer correctly found that FIDCO has failed to establish that SOS's violation is the proximate cause of any such losses by FIDCO. The Presiding Officer's decision is therefore adopted in that respect.

With respect to FIDCO's claim of injury resulting from the excess in freight charges paid by FIDCO over the amount SOS paid the underlying ocean carrier, SOS does not deny that it received payment on the basis of the unfiled rate, but insists that FIDCO was not injured thereby because it had agreed to the payment of that rate. Upon close examination, this argument proves itself to be without merit.

The primary purpose of section 18(b) is to prevent discrimination among shippers and to make the use of an unfiled rate unlawful. The courts, this Commission, and the Interstate Commerce Commission (under similar provisions of the Interstate Commerce Act) have long recognized that although carriers subject to regulation may establish rates under private contracts with shippers, the rates so agreed upon may be collected only when set forth in a tariff duly on file and in effect at the time of the shipment. As the Supreme Court explained in *Armour Packing Co. v. United States*, 209 U.S. 56 (1908), in referring to section 6 of the Interstate Commerce Act:<sup>5</sup>

There is no provision excepting special contracts from the operation of the law . . . . There is no provision for the filing of contracts with shippers and no method of making them public . . . . If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to

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<sup>5</sup> P.L. 95-473 recodified the Interstate Commerce Act without substantive change. The pertinent portions of section 6 now appear at 49 U.S.C. 10761 and 10762. These provisions closely parallel section 18(b) of the Shipping Act, 1916, which, among other things: (1) requires that water carriers engaged in foreign commerce file with the Commission tariffs containing all their rates and charges; (2) sets forth the conditions upon which tariffs of such rates and charges will become effective; (3) prohibits carriers from receiving a different compensation than provided in their tariffs; and (4) makes unlawful the use of a rate whose filing was rejected by the Commission.

establish a rate duly published, known to all and from which neither shipper nor carrier may depart. 209 U.S. at 81.<sup>6</sup>

The Shipping Act similarly prohibits special arrangements between shippers and carriers unless their terms are fully disclosed in the tariff. *Tariff Filing Practices, Etc. of Containerships, Inc.*, 9 F.M.C. 56 (1965); *Investigation of Tariff Filing Practice*, 7 F.M.C. 305 (1962); *Intercoastal Investigation*, 1 U.S.S.B.B. 400, 416 (1935). Indeed, the tariff adherence requirements of the federal common carrier statutes are so strict<sup>7</sup> that, when properly filed, tariffs have the force of law and strict liability is imposed upon shippers and carriers alike.<sup>8</sup>

The question presented by the instant case therefore reduces itself to what reparation may a shipper receive when a carrier has unlawfully collected charges for untariffed services. SOS's argument that FIDCO may receive nothing is based upon the assumption that a carrier without a tariff may not be penalized for "misrating" freight (or for giving rebates or refunds) despite being in plain violation of section 18(b), because there is no "lawful" rate against which the unlawful charges can be measured.<sup>9</sup>

<sup>6</sup> See also *Atchison T. & S.F. Ry. Co. v. Robinson*, 233 U.S. 173 (1913); *Chicago & Alton R.R. Co. v. Kirby*, 225 U.S. 155 (1912); *Texas & Pac. Ry. v. Mugg*, 202 U.S. 242 (1906); *New York, N.H. & H. R.R. Co. v. ICC*, 200 U.S. 361 (1906); *Bernstein Bros. Pipe & Machinery Co. v. Denver & R. G. W. R.R. Co.*, 133 F. 2d 441 (10th Cir. 1951); *Northern Valley Transfer, Inc. v. ICC and USA*, 192 F. Supp. 600, 604 (N.J. 1961); *S. L. Sheppard & Co. v. Agulines, Inc.*, 39 F. Supp. 528, 531 (D.S.C. 1941); *American Broadcasting Companies, Inc. v. F.C.C.*, No. 78-1968 (D.C. Cir., April 28, 1980).

<sup>7</sup> Principles of equity which might prevail in other contractual situations are inapplicable to freight rate disputes. Thus, when carriers rate shipments in good faith reliance on cargo descriptions furnished by the shipper, they may nonetheless be held in violation of section 18(b)(3) and ordered to pay reparation if the shipper submits evidence showing that the commodity transported was something other than that described in the shipping documents. *E.g., Durite Corp. v. Sea-Land Service, Inc.*, 20 F.M.C. 4 (1978), *aff'd without opinion Sea-Land Service, Inc. v. Federal Maritime Commission*, 610 F.2d 1000 (D.C. Cir. 1979); *Sun Co., Inc. v. Lykes Bros. Steamship Co., Inc.*, 20 F.M.C. 67 (1977); *Abbott Laboratories v. Alcoa Steamship Co.*, 18 F.M.C. 376 (1975); *Western Publishing Co., Inc. v. Hapag Lloyd A.G.*, 13 F.M.C. 16 (1972).

<sup>8</sup> *Louisville & N.R.R. Co. v. Maxwell*, 237 U.S. 94 (1915); *Pennsylvania R.R. Co. v. International Coal Mining Co.*, 230 U.S. 184 (1913); *Chicago, B. & O. R. Co. v. Ready Mixed Concrete Co.*, 487 F.2d 1263 (7th Cir. 1973); *U.S. v. Pan American Mail Line, Inc.*, 359 F. Supp. 728 (S.D.N.Y. 1972). The recent amendment to section 22 of the Shipping Act, 1916 strengthening the Commission's authority to prosecute rebating underscores the Congressional intent that tariff adherence requirements be rigidly enforced. P.L. 96-25, 93 Stat. 71, effective June 19, 1979. The need for a tariff on file as a condition precedent to the collection of freight charges is further illustrated by the requirement under the special ticket procedure established pursuant to section 18(b)(3) that, when the failure to timely file a new tariff is inadvertent, or due to error, before applying to the Commission for relief, the carrier must file a tariff setting forth the rate sought to be charged. See *e.g., Airlex Shipping A/C v. Lykes Bros. S.S. Co.*, 19 F.M.C. 16 (1975); *Oppenheimer International Corp. v. Moore-McCormack Lines, Inc.*, 15 F.M.C. 1 (1971).

<sup>9</sup> FIDCO relies heavily upon domestic commerce decisions. In *J. G. Boswell v. American-Hawaiian Steamship Co.*, 2 U.S.M.C. 95 (1939), the Commission held that although certain carriers had collected charges without tariff authority, complainants were not entitled to reparation "unless the sum paid by complainants amounted to an unjust and unreasonable exaction for the service performed." *Id.* at 105. The Interstate Commerce Commission has held that when transportation services are rendered without a tariff on file, the ICC may find reasonable charges therefor and award reparation where the charges collected were excessive. *Manufacturers Shippers Cooperative Ass'n v. Erie R. Co.*, 311 I.C.C.

Although the Commission has no authority to prescribe just and reasonable rates in foreign commerce,<sup>10</sup> if section 18(b) is to be reasonably construed to fulfill its legislative intent, an ocean carrier should not be allowed to collect and retain the fruits of its unlawful act.<sup>11</sup> Tariff filing requirements benefit and protect shippers by subjecting rates to public scrutiny and the pressures of competing market forces, thereby ensuring not only equal treatment, but also equal opportunity for all shippers, especially those less experienced in transportation matters. The collection of untariffed rates in violation of the statute deprives the shipper of those benefits and this deprivation causes injury for which reparation may be granted under the terms of section 22 of the Shipping Act, 1916.

Because an unfiled rate is unlawful *per se*, the shipper suffers a legally cognizable injury at the time it pays the unlawful charges.<sup>12</sup> The premise that damages must be proven rather than presumed does not prevent an award of reparation in circumstances where, as here, the disputed charges were unlawful in their entirety. Similar arguments were rejected by the Supreme Court 65 years ago when it held that proof of particular pecuniary loss to the shipper was unnecessary in overcharge cases and that damages could be awarded upon mere proof that a higher rate was paid. *Lehigh Valley R. Co. v. Meeker*, 236 U.S. 412 (1915).<sup>13</sup>

Even though a carrier may not collect charges based on an untariffed rate, the Commission may, in the exercise of the discretion granted by section 22 and as determined by the circumstances of each particular

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637, 641 (1960); *Southwestern Petroleum Co., Inc. v. S. W. R. Co.*, 310 I.C.C. 431 (1960); *Hackney Bros. Body Co. v. N.Y. Central R. Co.*, 266 I.C.C. 795, 798 (1946); *Cities Service Oil Co. v. Erie R. Co.*, 237 I.C.C. 387 (1940); *International Paper Sales Co. v. Georgia R. & B. Co.*, 213 I.C.C. 67, 68 (1935); *Bannon v. Southern Express Co.*, 13 I.C.C. 516 (1908).

<sup>10</sup> Section 18(a) of the Shipping Act, 1916 (46 U.S.C. 817(a)) and sections 3 and 4 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 845 and 845(a)) provide for ratemaking authority in domestic off-shore trades only. The unfiled rate is not being challenged under section 18(b)(5) which forbids rates which are so unreasonably high or low as to be detrimental to United States foreign commerce.

<sup>11</sup> The duty to file rates and charges and to strictly adhere to tariffs is the same for both foreign and domestic commerce carriers. If carriers which file no tariffs were permitted to benefit from the retention of revenues from negotiated rates, the result would be that carriers which do obey the law would be held to more stringent standards than those which do not.

<sup>12</sup> *Adams v. Mills*, 286 U.S. 397, 407 (1932); *News Syndicate Co. v. N.Y. Central R. Co.*, 275 U.S. 179 (1927); *Louisville & Nashville R.R. Co. v. Glass-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925). See also *Southern Pacific Co. v. Darnell-Taensler Lumber Co.*, 245 U.S. 531, 534 (1918), where the Court noted that:

The tendency of the law, in regard to damages, is not to go beyond the first step. It holds the carrier liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered a loss to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law.

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The carrier ought not to be allowed to retain his illegal profits and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. 245 U.S. at 533-534.

<sup>13</sup> See also cases cited in n. 12, *supra*.

case, consider whether to permit the carrier to retain out of pocket expenditures made for the benefit of the shipper.<sup>14</sup> In this instance, the record shows that of the \$123,101.38 it collected from FIDCO, SOS paid \$69,616.67 in freight charges for the water movement of the cargo, which is the amount FIDCO would have paid for the ocean transportation had it dealt directly with the ocean carrier.<sup>15</sup> FIDCO claims as reparation only the balance of \$53,484.71, which amount reflects the difference between the amount collected by SOS and the cost of the transportation service which FIDCO received and from which FIDCO benefitted. In view of the Commission's authority to make equitable adjustments in the amount of reparation awarded, *Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1966), FIDCO will only be granted reparation for the balance of \$53,484.71, with interest calculated from the date of payment.

Other contentions and arguments not specifically discussed have nevertheless been considered and found to be without merit.

THEREFORE, IT IS ORDERED, That the Presiding Officer's Initial Decision on Remand is adopted to the extent it denies FIDCO's claim for damages for loss of business or profits and is vacated in all other respects; and

IT IS FURTHER ORDERED, That FIDCO is hereby awarded reparation in the amount of \$53,484.71 with interest of 12 percent per annum from the date of payment of the freight charges found unlawful herein; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY  
Secretary

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<sup>14</sup> See *United States v. Columbia Steamship Company*, 17 F.M.C. 8 (1973).

<sup>15</sup> It is apparent from the record that FIDCO lacked experience in matters concerning ocean transportation.

*Chairman Richard J. Daschbach, concurring in part, dissenting in part.*

I do not agree with the majority in its conclusion as to the amount of reparation to be granted to the shipper.

Ship's Overseas Services, Inc. (SOS), has acted as a regulated non-vessel operating common carrier with respect to the subject cargo shipment and failed to file a tariff covering that shipment in violation of section 18(b). The majority correctly notes that rates established under private contracts between shippers and carriers "*may be collected only when set forth in a tariff duly on file and in effect at the time of shipment.*"(p.50) (emphasis added) The majority also recognizes that an unfiled rate is unlawful *per se*, and that legally cognizable injury immediately arises upon the payment of such a rate. It further states that:

The premise that damages must be proven rather than presumed does not prevent an award of reparation in circumstances where, as here, the disputed charges were unlawful in their entirety. (p.52)

Despite this analysis, the majority invokes the aegis of the Commission's discretionary power to establish reparations awards under section 22 of the Act, and denies the shipper the return of its *full* payment, thereby partially sanctioning SOS' violation of the law.

The foundation of regulated liner shipping is the filed tariff. The Shipping Act, 1916, requires strict adherence to these tariffs in order to maintain stability and regularity in the U.S. liner trades and to protect shippers from discriminatory, capricious or unscrupulous deviations from published rates. Any effort by the Commission to substitute 'discretionary' ratemaking for enforcement of strict tariff adherence erodes the foundation of the tariff filing system. Consequently, I would require the return to the shipper of all monies collected by SOS for the shipment of the cargo involved in this proceeding.



*Commissioner Leslie Kanuk, dissenting.*

The majority's opinion is based on the best of intentions and my sympathies are with them. Unfortunately, the law is not. Section 22 permits the award of reparations for injuries resulting from violations of the Shipping Act. The only violation here is a failure to file a tariff for the negotiated rate. This violates section 18(b)(1) of the Shipping Act. Had SOS properly filed the rate resulting in the \$123,101.38 charge, there would be absolutely no cognizable action which this agency could entertain. However, the section 18(b)(1) violation by SOS has not in my opinion, been properly linked to an injury suffered by FIDCO. Even if injury is presumed, I can find no rationale for awarding reparations in the amount of \$53,484.71 as a direct result of failure to file a tariff.

It is unfortunate that the law sometimes does not permit us to act in complete accordance with our good intentions. However, I view FIDCO's situation to be one best remedied in a forum with equity powers.

This regulatory agency cannot properly honor FIDCO's request for reparations.

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 79-101**

**LORESCO INTERNATIONAL, INCORPORATED**

**v.**

**YAMASHITA-SHINNIHON STEAMSHIP COMPANY, LIMITED**

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**NOTICE**

*July 17, 1980*

Notice is given that no exceptions have been filed to the June 16, 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

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DOCKET NO. 79-101

LORESCO INTERNATIONAL, INCORPORATED

v.

YAMASHITA-SHINNIHON STEAMSHIP COMPANY, LIMITED

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Complainant, an exporter of a backfill product known as "Loresco Type DW2," made ten shipments of this product via respondent carrier during December 1977 through February 1978. Complainant contends that the product should have been rated as "calcined petroleum coke" instead of "artificial graphite." Respondent rated the shipments under the latter tariff item, as a result, deriving an aggregate amount of \$15,634.67, in additional freight. It is held that:

- (1) The preponderance of the evidence shows with reasonable certainty and definiteness that the product was in fact "calcined petroleum coke" since the raw petroleum coke from which it was made was never heated to the level necessary to convert "calcined petroleum coke" to "artificial graphite." Moreover, respondent has in effect acknowledged this fact by paying a later claim on the same product, after being informed of the true nature of the product.
- (2) Complainant is entitled to show what actually moved notwithstanding erroneous descriptions inserted into bills of lading, or export declarations, especially in such a case as this in which the shipper was apparently inexperienced in exporting its product and unfamiliar with respondent's tariff structure.
- (3) Reparation in the aggregate amount of \$15,634.67 is awarded plus interest on each individual overcharge from date of payment at the rate of 12 percent, as prescribed by current Commission policy.

*Joseph F. Tatum, Jr.*, for complainant Loresco International, Inc.

*Thomas E. Kimball and Charles L. Coleman*, for respondent Yamashita-Shinnihon Steamship Co., Ltd.

INITIAL DECISION<sup>1</sup> OF NORMAN D. KLINE,  
ADMINISTRATIVE LAW JUDGE

*Finalized July 17, 1980*

This case commenced with the filing of a complaint on December 13, 1979. Complainant, Loresco International, Incorporated, is in the business of selling carbon products overseas. Complainant alleges that respondent, Yamashita-Shinnihon Steamship Company, Limited, a common carrier by water engaged in the foreign commerce of the United States, overcharged it on 10 shipments of a product known as

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<sup>1</sup> 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).

“Loresco Type DW2 Backfill” which respondent carried during the period December 1977 through February 1978 from New Orleans to Japan under services and rates published in respondent’s intermodal tariff (the Pacific Westbound Conference Westbound Intermodal Tariff No. 8). Loresco alleges that respondent misclassified the products in question as “artificial graphite” whereas, according to Loresco, the products are actually “calcinated” or “calcined petroleum coke.” Loresco claims that this misclassification constitutes a violation of section 18(b)(3) of the Shipping Act, 1916, and that, as a result, Loresco paid additional freight in the amount of \$15,634.67, which it now seeks as reparation.

Following the filing and serving of the complaint, respondent, through its general agent, requested additional time to file its answer so that it could retain Conference counsel under the Conference’s rules. A further reason for this request was to enable respondent to file a full and complete answer which would deal more thoroughly with the issues than would a perfunctory general-denial answer. In granting permission to respondent, I also advised complainant, who was not represented by an attorney or by a registered Commission practitioner, that it was incumbent upon complainant to furnish adequate evidence showing the nature of its product known as “Loresco Type DW2 Backfill” since complainant had submitted nothing but bills of lading, tariff pages, copies of Commission regulations, a corrected invoice, case citations relating to the two-year statute of limitations, and a one-page chemical analysis, none of which appeared to show that the product was in fact “calcinated” or “calcined petroleum coke” rather than “artificial graphite.” Thereafter, on January 25, 1980, and April 30, 1980, complainant supplemented its evidentiary submissions with sales literature, export shipping instructions, packing lists, a chemical analysis, and a letter and affidavits from Loresco’s president explaining that the product was “calcined petroleum coke.” Finally, in response to my further instructions, complainant, on May 12 and 20, 1980, through its freight forwarder, W.R. Zanes & Co. of La., Inc., furnished canceled checks and other evidence relating to the date of payment on two shipments for which the bills of lading appeared to be dated more than two years prior to the filing of the complaint. Since the Commission has held that date of payment may be used to calculate the two-year period of limitation under section 22 of the Act, the furnishing of this evidence was essential to enable me to consider claims of overcharges on these two shipments on the merits. See *Sun Co. v. Lykes Bros.*, 20 F.M.C. 67, 69 (1977); *TDK Electronics Co., Ltd. v. Japan Lines, Ltd.*, F.M.C. Docket No. 79-87, May 20, 1980, p. 3. Complainant also furnished a legible copy of one bill of lading which had originally been furnished in an illegible form.

## DISCUSSION AND CONCLUSIONS

### THE EVIDENTIARY SUBMISSIONS OF THE PARTIES

The issue for determination in this case is simply whether the product shipped by respondent known as "Loresco Type DW2 Backfill" is "calcinated" or "calcined petroleum coke" rather than "artificial graphite." If it is the former, then respondent has overcharged Loresco in violation of section 18(b)(3) of the Act because respondent applied the higher rate for "artificial graphite" published in its tariff at the time of the shipments in question.<sup>2</sup> In determining this issue, I must also determine the subsidiary issue of whether the evidence submitted by Loresco is sufficient to sustain its contention that the product was in fact "calcined petroleum coke."

As mentioned above, Loresco submitted its evidence at several different times and in different forms. At the time of filing the complaint (December 13, 1979), complainant submitted various documents consisting of the pertinent bills of lading, tariff pages, Commission regulations, a corrected invoice, chemical analysis, and case citations. These documents, while useful in providing background information, did not demonstrate whether the product "Loresco Type DW2 Backfill" was "calcined petroleum coke" or "artificial graphite." For example, the various bills of lading for the ten shipments involved merely showed that the commodity had been described as "Loresco Type DW2 Backfill." After I advised complainant that its evidence required supplementation if complainant wished to pursue its claims, Loresco furnished additional evidence in the form of sales literature, export shipping instructions, packing lists, chemical analyses, affidavits of Loresco's president, Mr. Joseph F. Tatum, Jr., excerpts from a chemical reference book, and evidence showing dates of payment for all ten shipments.

Respondent replied several times in response to the various allegations and to the evidence submitted by Loresco. Initially, on January 28, 1980, respondent filed its answer and brief in support thereof. Respondent denied that it had misrated the shipments in question, although generally acknowledging the veracity of the bills of lading and the fact that respondent had denied the claims when they had been submitted under the Conference's rules because they had not been submitted within the time period required by Conference Rule 20. (See

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<sup>2</sup> Complainant is claiming that a rate of \$94 per kt should have been applied. This was the rate published in respondent's tariff for "Petroleum Coke N.O.S. packed" with an Item No., at that time, of 332 9000 40. (See tariff, 9th rev. page 403, attached to complaint.) According to the rated bills of lading for the ten shipments and the table of calculations attached to the complaint, respondent rated nine of the shipments at \$117 per cubic meter and one shipment at \$117 per kt. Respondent admitted that it assessed the \$117 per cubic meter rate on the nine shipments but couldn't read the rated bill of lading showing \$117 per kt. Complainant later furnished a legible copy of that bill of lading, dated 12/17/77, showing the rate as \$117 per kt. The \$117 WM rate which respondent charged was that for "artificial or colloidal graphite" with an Item No., at the time of the shipments, of 599 7200 00. (See the two tariff pages 524 attached to respondent's Brief in Support of Answer to Complaint.)

letter from respondent's agent, Lilly, dated September 19, 1979, attached to the complaint.) Respondent also acknowledged that it had rated the shipments as "artificial graphite." However, respondent argued that the shipments had moved in sealed containers, leaving respondent with minimal opportunity to verify the contents of the container, that Loresco submitted evidence which was insufficient to carry complainant's "heavy burden of proof," and that the evidence submitted was consistent with respondent's rating the shipments as "artificial graphite." Respondent also commented on the fact that some of the evidence submitted was illegible and that at least two of the shipments moved on bills of lading which were stamped "freight prepaid" and were dated December 8, 1977, a date beyond the two-year period of limitation prescribed by section 22 of the Act since the complaint was filed on December 13, 1979. Finally, respondent contended that the export declarations which it located and furnished for the record relating to six of the shipments in question show that the commodity classification number selected for export purposes (the "Schedule B" number)<sup>3</sup> was the number for "artificial graphite." Therefore, argued respondent, both the bills of lading and the export declarations indicate that the product shipped was "artificial graphite" rather than "calcined petroleum coke." Respondent also furnished additional evidentiary materials for the record, including tariff pages showing how its tariff had been conformed to the "Schedule B" numbers, and excerpts from a chemical dictionary explaining the physical differences between "calcined petroleum coke" and "artificial graphite."

Because respondent had not had an opportunity to analyze and comment upon some of the evidence which was submitted by Loresco on January 25, 1980, consisting of sales literature, packing lists, a letter from Loresco's president, and a chemical analysis, I granted respondent permission to file additional responses. (See Notice of Instructions to Supplement the Record, March 31, 1980.) Respondent did so and argued that the additional evidence still did not show that the product in question was "calcinated petroleum coke." Respondent contended furthermore that the chemical analysis was not shown to be that for "calcinated petroleum coke," that the packing lists continued to show "Loresco Type DW2 Backfill" as did the sales literature, and that the literature suggested that some of the component parts of this product might have been graphite. In short, respondent again argued that Loresco had not carried its burden of proof and that respondent had relied upon the information presented to it in the bills of lading and

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<sup>3</sup> This so-called "Schedule B" number entered on export declarations refers to a list of numbers printed in the Schedule B Statistical Classification of Documents and Foreign Commodities Exported from the United States, published by the U.S. Department of Commerce.

export declarations which indicated that the product shipped was "artificial graphite."

After the filing of respondent's supplemental arguments described above, complainant filed its last evidence and arguments as permitted under my ruling of March 31, 1980, cited above.<sup>4</sup> In this last submission, dated April 30 and May 1, 1980, Loresco furnished product literature, excerpts from a book entitled *Carbon and Graphite Handbook*, and affidavits explaining how the product was manufactured so that it became "calcined petroleum coke" rather than "artificial graphite." Except for a few later documents relating to dates of payment and one illegible bill of lading, the above materials completed Loresco's evidentiary case. Because the record seemed sufficient for me to issue an initial decision without the need for oral hearing and cross-examination, I instructed the parties to advise me if they consented to my following such procedure. (See Final Instructions to Furnish Additional Evidence and Advise Regarding Desired Procedure, May 6, 1980.) In the interest of avoiding unnecessary expense and delay which a trial-type hearing would have caused, both parties consented. To its credit, respondent not only agreed that a trial-type hearing was unnecessary but acknowledged that such formal hearing "would be wasteful of the resources of all parties and the Commission."<sup>5</sup>

#### ANALYSIS OF THE EVIDENCE AND ARGUMENTS

Analysis of the evidence and arguments submitted by both parties reveals that there is essentially only one factual issue to be resolved in this case, namely, whether the product known as "Loresco Type DW2 Backfill" was heated to the level necessary to convert "calcined petroleum coke" into "artificial graphite." The evidence, especially the product literature, shows that the product in question is a "backfill," i.e., a substance intended to be used to fill in a trench or excavation surrounding a foundation.<sup>6</sup> Furthermore, there appears to be no dispute regarding the fact that the backfill is a carbon product and that it originated as raw petroleum coke, i.e., a residue of petroleum distillation.<sup>7</sup> There-

<sup>4</sup> In that ruling I noted that in cases of this type it is customary for complainant, who has the burden of proof to file the last pleading. For example, under the Commission's shortened procedures (Rules 181 through 187, 46 C.F.R. 502.181-187), when both parties wish the case to be decided upon written pleadings and evidence, complainant has the right to file its memorandum in reply to respondent within 15 days after respondent's answering memorandum. (See Rule 184, 46 C.F.R. 502.184.) As I note later, both parties in this case have consented to the use of the shortened procedure.

<sup>5</sup> Although respondent consented to my issuing a decision without needless oral hearings and cross-examination, respondent did prepare and file cogent pleadings together with useful evidence which served to narrow the issues in this case considerably, thereby helping to move the case along to prompt disposition.

<sup>6</sup> According to Webster's Third New International Dictionary (p. 158), a "backfill" is "the material used in backfilling" or "the refilling of a trench or other excavation or of the space around a foundation."

<sup>7</sup> "Petroleum coke" is defined as a residue "obtained as the final still product in the distillation of crude petroleum." Webster's Third New International Dictionary (p. 1691).

fore, the only question is whether this raw petroleum coke was heated to the level necessary to convert it into artificial graphite.

Respondent itself argued and furnished evidence showing that although "raw petroleum coke," "calcined petroleum coke," and "artificial graphite" are related products of carbon, the critical distinction between the latter two is the degree to which the raw coke was heated in the manufacturing process. Thus, as respondent states:

Raw coke becomes "calcined" after being heated to 1200-1800 degrees C. Coke changes into artificial graphite when it is heated above 2400 degrees C. (Brief in Support of Answer to Complaint, p. 4 n. 7.)

The excerpts which respondent has furnished from a reference book entitled *Kirk-Othmer Encyclopedia of Chemical Terminology* (1968 and 1978 editions) fully support the above quotation and describe the process of "calcination" and manufacture of artificial graphite in some detail. Another reference work furnished by complainant, entitled *Carbon and Graphite Handbook*, written by Charles L. Mantell (Library of Congress No. 67-29457) appears to agree substantially with respondent's authority. This author states that "graphitization can be described in a series of steps which occur as the temperature is raised to 2500-3000 degrees Centigrade." (See book cited, p. 9, quoted in complainant's pleading received May 3, 1980, and attached to letter from complainant, dated May 1, 1980.)

Both complainant's and respondent's textbook authorities appear to agree substantially as well as to the nature of the "calcination process." Thus, complainant's authority (*Carbon and Graphite Handbook*) indicates that "calcination" is merely a heating process and that incipient graphitization does not commence until the heating or "calcining" exceeds 1300 degrees Centigrade. (See book cited, p. 9.) Full graphitization does not occur, according to complainant's authority, until the temperature is raised to 2500-3000 degrees Centigrade, as I mentioned above. As noted, respondent's authority stated that raw coke became "calcined" after being heated to temperatures of 1200-1800 degrees Centigrade and further stated that "artificial graphite" is not created until the carbon product is heated above 2400 degrees Centigrade.

Accordingly, it is obvious that Loresco's backfill could not have been converted into "artificial graphite" unless it had been heated to a temperature of at least 2400 or 2500 degrees Centigrade depending upon which authority one relies. Furthermore, it is obvious that the raw petroleum coke should be considered to have become "calcined" petroleum coke if it has been heated either between 1200 to 1800 degrees Centigrade according to the respondent's authority or between 1000 to 1300 degrees Centigrade according to complainant's authority. (See *Carbon and Graphite Handbook*, p. 9, cited above.)



The determination of the nature of "Loresco Type DW2 Backfill," therefore, in large measure boils down to the manufacturing process, i.e., to what temperature was the raw petroleum coke heated. Respondent contends that complainant is in a much better position to provide evidence regarding the composition of its product. (See respondent's supplemental reply, received April 14, 1980, p. 1.) But complainant has furnished the evidence. According to the unrefuted affidavit of Loresco's president, Mr. Joseph F. Tatum, Jr., the product in question could not possibly have become "artificial graphite" because the temperature to which it was raised in the kiln never exceeded 1315 degrees Centigrade. Indeed, the average temperature in the center of the kiln is only in the range of 1200 degrees Centigrade and the product is heated to about 1300 degrees Centigrade only for a short period of time. Because this affidavit is so critical to my finding that the product in question is in fact "calcined petroleum coke," I quote the affidavit in full as follows:

The calcination of "Loresco Type DW2 Backfill" is performed in a rotary kiln lined with fire brick. The kiln is approximately 11' in diameter, and approximately 80' long. As the calcined fluid petroleum coke enters the kiln, in what we call the front of the kiln, it has a temperature of about 871 degrees Centigrade. As it reaches the center of the kiln, and only for a short period of time, it reaches a momentary temperature in the range of about 1300 degrees Centigrade. The maximum which has ever been recorded was 1315 degrees Centigrade, and the average temperature of the center burned of the kiln is in the range of 1200 degrees Centigrade. When the kiln is running in the range of 1300 degrees Centigrade, we experience brick problems and hence do not often approach the temperature of 1300 degrees Centigrade. At the tail of the kiln, the temperature has decreased and the average outfall of the material is approximately 870 degrees Centigrade. To the best of my knowledge, the above is true and factual.

Although the above evidence is sufficient to show that the product in question is in fact "calcined petroleum coke" as complainant has alleged, this evidence does not stand alone. Complainant alleges and respondent admits that several months after the ten shipments in question, Loresco filed a claim with respondent on another shipment of its product, which claim respondent honored. This later shipment, which sailed from Oakland on August 14, 1978, moved under a bill of lading which, unlike the bills of lading relating to the shipments in question, showed a "Schedule B" number (517.5120) for "petroleum coke, calcined." (See Brief in Support of Answer to Complaint, p. 5.) The bill of lading for this claim which respondent paid is attached to the complaint. It is dated August 5, 1978, and describes the product as "Backfill DW2." Respondent, as noted, admits that it honored this claim. The

only distinction which respondent offers between this honored claim and the claims for the 10 shipments in question which it contests is that the bill of lading on the honored claim listed the correct "Schedule B" number. Therefore, respondent did not deny that the "Type DW2 Backfill" shipped by Loresco was "calcined petroleum coke" apparently because it relied upon the fact that the correct "Schedule B" number was shown on the bill of lading. However, respondent is denying the present claims on the grounds that the bills of lading and export declarations showed the wrong "Schedule B" numbers and that none of the documents shown to respondent at least prior to the final affidavit which I have quoted showed that the product was "calcined petroleum coke" rather than "artificial graphite." Furthermore, since the bills of lading and export declarations showed the "Schedule B" number for "artificial graphite," respondent feels it was justified in rating the product as "artificial graphite."

#### GOVERNING PRINCIPLES OF LAW

The Commission has held for some time that a shipper is entitled to reparation for overcharges if the shipper can show what actually moved notwithstanding an incorrect description which the shipper or its forwarder may have placed on the bill of lading. The leading case is recognized to be *Western Publishing Co. v. Hapag-Lloyd A.G.*, 13 S.R.R. 16 (1972), but this was the Commission's view even before that case. See, e.g., *Union Carbide Inter-America v. Norton Line*, 14 F.M.C. 262, 264 (1971), and the case cited therein.<sup>8</sup> Although the basic doctrine holding that the shipper can recover for an overcharge if it can show what actually moved is still the law, the Commission has refined it in various ways. Thus the Commission has adopted language explaining the *Western Publishing* doctrine to mean that the shipper "must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim." See *Merck Sharp & Dohme v. Atlantic Lines*, 17 F.M.C. 244, 245 (1973), and the cases cited therein; *Sun Co. v. Lykes Bros.*, 20 F.M.C. 68, 70 (1977). A decision to award reparation is issued, furthermore, after consideration of "all the evidence of record with no single document or piece of evidence necessarily being controlling." *Kraft Foods v. Moore McCormack Lines, Inc.*, 19 F.M.C. 407, 410 (1976).

Although some Commission decisions reiterate the statement that a shipper has a "heavy burden of proof" when the goods have left the

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<sup>8</sup> It is also established law in numerous Commission decisions that the shipper may recover for overcharges even if the shipper inserted a trade name on the bill of lading in violation of a carrier's tariff rule or failed to comply with some other tariff rule regarding cargo description. See, e.g., *Pan American Health Organization v. Prudential Lines, Inc.*, 19 F.M.C. 412 (1976); *Durite Corporation, Ltd. v. Sea-Land Service, Inc.*, 20 F.M.C. 674, 675 (1978); Order on Reconsideration, November 8, 1978 (unreported), affirmed without opinion, *Sea-Land Service, Inc. v. Federal Maritime Commission*, 610 F.2d 1000 (D.C. Cir. 1979); see also cases collected in *Sanrio Company, Ltd. v. Maersk Line*, 19 S.R.R. 1627, 1652 (I.D. April 21, 1980).

custody of the carrier, these words have been explained by the Commission to mean that the shipper will have "difficulty in obtaining the necessary evidence rather than to the weight to be given to such evidence." Informal Docket No. 387(I), *Pan American Health Organization v. Moore McCormack Lines, Inc.*, Report on Remand, September 12, 1979, p. 5 n. 9. The Commission reaffirmed this explanation of the so-called "heavy burden of proof" in *Pacific Freight Audit, Inc. v. American President Lines et al.*, 22 F.M.C. 207, 209 (1979). The Commission has furthermore confirmed that the standard of proof in overcharge cases is the normal standard observed in administrative proceedings, i.e., a "preponderance of the evidence." Thus, in replying to a court's inquiries regarding what standard of proof the Commission was following in overcharge cases, the Commission replied:

. . . a complainant seeking reparation under section 22 of the Shipping Act, 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. *Pan American Health Organization v. Moore McCormack Lines, Inc.*, Report on Remand, cited above, pp. 4, 5.

As discussed above, complainant's evidence showing that the product shipped was in fact "calcined petroleum coke" which was entitled to a lower rate than that for "artificial graphite," which latter rate had been charged, consists of a variety of shipping documents and excerpts from chemical dictionaries, chemical analyses, and affidavits, as well as the fact that respondent had honored a claim for the product in question at a later date. The critical evidence, however, appears to be the affidavit of complainant's president describing how the backfill product was manufactured so that raw petroleum coke was heated to become "calcined petroleum coke" rather than "artificial graphite." This evidence considered together with the chemical authorities cited shows with reasonable definiteness and certainty that Loresco's claim is valid. Added to this evidence is the fact that respondent itself paid a claim for a later shipment of the backfill product without contesting that it was in fact "calcined petroleum coke," apparently only because the bill of lading showed the "Schedule B" number applicable to "calcined petroleum coke." Had the bills of lading for the 10 shipments at issue in this proceeding shown the correct "Schedule B" number for "calcined petroleum coke" or had respondent not been required to reject the claim under Rule 20 of its tariff because the claim was filed after the goods left the carrier's custody, perhaps this present case might not have been brought before the Commission. <sup>9</sup>

<sup>9</sup> Rules in tariffs which do not allow carriers to consider claims for overcharges filed more than six months after date of shipment are not illegal. See *Proposed Rule Covering Time Limits on the Filing of*

## MISCELLANEOUS ARGUMENTS OF RESPONDENT

To rebut the evidence presented by complainant, respondent has furnished its own evidence and arguments. Mainly respondent argues that complainant has not sustained its "heavy burden of proof," that the shipping documents and chemical analyses submitted by complainant do not show that the product was "calcined petroleum coke," and that respondent relied upon the bill of lading and export declaration descriptions and "Schedule B" numbers which, if anything, indicated that the product was "artificial graphite." Moreover, some of the sales literature, according to respondent, indicates that some graphite may have been included in the backfill.<sup>10</sup> None of respondent's arguments or evidence, in my opinion, is sufficient to outweigh the evidence showing that the product was heated only to the level necessary to convert raw petroleum coke to "calcined petroleum coke" or to the fact that respondent itself paid a later claim on the Loresco backfill without contesting the fact that the product was "calcined petroleum coke."

As I have explained, the so-called "heavy burden of proof," which respondent recites, refers merely to the shipper's difficulty in obtaining evidence. The normal standard of "preponderance of the evidence" is the standard that governs. In this case, Loresco's affidavit showing that its product was not heated above the level necessary to convert the coke to "artificial graphite" coupled with respondent's own payment of a similar claim on this product at a later date when the claim was apparently not barred by the Conference's claims rule, in my opinion, outweigh the fact that Loresco's forwarder used a "Schedule B" number for "artificial graphite" when completing the export declaration or that some particles of graphite are found in the product. Although the Commission has held that export declarations are entitled to great weight, in the very case cited by respondent the Commission indicated that it considered export declarations only as one part of the entire body of evidence since it was the Commission's "well established policy

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*Overcharge Claims*, 10 F.M.C. 1 (1966). However, they and other tariff time limitation rules such as Rule 20 here have been held to be no bar against the filing of complaints with the Commission within the two-year period prescribed by Section 22 of the Act. See *Kraft Foods v. Federal Maritime Commission*, 538 F.2d 445 (D.C. Cir. 1976); *Union Carbide Inter-America, Inc. v. Venezuelan Line*, 19 F.M.C. 97, 99 (1976). The Commission's regulations require carriers to advise shippers of their rights to file complaints with the Commission within two years. See Docket No. 78-30, *Filing of Rates and Charges*, 21 F.M.C. 984 (1979). Respondent did so advise complainant of its rights. (See letter dated September 19, 1979, from respondent's general agent to complainant's forwarder, Mr. Corcoran of the Zanes Co., attached to the complaint.) Nevertheless, but for this tariff rule, respondent would have been able to consider the claims on their merits and it is possible that Loresco would have been spared the trouble of filing a formal complaint with the Commission.

<sup>10</sup> In all fairness to respondent, I should mention the fact that these arguments and comments were directed to the evidence which had been submitted by Loresco prior to April 30 when Loresco submitted its final affidavit explaining that the backfill was heated only to the level necessary to create "calcined petroleum coke." However, after this later evidence was submitted, respondent, as noted, consented to issuance of an initial decision without undergoing the expense and delay of oral hearings and cross-examination. (See Consent to Shortened Procedure, May 15, 1980.)

of considering any type of evidence by which a shipper may show the true nature of his cargo." *Chevron Chemical Co. v. Mitsui O.S.K.*, 20 F.M.C. 216, 218 (1977), affirming the Commission's earlier decision reported in 17 S.R.R. 1269, 1270 (1977). Furthermore, an export declaration, like the corresponding inbound document, the consumption entry, is generally prepared by someone other than the shipper, i.e., the forwarder or the customhouse broker, for purposes other than ocean carrier tariff classification or rating. Therefore, as the Commission has observed, these documents may not be based upon knowledge of the actual contents of the shipments and in the case of the consumption entry, the Commission has determined what the commodity shipped was notwithstanding a contrary description in the entry. See *Equality Plastics, Inc. et al.*, 17 F.M.C. 217, 227-228 (1973).

Similarly, respondent argues that Loresco's product literature suggests that some of the particles in the product may consist of graphite which was added as a lubricant because it is well known that graphite is used as a lubricant. Loresco's product literature submitted with its letter of January 25, 1980, does indeed show that "carbon lubricants" have been added to the backfill. Even more, as part of the chemical analysis of the product, Loresco states that "conductive and lubricating graphite particles have been added in the range of three percent to one percent by weight per unit of calcine (sic) fluid petroleum coke." The adding of such a minuscule portion of graphite, (which, incidentally is apparently natural, not artificial graphite), does not change the essential nature of the product, which is 99 or more percent calcined petroleum coke.<sup>11</sup> The ultimate question remains what is the essential nature of the product and whether complainant has shown that the product "may reasonably be included in the tariff item" for "calcined petroleum coke." See *United States of America v. Farrell Lines, Inc.*, 16 F.M.C. 41, 46 (1972); *Crestline Supply Corp. v. Concordia Line*, 19 F.M.C. 207, 211 (1976) (. . . "applicable freight rate should depend upon the intrinsic nature and market value of the goods themselves, rather than a shipper's representation as to the intended use of the goods . . ."); *European Trade Specialists v. Prudential-Grace Lines*, 21 F.M.C. 888, 890 (1979) ("true nature of the commodity").

Ultimately, respondent claims that it relied upon both the bills of lading and export declarations which used "Schedule B" numbers for artificial graphite and contends that neither these documents nor the

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<sup>11</sup> In his last pleading dated April 30, 1980, Loresco's president, Mr. Tatum, states that the minuscule portion of graphite added to the backfill is a "naturally mined natural graphite," and that, accordingly, "Loresco Type DW2 Backfill" is "over 99 percent pure calcined fluid petroleum coke." (See pleading cited, pp. 3, 4.) Mr. Tatum also states that graphite, as even respondent's dictionary definition states, is a "soft" substance whereas Loresco's backfill "has long been known for its rigidity and hardness . . ." (*Id.*, p. 4.) Also, he states that due to its excessively high cost per pound, graphite is not commonly used as a backfill. *Id.*

fact that respondent later honored a claim on this product (which was not time-barred under the Conference's claims rule) permit the inference to be drawn that the product was "calcined petroleum coke." However, as I have discussed, Loresco has provided the critical evidence showing how the product was heated and respondent nowhere explains how it could pay a later claim on the product, apparently acknowledging that it was in fact "calcined petroleum coke" in August 1978, while contesting similar claims on the same product in this case. Respondent merely states that the bills of lading for the later claim showed the proper "Schedule B" number for "calcined petroleum coke."<sup>12</sup> As has been made clear by the Commission, however, in many cases, an erroneous description in a bill of lading does not determine the nature of the commodity. It is the total evidence which the shipper now presents which is considered in determining what actually moved. The preponderance of this evidence shows, in my opinion, that the product could not possibly have been "artificial graphite" and that it was indeed "calcined petroleum coke."

Accordingly, I find that complainant has shown the validity of its claim for reparation for overcharges on 10 shipments carried under bills of lading dated at various times between December 8, 1977, and February 28, 1978. I find furthermore that the aggregate amount of reparation for the financial injury incurred as a result of the overcharges is \$15,634.67, as shown in the table of computations on page 2 of the complaint.<sup>13</sup>

The Commission has a policy of awarding interest in overcharge cases calculated at the rate of 12 percent, accruing from the date of payment of freight charges. See Policy Statement, dated May 8, 1980,

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<sup>12</sup> Furthermore, in his last pleading, Mr. Tatum, president of Loresco, states that the product shipped in August 1978, as to which respondent paid the claim, was the same product as that shipped in the present case, yet respondent contests the present claims. Moreover, Mr. Tatum states that Loresco was inexperienced in exporting and that the "Schedule B" number for "artificial graphite" and rate was selected by respondent, not by Loresco, which did not understand how respondent's tariff was constructed. Mr. Tatum states that when Loresco became familiar with exporting, they advised respondent of the true nature of the product and respondent agreed with Loresco, assigning the lower rate and "Schedule B" number for "calcined petroleum coke." (See Loresco's pleading, April 30, 1980, p. 5.)

<sup>13</sup> Respondent did not dispute this table of computations generally but raised some specific problems which have been corrected. For example, the table contained typographical errors for three of the bills of lading in areas not pertinent to the calculation of the overcharges. One bill of lading, dated 12/17/77, furnished with the table, was not legible. A legible copy of that bill of lading has been furnished confirming complainant's calculation in the table, as noted earlier. The only substantive objection raised by respondent related to the fact that two of the bills of lading were dated December 8, 1977, more than two years prior to the filing of the complaint. However, in response to my instructions, complainant, through its forwarder, submitted checks and other evidence showing date of payment of the freight, indicating that payment for the shipments shown on the two bills of lading occurred by check dated January 5, 1978; within the two-year period prescribed by section 22 of the Act. The Commission has held that date of payment of freight may be used to calculate the two-year period. See *Sun Co. v. Lykes Bros.*, 20 F.M.C. 67, 69 (1977); *United States of America v. Hellenic Lines Limited*, 14 F.M.C. 255, 260 (1971).

46 C.F.R. 530.12; *Interpur, A Division of Dart Industries, Inc. v. Barber Blue Sea Line*, 22 F.M.C. 679 (1980). Accordingly, interest is awarded at the rate of 12 percent for each of the 10 overcharges accruing from date of payment of each shipment, in addition to the aggregate award of \$15,634.67.<sup>14</sup>

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

Washington, D.C.  
June 16, 1980

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<sup>14</sup> Although it is current Commission policy to award interest at the rate of 12 percent dating from date of payment of freight, the Commission stated in its policy statement that it would consider whether to depart from its policy on a case-by-case basis. In the present case, complainant did not ask for interest but merely for the aggregate overcharge in the amount of \$15,634.67. Furthermore, applying interest at 12 percent dating back more than two years or so on the individual shipments means that a 12 percent rate is applied although at the time of the overcharge payments the rate of interest was probably substantially lower, and total interest to time of judgment may approximate \$4,000. (Cf. the different rate of interest established for payments of refunds under section 4 of the Intercoastal Shipping Act, 1933 (average prime rate during the applicable time period).) Of course, but for respondent's tariff Rule 20, it might have been possible for the parties to settle this case when Loresco first submitted its claim to respondent. The Commission may wish to consider these factors in determining whether to follow its current policy in this particular case.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-30

IN THE MATTER OF EXEMPTION OF KUGKAKTLIK,  
LIMITED FROM TARIFF FILING REQUIREMENTS

## REPORT AND ORDER

July 30, 1980

BY THE COMMISSION: (RICHARD J. DASCHBACH, *Chairman*;  
THOMAS F. MOAKLEY, *Vice Chairman*; JAMES V. DAY, LESLIE  
KANUK AND PETER N. TEIGE, *Commissioners*)

Kugkaktlik, Limited (Petitioner), an Alaskan corporation organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq.*), has petitioned the Commission for an order declaring that a tug and barge operation to be established during 1980 is exempt from the tariff filing requirements of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844) by virtue of the small vessel exemption contained in 46 C.F.R. 531.1(c).<sup>1</sup> Alternatively, Petitioner seeks an exemption of its operations pursuant to section 35 of the Shipping Act, 1916 (46 U.S.C. 833).

Petitioner is a village corporation based in the village of Kipnuk, Alaska, population approximately 400. Its shareholders consist solely of the Alaskan native population of the village. According to its latest financial statement, the total assets of Kugkaktlik, Limited are \$2,273,917.

In 1979, Petitioner purchased two vessels for purposes of establishing a common carrier service between Bethel, Alaska and eight smaller villages, including Kipnuk. The primary cargo would be liquid fuels of Grade (B) and below, the majority of which would be fuel oil; however, general commodities would also be transported.

Petitioner's vessels consist of a sixty-foot all steel tugboat with tonnage 73 gross and 49 net and two 500 horsepower diesel engines; and a steel combination deck cargo and oil barge with dimensions of 120' x 30' x 7' and a cargo fuel capacity of approximately 3,000 barrels.

<sup>1</sup> 46 C.F.R. 531.1(c) provides an exemption for:

(c) Transportation by vessels with a cargo carrying capacity of 100 tons or less, or with an indicated horsepower of 100 or less; *Provided*, That such vessels: (1) are not employed by or under the common control or management of a domestic offshore carrier which operates vessels in excess of these limits; (2) are not operated as part of a through route with another domestic offshore carrier; and (3) are not performing lighterage services in connection with or on behalf of another domestic offshore carrier; . . .



The tug and barge service will transport liquid fuels and general commodities from the vicinity of Bethel, Alaska, on the Kuskokwim River, downstream to the village of Tuntutuliak, also on the Kuskokwim River, thence out to the western coastal waters of Alaska, to the villages of Kongiganak, Kwigillingok, Kipnuk, Chefornak, Tooksook Bay, Nightmute, and Tununak.<sup>2</sup> The freight service will be conducted only six months of the year, commencing in May and terminating in October. The primary customers of this service will be the village corporations of the villages served, each of which owns large liquid fuel storage tanks. These corporations act essentially as wholesalers, retailing liquid fuels to individuals and companies. Furthermore, many of the general commodities will also be ordered by these corporations, most of which conduct retail businesses within their respective villages.

Other than serving the three villages listed in note 2, *supra*, Petitioner has no current plans for expansion of the tug and barge service described above, either in terms of number of vessels or geographical scope of operation.

Petitioner alleges that each of its vessels qualifies for a section 531.1(c) exemption since the tug has less than 100 tons cargo carrying capacity and the barge has less than 100 horsepower. The Commission disagrees. Petitioner's proposed service contemplates tandem use of the tug and barge at all times. The barge clearly could not operate without benefit of the tug and vessels which are operated as a unit must be considered to be a single vessel for purposes of determining whether the exemption applies. As such, the exemption does not apply to Petitioner's two vessels because the tug and barge combined have a cargo carrying capacity in excess of 100 tons and an indicated horsepower in excess of 100.

Petitioner alternatively requests that it be exempted from the tariff filing requirements pursuant to section 35 of the Shipping Act because imposition of such requirements would serve no regulatory purpose.<sup>3</sup>

The Commission has determined to grant the requested section 35 exemption. Petitioner has shown that its activities are both small and geographically remote and that the support of its customers for the

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<sup>2</sup> Petitioner may also extend service to Quinhagak, Eek, and Goodnews Bay, all south of the mouth of the Kuskokwim River.

<sup>3</sup> Section 35 provides:

The Federal Maritime Commission, upon application or on its own motion, may order or rule *exempt* for the future any class of agreements between persons subject to this chapter or *any specified activity of such persons* from any requirements of this chapter, or the Intercoastal Shipping Act, 1933, *where it finds that such exemption will not substantially impair effective regulation by the Federal Maritime Commission, be unjustly discriminatory, or be detrimental to commerce.*

The Commission may attach conditions to any such exemptions and may, by order, revoke any such exemption.

No order or rule of exemption or revocation of exemption shall be issued unless opportunity for a hearing has been afforded interested persons. (Emphasis added).

proposed operation has been uniformly enthusiastic. The expense of complying with the Commission's tariff regulations would be relatively large for a business of Petitioner's size. Moreover, the unique relationship between the customers and the operators of Petitioner's proposed water carrier service indicates that the commercial impact of the service may be small. In this region of Alaska ongoing communications between operator and customers are more likely to effectively establish and maintain fair and equitable rates than would Federal regulation based upon technical tariff filing requirements. For these reasons the exemption granted here should not substantially impair effective regulation.

Neither does it appear that the exemption would be unjustly discriminatory or detrimental to commerce. The instant petition was served on the only known competitor of the proposed service, United Transportation, Inc. (United), and noticed in the *Federal Register* on May 21, 1980 (45 F.R. 34065). No response to the petition has been received. Petitioner has demonstrated that the scope of United's service is much larger and includes more and larger vessels than does Petitioner's service. It has also been suggested that United has been unable to serve some of the villages adequately. Considering that no objection has been lodged to the requested exemption, the operations of Petitioner's only known competitor are not comparable, and Petitioner would fill a need not served by the existing carrier in this trade, the Commission concludes that grant of the exemption will neither be unjustly discriminatory nor detrimental to commerce.

The exemption is from tariff filing requirements only and will be limited to those service points north of the Kuskokwim River which Petitioner proposes to serve this year. At such time as Petitioner is ready to expand its operation it may petition the Commission for an extension of this exemption.

Therefore, pursuant to section 35 of the Shipping Act, 1916 (46 U.S.C. 833(a)) the following exemption is adopted.

Transportation by Kugkaktlik, Limited, a village corporation organized under the Alaskan Native Claim Settlement Act, limited to the following description, is exempt from the tariff filing requirements of the Shipping Act, 1916, the Intercoastal Shipping Act, 1933 and Part 531 of Title 46 C.F.R.

(1) Transportation on vessels consisting of a sixty-foot all steel tugboat with tonnage 73 gross and 49 net and two 500 horsepower diesel engines; and a steel combination deck cargo and oil barge with dimensions of 120' x 30' x 7' and a cargo fuel capacity of approximately 3,000 barrels.

(2) Transportation between Bethel, Alaska and the villages of Tuntuliak, Kongiganak, Kwigillingok, Kipnuk, Chefnak, Tooksook Bay, Nightmute, and Tununak.

(S) FRANCIS C. HURNEY  
*Secretary*

# FEDERAL MARITIME COMMISSION

## INFORMAL DOCKET NO. 746(1) GIRTON MANUFACTURING COMPANY

v.

## PRUDENTIAL LINES, INC.

### ORDER ADOPTING DECISION

*July 30, 1980*

The Commission has determined to review the March 14, 1980 decision of Settlement Officer Donald F. Norris in the above-captioned matter. This decision awarded Girton Manufacturing Company reparations based upon a finding that Prudential Lines, Inc., collected \$525.78 in excess ocean freight charges, but denied any recovery for interest expenses because Girton (or the independent ocean freight forwarder retained by Girton) was found to have exercised insufficient care in preparing the bill of lading upon which the ocean carrier relied.<sup>1</sup> The Settlement Officer also stated that the Commission's Rules prevented him from reducing the amount awarded to the shipper so as to compensate the carrier for the brokerage and freight forwarder compensation paid on the \$525.78 in excess freight.<sup>2</sup>

The Settlement Officer's calculation of the excess freight charges was carefully and accurately accomplished. Review was warranted only because of the need to articulate a standard approach to interest awards and the deduction of offsetting carrier expenses in informal docket cases.

On May 8, 1980, the Commission announced its intention to apply a uniform policy in awarding interest in overcharge situations. 46 C.F.R.

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<sup>1</sup> Girton shipped milk storage equipment from Philadelphia, Pennsylvania to Valparaiso, Chile on October 30, 1977 under a single bill of lading. This bill listed three items: (1) "milk cooling tanks," (2) "accessories," and (3) "condensing units," and noted that freight and ancillary charges totaling \$8,907 were prepaid. The controlling tariff was Atlantic & Gulf/West Coast of South America Conference Tariff No. FMC-1. The instant dispute concerns only the "condensing units" which were designed for attachment to the cooling tanks. These units were rated by Prudential as "steam condensers," but were entitled to the lower rate for "milk coolers" shown on 11th Rev. Page 137 because they were in fact parts for such coolers. The Settlement Officer also discovered and corrected an arithmetic error in the calculation of the shipment's cubic footage which favored the carrier.

<sup>2</sup> The Settlement Officer apparently perceived a significant distinction between the terms "overcharges" and "damages" as used in the Commission's informal docket regulations (46 C.F.R. 502.301 - 502.303). The Shipping Act, 1916, permits the award of "reparations" for "any injury" suffered as a result of statutory violations (46 U.S.C. 821). Overcharges are simply a particular type of injury. In adjudicating an informal claim, a Settlement Officer may properly consider a counterclaim against the complainant which arises from the same incident and is also under \$5,000 in amount.

530.12, 45 *Fed Reg.* 31722.<sup>3</sup> An ocean carrier's duty to rate cargo in strict accordance with its tariff is a nondelegable one. Section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)), is violated regardless of whether the carrier relies upon documentation furnished by the shipper. Although exceptional cases of shipper deception or misconduct could result in a refusal to allow full recovery of overcharge expenses, such determinations should be made in a procedural context other than that of a *pro forma*, nonprecedential informal docket dispute. Settlement officers shall therefore consistently award interest from the date the excess freight charges were paid.

Similar considerations of administrative efficiency and uniform statutory compliance apply to Prudential's claim for reimbursement of the excess freight broker and freight forwarding expenses it paid on Girton's shipment. Items of carrier expense are not ordinarily deducted from an overcharge claim,<sup>4</sup> and this is particularly so in the case of payments to freight forwarders subject to the FMC regulation under the Shipping Act, 1916. Such persons are required to adjust their brokerage receipts when a carrier submits appropriate documentation of an overpayment, and in recent special docket proceedings the Commission has specifically ordered carriers to collect excess payments from licensed forwarders. *Sea-Land Service, Inc. to Benefit New Era Shipping*, 22 F.M.C. 270 (1979); *Sea-Land Service, Inc. to Benefit BDP International, Inc.*, 22 F.M.C. 226 (1979). To the extent freight brokerage payments are made to persons not subject to the Shipping Act, carriers can readily modify their contractual arrangements with such persons to account for overcharge possibilities.<sup>5</sup>

A final matter which concerns the Commission is the presence of evidence which indicates that Girton's sale was made "C.I.F., Valparaiso" and that Girton has probably been reimbursed for the entire amount it paid Prudential, including the \$525.78 overcharge. This fact does not defeat Girton's standing to file a Shipping Act complaint and receive full reparations.<sup>6</sup> In the interest of fairness, however, a copy of the Commission's decision will also be mailed to the consignee.

**THEREFORE, IT IS ORDERED,** That, except to the extent indicated above, the decision of the Settlement Officer is affirmed; and

<sup>3</sup> See also *Interpur v. Barber Blue Sea Line*, 22 F.M.C. 679 (1980).

<sup>4</sup> Although the Commission possesses authority to adjust reparations awards based upon equitable considerations, see *Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1966), it is highly unlikely that a situation would arise wherein a shipper would be awarded overcharge damages less a deduction for carrier expenses. When the shipper's conduct is particularly culpable, the more appropriate remedy would be to deny relief entirely.

<sup>5</sup> Carriers could commit themselves to pay no more than a percentage of the lawful rate specified in their tariff, subject to adjustments in the event of error.

<sup>6</sup> See *Adams v. Mills*, 286 U.S. 397, 407 (1932).

IT IS FURTHER ORDERED, That Prudential Lines, Inc., pay to Girton Manufacturing Company, Inc., the amount of \$525.78, plus interest at the rate of 12%, accruing from the date freight charges were paid; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.\*

(S) FRANCIS C. HURNEY  
*Secretary*

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\*Commissioner Leslie Kanuk dissenting. Chairman Richard J. Daschbach not participating.

*Commissioner Leslie Kanuk, dissenting.* The award of interest in informal dockets is a matter which involves an exercise of discretion on the part of the Commission. As a general rule, I support the award of interest as a means of compensating shippers for the deprivation of the use of their money during the period in which overcharge claims are litigated. However, I would not award interest in situations where the misrating was caused by or contributed to by documentary errors made by the shipper. This appears to have been the case in this proceeding.

*Chairman Richard J. Daschbach, not participating.* I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The settlement officer's decisions in informal dockets do not have precedential value, Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 746(I)  
GIRTON MANUFACTURING COMPANY

v.

PRUDENTIAL LINES, INC.

Decision of Donald F. Norris, Settlement Officer<sup>1</sup>

*Adopted July 30, 1980*

*Reparation awarded; claim for interest denied; off-setting claim denied.*

By its complaint filed with the Commission on October 22, 1979, the Girton Manufacturing Company (Girton), through its agent, claims \$224.76 plus 6% interest of the Prudential Lines, Inc. (Prudential), this amount representing an alleged overcharge arising out of a Girton shipment transported by Prudential in one of its vessels from Philadelphia, Pa. to Valparaiso, Chile pursuant to a bill of lading dated October 30, 1977. The shipment comprised the following: (a) 17 crates of "milk cooling tanks" measuring 2,153 cubic feet (hereafter feet); (b) one crate of "accessories" measuring 22 feet; and (c) 17 crates of "condensing units" measuring 379 feet. Girton prepaid freight and ancillary charges amounting to \$8,907.60 assessed it by Prudential pursuant to the latter's interpretation of the controlling tariff, i.e., the United States Atlantic and Gulf /West Coast of South America Conference's Tariff No. S.B. SA-12, FMC-1 (the Tariff). While no violation of section 18(b)(3) of the Shipping Act, 1916 is alleged such is presumed in that the *res* of the complaint is that Prudential did not assess and collect rates of freight in accordance with the commodity descriptions and classifications then applicable.

By way of reply, Prudential has submitted a general denial along with three "complete affirmative" defenses which are quoted in their entirety:

(First defense):

- V. Carrier relied upon the description of the articles carried provided by the shipper and acted in reliance upon those representations in stowing and securing the cargo and in paying commissions to brokers and charges of freight forwarders.

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<sup>1</sup> Both parties having consented to the informal procedure under Subpart S 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.



VI. Carrier having acted in reliance upon shippers description, and having made payments which cannot be recovered based thereon, claimants complaint should be dismissed.

(Second defense):

VII. Claimant supports this claim only with shippers records and advertising materials.

VIII. Claimant asserts that shippers records previously resulted in a misdescription of the freight, resulting in a higher freight charge.

IX. Claimant having impeached the shippers records cannot rely solely on those records to support this claim.

X. The freight shipped having been delivered and not being available to either party the claimant has not met its heavy burden of proof in this case as no creditable evidence has been provided to support its allegation that the freight was other than that previously described by the shipper in documents of equal weight to those now relied upon by claimant.

(Third defense):

XI. The higher assessment of freight charges alleged was done by shipper and/or shippers agent and not by the carrier.

XII. Any award of refund here should be without interest and should be reduced by the amount of brokers and freight forwarders fees paid by carrier.

Each defense will be dealt with in turn. As to the first, the Settlement Officer (S.O.) considers it irrelevant to the issue. As the S.O. views it, the issue here is how should the shipment, any of its components, and all else accompanying the shipment have been classified and rated.<sup>2</sup> The issue established, it seems to the S.O. that the holding in *Union Carbide Inter-America v. Norton Line*, 14 F.M.C. 263 (1971) applies. Briefly summarized, that case stands for the proposition that it is what was actually shipped in any instance, not necessarily what appears upon the bill of lading as shipped, as controlling for classification and rating purposes.

The second defense runs to what the S.O. conceives to be Prudential's evaluation of the "evidence" submitted in support of Girton's claim, and the "weight" which should be accorded it. Prudential is correct in its assertion, that the cargo having left its possession, that the burden of proof lies upon Girton.<sup>3</sup> A corollary flowing from *Union*

<sup>2</sup> To be distinguished from claims for damages to cargo where reliance upon shippers' assertions as to the nature or description of cargoes may well be relevant.

<sup>3</sup> Often described as "heavy." However, the adjectival "heavy" "... relates to the shipper's difficulty in obtaining the necessary evidence rather than the weight to be given such evidence." Informal Docket No. 387(I), *Pan American Health Organization v. Moore-McCormack Lines, Inc.*, 22 F.M.C. 98 (1979).

*Carbide, supra*, however, is that any claimant is entitled to submit any materials of reasonably probative value seeking to establish the true identity of any merchandise shipped, his knowledge of the cargo being considered intimate if not unique.<sup>4</sup> Advertising matter or sales literature are acceptable. *European Trade Specialists, Inc. and Kunzle & Tasin v. Prudential-Grace Lines, Inc., and the Hipago Co., Inc.*, 19 F.M.C. 148, 183 (1976).

The relevant materials submitted here consist of (a) a copy of the original bill of lading; (b) a Girton invoice addressed to the "notify" party appearing upon the bill of lading; (c) a certificate of insurance involving the notified party appearing upon (a) and (b); and (d) sales literature. All, except (d), make reference to the same "import permit" or "license" number. Exhibits (a) and (c) describe the cargo in identical terms. In particular, (a), the bill of lading, was sufficiently clear so as to enable a part of the shipment to have been rated correctly in any event. The invoice, (b), describes the cargo in more detail and, by referral to the sales literature, (d), assists in determining what the S.O. conceives to be the crucial issue here -- whether the 17 crates of "condensing units" are to be considered "parts" of the milk cooling tanks as contemplated by the Tariff's Rule No. 2(g).

As to the third defense, no determination can be made from the bill of lading as to who "rated" it -- Girton, Girton's forwarder, or Prudential's staff. Whoever did made something of a hash of things. Whatever, this is really not material to the statutory obligation imposed upon Prudential by the terms of section 18(b)(3) of the Shipping Act, 1916 (46 USC 817), i.e., and to wit: that Prudential is to ensure that it *shall not* ". . . charge or demand or collect or receive a greater or less or different compensation [for services] than the rates and charges which are specified in its tariffs. . . ." The claim for offsets, set forth in XII., is dealt with below.

As stated previously, the critical issue here is to determine whether the condensing units are "parts" of the milk cooling tanks so as to fall within the Tariff's Rule No. 2(g). That Rule provides:

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.<sup>5</sup>

<sup>4</sup> To be distinguished from shippers' arguments as to the proper interpretation of tariffs' rates, terms, and conditions.

<sup>5</sup> The phrase "same basis" appearing in the second line can create confusion if not read in the context of the entire rule. In the Tariff proper, the basis of rating is whether any rate assessed is to be based upon a "weight" ton of 2,000 pounds or a "measurement" ton of 40 cubic feet. Read in the context of the entire rule, however, the S.O. is convinced that "same basis" refers to the "rates or ratings" as appear in the fourth and fifth lines. Even if this were not so, any alternative construction would result in tariff's ambiguities which require resolution in any shipper's favor.

Despite the fact that they were shipped and transported in separate crates, Girton's invoice describes the cargo shipped as being "bulk milk cooler(s)" of various models *with* (emphasis added) "condensing unit(s)" of varying horsepower. A diagram in the sales literature indicates that the condensers are in some way attached, or connected, to each cooler's divided "cold plates" although each condenser lies outside of the cooler proper. However, each seems to be critical to the cooler's milk cooling function. This conception is reinforced by the standard order form incorporated in the sales literature. In essence, the standard order form calls for the purchase of a milk cooling unit of a recommended capability *with* (again, emphasis added) a condenser or condensers of various makes or varying power. The sales literature makes clear the point that no condensers need be ordered if any serviceable condensers are in the purchaser's possession still. Further, condensers are distinguished from various, listed, "milkhouse accessories" -e.g., stainless steel wash sinks, sani spray, valve brushes, brush racks, etc. -- whose purchase is optional with the buyer but which -- as with the one crate of "accessories" -- someone thought clearly fell within the application of Rule No. 2(g). Upon the evidence submitted, the S.O. considers the condensers to be "parts" of the milk cooling tanks, if not vital components. Accordingly, Girton is entitled to a reparation.

In structuring the claim, Girton's agent, the Traffic Service Bureau, Inc., seems to have overlooked several things. First, and in apparent reliance upon, although without mention of, Rule No. 2(g), it claims that the entire shipment should have been rated as per Tariff Item 735, Refrigerators, NOS. at a rate of \$130.50 per 40 cubic feet. On October 17, 1977, the Conference amended its Tariff to reflect that shipments of "milk storage tanks," also "coolers, milk" to Group 3 Chilean ports (including Valparaiso) were to be assessed a Class 17 rate, and as applies here, of \$126.20 per measurement ton of 40 cubic feet.<sup>6</sup> Secondly, Girton was "overcubed" by some 20 cubic feet through an erroneous addition as it appears in the rating box in the lower left hand corner of the bill of lading copy, and as mirrored in much of the Service Bureau's correspondence concerning the matter. Thirdly, the Service Bureau did not make compensating adjustments in the various ancillary charges assessed.

According to the S.O.'s calculations, based upon the bill of lading figures as recited in the first paragraph of this decision, the shipment amounted to 2,554 feet (rather than 2,574 feet) working out to 63.85 measurement tons of 40 feet each. The applicable rate of freight was \$126.20 per 40 feet for the tanks and its parts, including the condensers

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<sup>6</sup> Eleventh revised page 137, effective October 17, 1977. This rate was actually applied to the milk cooling tanks and their accessories. The condensing units were rated as "steam condensers" at a rate of \$173. per 40 feet.

as per Rule No. 2(g). The proper freight amounted to \$8,057.88. In addition, the Tariff required the assessment of a terminal surcharge of \$1.25 per measurement ton, (\$79.81), and a Chilean governmental importation tax of 3% of the "total transportation charges" (\$244.13). The total due and payable to Prudential then amounted to \$8,381.82. As recited in the first paragraph, and as reflected in the submitted documents, Girton paid a total of \$8,907.60. Accordingly, Girton is entitled to a reparation to the amount of \$525.78. So ordered.<sup>7</sup>

Girton claims interest. The award of interest is left to the Commission's discretion. *Flota Mercante Grancolombiana v. Federal Maritime Commission*, 373 F. 2d 674 (D.C. Circuit, 1967.) The claim arose from Girton's lack of care in adequately describing the condensers upon the bill of lading. A description reading "milk cooling tanks' condensing units" would have brought the item involved squarely within the ambit of Rule No. 2(g). Further, a claim was lodged with Prudential only about a month before the complaint here was filed with the Commission. In the circumstances, the S.O. can see no reason why interest should be awarded. The claim for interest is denied. So ordered.

Prudential contends that any reparation be reduced by the amount of brokers' and freight forwarders' fees paid by Prudential. There are several reasons for denying this. The most important, however, is that the S.O. does not believe that he has the authority to do so. Subpart S - Informal Procedure for Adjudication of Small Claims (46 C.F.R. 502.301 et seq.) of the Commission's Rules of Practice and Procedure is directed to "Claims against *common carriers* subject to the Shipping Act, 1916 . . . for the recovery of damages (not including claims for loss or damage to property), or for the recovery of overcharges. . . ." Section 502.303 defines "overcharges" as "charges in excess of those applicable under tariffs lawfully on file with the Commission. . . ." Damages ". . . means such *violations* (by common carriers) of the Shipping Act, 1916, as amended . . . other than overcharges for which reparation may be granted." As the S.O. views it, under section 22 of the Act Prudential must demonstrate (a) that Girton is an "other person subject" to the Shipping Act, 1916 (e.g. section 16 initial paragraph, and as no "tariff" is involved, (b) demonstrate that it has in some way violated the Act for it to have a chance of prevailing. This is clearly beyond the scope of the authority delegated to the S.O. Lastly, the claim is really directed to a party not present here given the peculiar relationships of freight forwarders to common carriers whereby the latter, and not the forwarders' principals, are the primary source of

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<sup>7</sup> The result here is in accord with that reached in Informal Docket No. 568(I), *Girton Manufacturing Company v. Prudential Lines, Inc.*, served February 29, 1979. The same commodities were involved, as well as the application of the same Tariff Rule. Only the defenses differed. There, Prudential relied upon the Conference's so called "six months rule" as precluding its consideration of the matter.

forwarders' compensation for services rendered. The S.O. suggests that Prudential's proper recourse is to re-bill the forwarder involved using this decision as the basis of adjustment. Accordingly, the claim for offset is denied. So ordered.

(S) DONALD F. NORRIS  
*Settlement Officer*

March 14, 1980

# FEDERAL MARITIME COMMISSION

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SPECIAL DOCKET NO. 704

APPLICATION OF SEA-LAND SERVICE, INC.  
FOR THE BENEFIT OF UNITED FORWARDERS  
SERVICE, INC., AS AGENT FOR MIRRO ALUMINUM CO.

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Application for permission to refund a portion of freight charges in the amount of \$2,992.50 granted.

Errors made by applicant in filing the \$47.00M rate found to be of a clerical or administrative nature within the purview of the remedial provisions of section 18(b)(3) of the Shipping Act, 1916.

## REPORT AND ORDER

*July 31, 1980*

BY THE COMMISSION: (RICHARD J. DASCHBACH, *Chairman*;  
THOMAS F. MOAKLEY, *Vice Chairman*; JAMES V. DAY, LESLIE  
KANUK AND PETER N. TEIGE, *Commissioners*)

The proceeding is before the Commission on Exceptions filed by Sea-Land Service, Inc., to the Initial Decision of Administrative Law Judge Joseph N. Ingolia denying Sea-Land permission to refund a portion of the freight charges collected from United Forwarders Service, Inc., as agents for the shipper, the Mirro Aluminum Company, on a shipment of aluminum kitchen utensils carried from Elizabeth, New Jersey, to Puerto Limon, Costa Rica. Sea-Land asks permission to refund \$2,992.50 of the \$5,363.50 collected.

Pursuant to negotiations with the shipper's agent and the consignee, Sea-Land had agreed to publish a rate of \$47.00M trailerload (TL) minimum 1800 cu. ft. for Mirro's shipment. Due admittedly to a clerical error, the revision to the tariff filed prior to the sailing of the vessel did not reflect the rate agreed upon and, as a result, freight charges were collected at the rate of \$113.50M per 40 cu. ft., the rate in effect at the time of shipment. Because of further errors made in filing the \$47.00 rate, Sea-Land revised its tariff several more times before applying for a refund.

The Presiding Officer denied the application on the ground that Sea-Land's many revisions failed to properly set forth the proposed rate but rather rendered the tariff ambiguous.

Sea-Land on exceptions maintains that as ultimately filed the tariff properly reflects the intended rate.<sup>1</sup>

### DISCUSSION

The Presiding Officer correctly found that the application was timely filed and that the errors made in the tariff were of the type contemplated by the statute.<sup>2</sup> Therefore, the only question before the Commission is whether, prior to applying for authority to refund a portion of the freight charges, Sea-Land filed a new tariff setting forth the rate on which the refund can be based.

As mentioned, the Presiding Officer held that Sea-Land had not filed such a tariff. The Initial Decision, however, is somewhat ambivalent on that point. The conclusion that the record does not justify a finding that a new, corrected tariff was filed prior to the application, appears to rest not so much on the failure to file the \$47.00 rate, but rather on a finding of ambiguity in the tariff.

After a sequence of revisions and corrections, the tariff which was to serve as the basis for the refund provided at the same time both a class and a commodity item number as well as two different rates for the same commodity, and, on its face, at least, could appear to be ambiguous. Tariff ambiguity alone, however, is not a ground for denying relief.

Here, notwithstanding Sea-Land's careless filing practices, the \$47.00M rate upon which the refund would be based appears in the tariff. Following the principle of long standing that any ambiguity in the tariff must be construed against the carrier, the Commission finds that the filing satisfies the requirements of section 18(b)(3).

The cases cited in the Initial Decision as precedents are not controlling here. In *Munoz y Cabrera v. Sea-Land Service, Inc.*, 20 F.M.C. 152 (1977), permission to waive collection of a portion of freight charges was denied because the tariff Sea-Land filed before the application set forth a rate other than the negotiated rate agreed upon before the date of the shipment; and in *Louis Furth, Inc. v. Sea-Land Service, Inc.*, 20

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<sup>1</sup> Sea-Land addresses the various ways available for amending a tariff and submits that the technical aspects of how to revise a tariff are best left to the carrier's discretion.

<sup>2</sup> Section 18(b)(3) of the Shipping Act, 1916, provides in part:

That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers 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 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 further*, That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment. 46 U.S.C. 817(b)(3).

F.M.C. 186 (1978), and in *A. G. Staley Mfg. Co. v. Mamenic Lines, Inc.*, 20 F.M.C. 385, 642 (1978), the carriers had failed altogether to file a new tariff prior to their applications.

Accordingly, the Initial Decision of the Administrative Law Judge issued in this proceeding is hereby reversed and Sea-Land is granted permission to refund the amount of \$2,992.50 of the \$5,363.50 collected from Mirro for freight charges.

**THEREFORE, IT IS ORDERED**, That applicant is granted permission to refund \$2,992.50 of the charges collected from Mirro Aluminum Company; 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. 704, that effective August 18, 1979, and continuing through January 23, 1980, inclusive, the rate on file on aluminum utensils, cooking, kitchen, hospital or toilet, N.O.S electric or non-electric (not forks, knives or spoons), TL minimum 1800 cu.ft. is \$47.00M subject to all applicable rules, regulations, terms and conditions in this tariff.

and

**IT IS FURTHER ORDERED**, That refund of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

(S) FRANCIS C. HURNEY  
*Secretary*



# FEDERAL MARITIME COMMISSION

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DOCKET NO. 79-104

## SPECIFIC COMMODITY RATES OF FAR EASTERN SHIPPING COMPANY IN THE PHILIPPINES/U.S. PACIFIC COAST TRADE

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Controlled carrier's rates on "Buri Furniture" and "Woven Articles" found to be unjust and unreasonable and are, therefore, disapproved.

*Steven B. Chameides and John F. Dorsey* for Far Eastern Shipping Company.

*Edward M. Shea and Francis W. Fraser* for Sea-Land Service, Inc.

*Charles F. Warren and George A. Quadrino* for Philippines North America Conference.

*Polly Haight Frawley, Alan J. Jacobson, and Paul J. Kaller* for Bureau of Hearing Counsel.

### REPORT AND ORDER

*August 5, 1980*

BY THE COMMISSION: (RICHARD J. DASCHBACH, *Chairman*, THOMAS F. MOAKLEY, *Vice Chairman*, JAMES V. DAY, PETER N. TEIGE, *Commissioners*) \*

This proceeding was initiated on December 28, 1979, by Order of Suspension and to Show Cause directed to the Far Eastern Shipping Company (FESCO).<sup>1</sup> In that Order, the Commission: (1) found that eight FESCO rates on five commodities in the Philippines/U.S. trade may be unjust and unreasonable,<sup>2</sup> and ordered FESCO to show cause why they should not be disapproved; and (2) suspended those rates for 180 days pursuant to section 18(c)(4) of the Shipping Act, 1916 (46 U.S.C. 817(c)(4)), pending the Commission's determination in this proceeding. Sea-Land Service, Inc., and the Philippines North America Conference (PNAC) intervened.

The proceeding was assigned to Administrative Law Judge Norman D. Kline for the expedited development of an evidentiary record, with the record to be certified to the Commission for decision. On April 18,

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\* Commissioner Leslie Kanuk dissents in part. A separate opinion will follow.

<sup>1</sup> FESCO is a "controlled carrier" subject to regulation under the Ocean Shipping Act of 1978, P.L. 95-483, 92 Stat. 1607, which amended sections 1 and 18 of the Shipping Act, 1916 (46 U.S.C. 801, 817). FESCO is directly or indirectly owned and controlled by the government of the U.S.S.R. under whose flag its vessels operate.

<sup>2</sup> See Attachment A.

1980, the Presiding Officer certified a record consisting of 20 documents admitted as Exhibits 1 through 19 (including Exhibits 16A and 16B). Three late-filed exhibits were subsequently received (20, 21, and 22) and made part of the record. FESCO, Sea-Land, PNAC, and the Commission's Bureau of Hearing Counsel filed simultaneous opening briefs. Reply briefs were filed by all parties except PNAC. FESCO's request for oral argument was denied by the Commission.

#### POSITIONS OF THE PARTIES

FESCO contends that the eight rates at issue are similar to rates of other carriers in the same trade. It compares its suspended rates both with other carriers' rates in existence at the time this proceeding began and at the time the record closed. Its rates for four out of five of the commodities are allegedly the same as or similar to other carrier rates as of the commencement of the proceeding, while at the close of the record, every rate is allegedly the same or higher. FESCO maintains that the Commission's earlier determination that rate comparisons employ rates in existence at the time of the issuance of an investigative order was incorrect, that the effect of a finding of unreasonableness is prospective only, and that the Commission's decision should be based on the most current information available.

FESCO also states that its service is different than that of the Conference carriers, *i.e.*, less frequent and slower, and that this results in greater costs to shippers (primarily the buyer's cost of financing the goods as part of its inventory and insurance costs). FESCO contends, therefore, that its rates should be lower than the Conference carriers' rates by the amount of these added costs. Finally, in an attempt to show that its rates are required to assure the movement of particular cargo, FESCO offers affidavits from one Philippine exporter and one U.S. importer endorsing FESCO's rate levels on furniture and woven articles.

PNAC and Sea-Land offer similar arguments in response to FESCO. They initially note that the Commission previously concluded that Military Sealift Command (MSC) rates of competing carriers are inappropriate for rate comparison purposes. They also contend that a comparison of suspended rates with current rates is inappropriate. Sea-Land claims that the Ocean Shipping Act of 1978 was not intended to be prospective only and that by the time the Commission commences a proceeding by suspending controlled carrier rates, the damage which the Act was designed to prevent may already have occurred -- *i.e.*, a controlled carrier may already have gained an unjust and unreasonable market penetration. If rates in effect at the time of the Commission's Order to Show Cause are used, PNAC and Sea-Land conclude that FESCO's rate for each of the subject commodities is the lowest in the trade and should, therefore, be disapproved.

PNAC also points out that one independent carrier used by FESCO for comparison purposes, Scindia Steam Navigation Co., Ltd., has not offered service in the eastbound Philippines/U.S. trade since 1976. In addition, PNAC notes that for "Woven Articles," FESCO has converted its individual measurement rate to a per container rate and then compared this rate with per container rates of other carriers, even though some carriers provide a measurement rate for this commodity. Sea-Land further maintains that certain FESCO comparisons contain inaccuracies and that the only way to ensure meaningful rate comparisons is by reference to actual tariff pages, something FESCO has failed to provide.

PNAC and Sea-Land contend that nothing in the record supports FESCO's argument that its rates are necessary to assure the movement of particular cargo, especially since one of FESCO's shipper witnesses remains a PNAC dual rate contract signatory and the Conference members and Sea-Land continue to carry the particular commodities. They further maintain that FESCO's argument that its "inferior service" requires lower rates: (1) is based on unsupported inventory and insurance costs; (2) understates FESCO's sailing frequencies; and (3) ignores the majority of Conference carriers with service frequencies less than its own. Moreover, Sea-Land points out that differences in total transportation times and vessel itineraries are transient in nature and are, therefore, of questionable value. In fact, Sea-Land asserts that it offers a slower service in the trade than does FESCO.

Hearing Counsel also agrees that the Commission should use rates of non-controlled carriers on file at the time of a suspension in assessing rate similarity. It argues that a Commission determination of unlawfulness is based on certain conditions in the trade and that such a determination would not necessarily apply if conditions changed. Hearing Counsel further states that consideration of rate changes after a suspension would be procedurally unworkable and could restrict a controlled carrier's competitors from responding to its rates or other competitive pressures in the trade during the pendency of a proceeding.

Hearing Counsel maintains that FESCO's rates on "Buri Furniture" and "Woven Articles" are not similar to those of its competitors and should, therefore, be disapproved. Hearing Counsel explains that while FESCO's total transportation charges for all five commodities are lower than comparable competitors' charges, it does not believe there is sufficient evidence from which to conclude that other carriers suffered "injury" from the rates on the remaining three commodities, particularly where, in 1979, FESCO did not carry any commodities under these tariff descriptions -- "Glass Manufactures, N.O.S."; "Reefer Cargo, other" and "Fruit Juice Concentrates."

## DISCUSSION

For the purposes of determining whether rates of a controlled carrier are just and reasonable, the Commission is permitted to take into account appropriate factors, four of which are set forth in section 18(c)(2).<sup>3</sup> In an attempt to meet its statutory burden, FESCO has presented evidence relating to the second and third factors. Other parties take issue with this presentation. The Commission has reviewed the entire record, and has found that rates on two of the commodities at issue are unjust and unreasonable.

FESCO's attempt to justify some of its rates as necessary to assure the movement of particular cargo relies on affidavits of one exporter and one importer. These affidavits relate, at best, to only two of the five commodities at issue -- "Buri Furniture" and "Woven Articles." One of the affiants is a dual rate contract signatory with PNAC and ships some of its goods via PNAC member carriers. (Exhibit 6, at 14). In addition, the record reveals that even though FESCO's share of these commodities is growing, the Conference still carries substantial amounts of these items. (Exhibit 6, at 9). It appears, therefore, that consistent with recently established principles, FESCO's rates on these two commodities are not *necessary* to assure their movement. See *Rates of Far Eastern Shipping Company*, 22 F.M.C. 651, 656 (1980).

In *Rates of FESCO, supra*, the Commission determined that rate comparisons made pursuant to section 18(c)(2)(ii) should generally employ rates of other carriers in effect on the date of the order instituting the proceeding. The Commission reaffirms this position. In proceedings under the Ocean Shipping Act of 1978, the Commission is not empowered to set rate levels for a controlled carrier to adhere to in the future. The Commission is simply determining the justness and reasonableness of a rate based upon circumstances existing at a particular point in time -- when the rate is initially questioned. Such an approach is the only rational way of administering our regulatory duties under this Act. If a later date certain (*e.g.*, the close of the record) or a sliding reference point were employed, it would become very difficult to resolve controlled carrier rate cases within the 180-day

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<sup>3</sup> Section 18(c)(2) states in part:

... 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.

suspension period, and potentially unjust or unreasonable rates could be reinstated pending resolution of the proceeding. Moreover, without a predetermined reference point for rate comparison purposes, the parties could find it extremely difficult to marshal their facts, conduct discovery, and prepare their briefs. In addition, the impacts of subsequent rate changes on a trade or their duration, could not be ascertained for some time following their effective dates. The Commission will, therefore, rely upon rate comparisons using rates of other carriers in effect on December 28, 1979.

Section 18(c)(2) provides the Commission with the option of considering other "appropriate factors" when determining the justness or reasonableness of a controlled carrier's rates. 46 U.S.C. 817(c)(2). The Commission is not, therefore, relegated to merely reviewing naked rates presented to it for comparison purposes. The Commission can and will look behind these rates to the service characteristics of the carriers themselves, when appropriate to do so. In this case for instance, some carriers whose rates are compared with FESCO's offer only feeder service rather than direct service (Zim Israel Navigation Company and Evergreen Line). Others operate much larger vessels than FESCO (Zim) or different types of vessels (Knutson Line -semicontainer). In addition, at least one compared carrier is a non-exempt, state-owned or controlled carrier (Neptune Orient Line).<sup>4</sup> Absent any proof that these differences have no relevance to the level of rates set by these carriers, the Commission will give greatest weight to comparisons between FESCO and those carriers most operationally similar to it. At the very least, the rates of any carrier not presently operating in the trade will be disregarded.<sup>5</sup>

FESCO has claimed that because the frequency and speed of its service are less than those of Sea-Land and American President Lines (APL), its rates must necessarily be lower to remain competitive. This theory is based upon the assumption that slower service results in increased inventory and insurance costs to shippers. Certain parties have questioned FESCO's exclusive reliance on the sailing frequencies of Sea-Land and APL. The itineraries presented by FESCO have also been disputed. Sea-Land, for instance, provides a service from Cebu

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<sup>4</sup> Listing of Controlled Carriers, (45 Fed. Reg. 5397, January 23, 1980). Zim Israel Navigation Company is also state-owned or controlled. It is exempt from the requirements of the Ocean Shipping Act of 1978 by virtue of its status as a carrier of a state whose vessels are entitled by treaty to receive most-favored-nation treatment. See 46 U.S.C. 817(c)(6)(i).

<sup>5</sup> Scindia Steam Navigation Co., Ltd., has had rates on file for this trade since 1976, but has never amended these rates or apparently offered any service in the trade during that time. (See Exhibit 6, at 3, 4). This is supported by a recent advertisement in the *Pacific Shipper* which indicates that Scindia does not presently offer inbound service from the Philippines (Exhibit 20). Although not a matter at issue here, Scindia's failure to serve the trade could result in the cancellation of its inbound Philippine tariff under the principles developed in Docket No. 77-35, *Publication of Inactive Tariffs by Carriers in Foreign Commerce*, 20 F.M.C. 433 (1978).

(the port from which 86% of FESCO's Philippine cargo originates) which is actually slower than FESCO's (31 days vs. 29 days). In any event, FESCO's contentions concerning the level of insurance and inventory costs are unsupported by any evidence.

FESCO has converted its measurement rates on "Woven Articles" to per container rates and then compared these rates with per container rates of other carriers. However, many carriers in this trade offer measurement rates for this commodity, including some of the carriers with which FESCO has compared per container rates. Measurement rates are intended to apply to shipments which are not eligible for full container rates because of their volume. If other carriers also publish measurement rates, such rates are the best basis for comparison.<sup>6</sup> For comparison purposes, the Commission will, therefore, give greatest consideration to measurement rates which have been filed for woven articles.

The Commission has established certain principles for deciding controlled carrier rate cases. Rate comparisons should include any differences which affect the total transportation charge to a shipper.<sup>7</sup> *Rates of FESCO*, 19 S.R.R. at 1541. However, rate similarity between a controlled carrier and another carrier in a trade is not conclusive proof that a controlled carrier's rate is just and reasonable. If there is evidence that differences in rates, no matter how slight, have caused trade disruption, such rates could be found unlawful. *Rates of FESCO*, 19 S.R.R. at 1543. We will now examine the particular rates at issue in light of these principles.

FESCO's suspended rate for "Glass Manufactures, N.O.S." is the only 20 foot container rate offered in the trade. As a result, it is necessary to convert this rate to a weight basis. (See Exhibit 9, at 3). Once converted, a comparison of FESCO's rate with that of the Conference indicates that FESCO's total charges on a weight basis are actually higher than PNAC's.<sup>8</sup> Even though this rate was deleted subsequent to its suspension, it will not be disapproved.<sup>9</sup>

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<sup>6</sup> Conversions of measurement or weight rates to per container rates, or vice versa, introduce a variable which lessens their value as indicators -- the stowage factor for the particular commodity.

<sup>7</sup> The Commission has previously indicated that a controlled carrier relying upon a rate comparison should provide:

- (1) applicable tariff pages, (2) an explanation of any adjustments made to effect a comparison,
- (3) all relevant charges which affect the total transportation charge, and (4) if converting a per container rate to a weight/measure rate or *vice versa*, representative bills of lading. *Rates of FESCO*, 19 S.R.R. at 1541, fn. 9.

Though FESCO has failed to comply with this requirement, there does appear to be general agreement as to all applicable rates and charges.

<sup>8</sup> The various rate comparisons in the record employ contract rates offered by PNAC and other carriers. These rates are generally 15 percent below the ordinary rates for any given commodity and are available to any shipper which signs a contract giving all, or a fixed portion, of its business to the Conference or carrier. See 46 U.S.C. 813a.

<sup>9</sup> The impact of this rate or its predecessors appears minimal given the fact that FESCO carried none of the commodity covered by the rate in 1979. Exhibit 15.

FESCO has attempted to justify its reefer rates -- "Reefer Cargo, other" and "Fruit Juice Concentrates" -- solely by reference to rates filed by Scindia. Such a comparison is of no value because Scindia has not and does not operate in the trade. However, Hearing Counsel has also provided comparisons for these items, using carriers which do operate in the trade (Attachments G and H). These comparisons indicate that FESCO's charges are significantly less than those of PNAC and Seatrain. However, these rates have also had a minimal impact on the trade because of FESCO's failure to carry any cargo under them in 1979 (See Exhibit 15). They will not, therefore, be found unjust and unreasonable.

FESCO's total charges for "Buri Furniture" and "Woven Articles" are significantly lower than the Conference's charges for these commodities. They are also lower than the charges assessed by the relevant independent carriers in the trade. See Attachments B and C. Furniture<sup>10</sup> and woven articles are two of the seven major moving commodities in the trade. (Exhibit 6, at 9). Exports of these commodities have increased steadily from 1977 to 1979. (Exhibit 14, at 4, 5). However, during this period, the Conference and Sea-Land experienced a decrease in their carriage of these commodities. See Attachment D.

Furniture and woven articles were the principal commodities FESCO carried from the Philippines in 1979, accounting for 80 percent of its total carriage. (Exhibit 15).<sup>11</sup> From 1978 to 1979, FESCO increased its share of furniture and woven articles by 75 percent. (Exhibit 16A, at 2). By the end of 1979, FESCO was carrying over one-third of this cargo.<sup>12</sup> This increasing market penetration has been accompanied by the consistent maintenance of significant differentials in total charges between FESCO and PNAC and Seatrain. See Attachments E and F. These facts indicate that, for "Buri Furniture" and "Woven Articles," FESCO's rates have had a significant impact on the trade. Because FESCO has failed to meet its burden of proving that these rates are just and reasonable, they will be disapproved.

THEREFORE, IT IS ORDERED, That the rates of Far Eastern Shipping Company for "Buri Furniture" and "Woven Articles," as

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<sup>10</sup> The record data does not distinguish between furniture and "Buri Furniture," though the latter is obviously subsumed in the former. The commodity description of the rate under consideration is "Buri Furniture Only, From All Ports Except Cebu." Though its extent cannot be precisely determined, it is clear that the subject rate contributes to FESCO's overall penetration of the market for the carriage of furniture.

<sup>11</sup> FESCO is the only independent carrier to carry a significant amount of furniture and woven articles. (Exhibit 11).

<sup>12</sup> FESCO carried 79 percent as much furniture as the entire 17 carrier conference, and 49 percent as much woven articles. (See Attachment D).

listed in Attachment A, are hereby disapproved as unjust and unreasonable; and

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

(S) FRANCIS C. HURNEY  
*Secretary*



ATTACHMENT A

Far Eastern Shipping Company Freight Tariff - FMC-23  
 From: Ports in the Philippines  
 To: U.S. Pacific ports and Overland Common points

DESCRIPTION	TAR- IFF ITEM	RATE SUSPENDED	EFFECTIVE DATE
Glass Manufactures, N.O.S.	510	Local \$1,200.00 P/C 20	12/30/79
Furniture made of: Buri Furniture Only	480	Local \$40.50M O.C.P. \$36.00M	1/05/80
Woven Articles, Viz: Bags-Market- ing/Shopping of Woven Fiber; Bas- kets, Bamboo/Buri Rib; Braids; Buri; Brooms; Cloth, Abaca/ Burlap/Raffia/Saguran; Mats-Mat- tings, Bamboo/Bankman/Buri/ Grass/Hemp/Door/Woven Fiber; Nipa Strips; Petutes Rakes; Bamboo; Rugs, Balangot/Hemp; Sawali and Screen; Woven Fiber, N.O.S.	1070	Local \$54.00M O.C.P. \$54.50M	1/06/80
Reefer Cargo Other	890	Local \$52.00W or \$46.50M	1/15/80
Fruit Juice Concentrates	890	Local \$113.40M	1/15/80

## ATTACHMENT B

## BURI FURNITURE

CARRIER	RATE	BUNKER SURCHARGE	TOTAL CHARGE	PERCENT BY WHICH FESCO'S TOTAL CHARGE DIFFERS FROM COMPETI- TOR'S TOTAL CHARGE
FESCO	LOC 40.50M	4.00	LOC 44.50M	
	OCP 36.00M	4.00	OCP 40.00M	
PNAC	LOC 45.00M	9.50	LOC 54.50M	18.35
	OCP 39.00M	9.50	OCP 48.50M	17.52
SEATRAN	LOC 41.00M	8.00	LOC 49.00M	9.18
	OCP 35.00M	8.00	OCP 43.00M	6.98
EVER- GREEN	LOC 43.00M	8.00	LOC 51.00M	12.74
	OCP 39.00M	8.00	OCP 47.00M	14.89

## ATTACHMENT C

## WOVEN ARTICLES\*

CARRIER	RATE	BUNKER SURCHARGE	TOTAL CHARGE	PERCENT BY WHICH FESCO'S TOTAL CHARGE DIFFERS FROM COMPETI- TOR'S TOTAL CHARGE
FESCO	LOC 54.00M	4.00	LOC 58.00M	
	OCP 54.50M	4.00	OCP 58.50M	
PNAC	LOC 60.00M	9.50	LOC 69.50M	16.55
	OCP 58.50M	9.50	OCP 68.00M	13.97
SEATRAN	LOC 54.00M	8.00	LOC 62.00M	6.45
	OCP 52.50M	8.00	OCP 60.50M	3.30

\* Per container rates of Zim and Knutsen which were converted to measurement rates have been disregarded because the conference and Seatrain offer rates on a measurement basis.

**ATTACHMENT D**  
**CARGO MOVEMENTS (REVENUE TONS) IN THE**  
**PHILIPPINES-U.S. PACIFIC COAST TRADE**

	Commodity	PNAC <sup>1</sup>	Sea-Land	FESCO <sup>3</sup>
1979	Furniture	64,486	6,288 <sup>2</sup>	50,847 (1994 TEU's x 25.5 cm stow)
	Woven Articles	40,239	9,821	19,660 (771 TEU's x 25.5 mwt stow)
1978	Furniture	66,782	7,530 <sup>2</sup>	----- <sup>4</sup>
	Woven Articles	41,173	11,489 <sup>2</sup>	
1977	Furniture	66,939	12,183 <sup>2</sup>	----- <sup>4</sup>
	Woven Articles	41,627	15,204 <sup>2</sup>	

1 Exhibit 6, at 9.

2 Exhibit 7, Attachment D, and Exhibit 16B, at 3.

3 Exhibit 15 provides data in TEU's. Stowage factors are available from Exhibit 2, at 2.  
 No data was provided for other years.

4 No data available.

## ATTACHMENT E

## BURI FURNITURE - LOCAL\*

(TOTAL CHARGES)

	FESCO	PNAC	SEATRAN
5/6/79		59.50	
5/7/79	47.00		
6/11/79		63.00	
8/15/79		61.25	
8/28/79			59.50
9/27/79			63.50
10/1/79	51.00	62.75	
10/15/79			58.50
10/24/79		60.75	
11/18/79		54.50	
11/27/79			56.00
11/29/79			49.00
1/1/80			50.50
1/5/80	**44.50		

\*(Exhibit 5, Schedule 3)

\*\*(Suspended)

## BURI FURNITURE-OCP\*

(TOTAL CHARGES)

	FESCO	PNAC	SEATRAN
6/20/76	37.75		
2/15/77		43.25	
4/1/78		51.25	
5/31/78		49.00	
3/1/79	39.00		
5/6/79		53.00	
5/7/79	41.00		
6/11/79		57.00	
8/15/79		56.75	
8/28/79			53.00
9/27/79			57.00
10/1/79	45.00	58.25	
10/15/79			54.00
10/24/79		56.25	
11/18/79		48.50	
11/27/79			52.00
11/29/79			43.00
1/1/80			44.50
1/5/80	**40.00		

\*(Exhibit 5, Schedule 4)

\*\*(Suspended)

## ATTACHMENT F

## WOVEN ARTICLES -- LOCAL\*

(TOTAL CHARGES)

	FESCO	PNAC	SEATRIN
6/20/76	46.75		
2/15/77		55.00	
11/19/77		60.00	
4/1/78		66.75	
3/1/79	59.00		
3/15/79	53.50		
5/6/79		70.75	
5/7/79	59.25		
5/25/79		64.00	
6/11/79		68.00	
8/28/79			64.00
9/27/79			68.00
10/1/79	63.25	69.50	
10/15/79			62.00
11/1/79	63.50		
1/1/80			63.50
1/6/80	**58.00		
	*(Exhibit 5, Schedule 1)		** (Suspended)

## WOVEN ARTICLES -- OCP\*

(TOTAL CHARGES)

	FESCO	PNAC	SEATRIN
6/20/76	42.25		
2/15/77		49.75	
11/19/77		54.75	
6/14/78		61.50	
3/1/79	54.00		
3/15/79	49.50		
5/6/79		65.50	
5/7/79	54.25		
5/25/79		62.50	
6/11/79		66.50	
8/28/79			62.50
9/27/79			66.50
10/1/79	58.25	68.00	
10/15/79			60.50
11/1/79	58.50		
1/1/80			62.00
1/6/80	**58.00		
	*(Exhibit 5, Schedule 2)		** (Suspended)

**ATTACHMENT G**  
**REEFER CARGO OTHER**

CARRIER	RATE	BUNKER SUR- CHARGE	TOTAL CHARGE	PERCENT BY WHICH FESCO'S TOTAL CHARGE DIFFERS FROM COMPETITOR'S TOTAL CHARGE
FESCO	LOC 52.00W	4.00	LOC 56.00W	
	LOC 46.50M	4.00	LOC 50.50M	
PNAC*	LOC 58.00W	9.50	LOC 67.50W	17.04
	LOC 51.75M	9.50	LOC 61.25M	17.55
SEATRAN*	LOC 52.00W	8.00	LOC 60.00W	6.66
	LOC 47.00M	8.00	LOC 55.00M	8.18

\* Exhibit 5.

## ATTACHMENT H

## REEFER CARGO - FRUIT JUICE CONCENTRATES

CARRIER	RATE	BUNKER SUR- CHARGE	TOTAL CHARGE	PERCENT BY WHICH FESCO'S TOTAL CHARGE DIFFERS FROM COMPETITOR'S TOTAL CHARGE
FESCO	LOC 113.40M*	4.00	LOC 117.40M	
PNAC	LOC 142.00W	9.50	LOC 151.50W	22.5
SEATRAN**	LOC 128.00W	8.00	LOC 136.00W	13.68

\* FESCO filed a measurement rate. The appropriate conversion rate is one metric ton per measurement ton of cargo. (Exhibit 1 at 6).

\*\* Exhibit 5.



*Commissioner Leslie Kanuk, concurring and dissenting in part.* With this decision, the Commission has made some progress towards achieving a rational approach to cases arising under section 18(c) of the Shipping Act, 1916. I concur in the disapproval of FESCO rates on Buri Furniture. However, I do have difficulties with the majority's approach to other issues in this proceeding.

The majority states that "[i]f there is evidence that differences in rates, no matter how slight, have caused trade disruption, such rates could be found unlawful." (Slip Opinion at p. 11). This statement begs the question of what constitutes trade disruption. In the context of this particular proceeding, the majority seems to supply a working definition of trade disruption when it observes that:

[FESCO's] increasing market penetration has been accompanied by the consistent maintenance of significant differentials in total charges between FESCO and PNAC and Seatrain. Slip Opinion at p. 13.

If disruption is defined as increasing market share, I fear the Commission has foreclosed the possibility of a controlled carrier exerting beneficial competitive influences on a trade. This fear is accentuated by the Commission's requirement in an earlier proceeding that a controlled carrier's replacement rates must meet the level of the national-flag carriers serving the trade.\* This requirement presumes that the national-flag rates are set at a level which is, indeed, just and reasonable. For the sake of the shippers in any affected trades, I earnestly hope this is true.

In other proceedings involving section 18(c) of the Shipping Act, I have expressed my reservations about the rigidity which the Commission has imposed on proceedings involving controlled carriers. (See FMC Docket No. 79-10, *Rates of Far Eastern Shipping Company*, separate opinions of November 28, 1979, and June 9, 1980). Though I will not treat those issues in detail in this particular opinion, they are incorporated herein. However, I reiterate my general concern that in its zeal to disapprove rates filed by Soviet-flag carriers, the Commission has created a precedential monster which will make it nearly impossible for any non-conference controlled carrier to have a pro-competitive impact in the United States ocean trades. I continue to consider the dangers of predatory rate practices of controlled carriers to be a serious threat. Nonetheless, I consider it unwise for the Commission to create case law which will make it virtually impossible for a non-predatory, non-conference controlled carrier to offer an alternative service to the shipping public at competitive rates.

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\* FMC Docket No. 79-10, *Rates of Far Eastern Shipping Company*, Report and Order of April 1, 1980, Slip Opinion at p. 17.

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-35

PACIFIC COAST EUROPEAN CONFERENCE  
(AGREEMENT NO. 5200 DR-4--EXTENSION OF  
DUAL RATE CONTRACT TO INTERMODAL SERVICE)

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## NOTICE

*August 7, 1980*

Notice is given that no exceptions were filed to the July 3, 1980 order discontinuing this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the order has become administratively final.

(S) FRANCIS C. HURNEY  
*Secretary*

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-35

PACIFIC COAST EUROPEAN CONFERENCE  
(AGREEMENT NO. 5200 DR-4--EXTENSION OF  
DUAL RATE CONTRACT TO INTERMODAL SERVICE)

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## ORDER DISCONTINUING PROCEEDING

*Finalized August 7, 1980*

Proponents of Agreement No. 5200 DR-4, who are the member lines of the Pacific Coast European Conference, have moved to dismiss this proceeding on the basis of "mootness" since the Agreement has been formally withdrawn by its letter of June 17, 1980.<sup>1</sup>

The Agreement, which is a modification to the Conference's existing Dual Rate Contract, was filed in mid-1976 and had been held in abeyance at the request of the Conference until the institution of this proceeding by Order of Investigation and Hearing served May 28, 1980. Basically the modification includes cargo of contract shippers described as moving "overland from a Pacific Coast area port via connecting water movements from U. S. Atlantic, Great Lakes and Gulf ports, to a destination port" within the scope of the conference agreement. According to the order, the apparent purpose of the modification is to include under the contract "mini-bridge" traffic which may be moved under the authority of the conference agreement.

The stated basis for withdrawing the application is that the issue of this Commission's jurisdiction to approve an extension of an exclusive patronage agreement to "mini-bridge" traffic moved by members of a conference under their approved conference agreement is presently before the United States Court of Appeals for the District of Columbia Circuit.<sup>2</sup> The proponents indicate that depending on the outcome of the litigation or, perhaps, clarifying legislation in the interim, the Conference may wish to file a similar application at some future time.

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<sup>1</sup> The undersigned did not receive either a copy of the Motion to Dismiss on Grounds of Mootness served June 17, 1980, or a copy of the letter in support thereof. Apparently Hearing Counsel were not served as well since those documents, which were eventually received in this office, were made available to Hearing Counsel for duplication and appropriate response. Since the motion included a certificate of service, I trust that all other parties were more fortunate and actually were served.

<sup>2</sup> See *U.S.A. v. F.M.C.*, No. 79-1299; *Seatrains Pacific Services, S.A. v. F.M.C.*, No. 80-1248 and *U.S.A. v. F.M.C.*, No. 80-1251.

Hearing Counsel by their reply to the motion served June 26, 1980, indicate they have no objection to the motion, and the designated protestants have not objected.

The above actions dispose of the issues to be decided herein. Accordingly, this proceeding is discontinued.

(S) PAUL J. FITZPATRICK  
*Administrative Law Judge*

July 3, 1980

# FEDERAL MARITIME COMMISSION

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INFORMAL DOCKET NO. 724(I)  
COTTON IMPORT AND EXPORT CO.

v.

SEA-LAND SERVICE, INC.

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## REPORT AND ORDER

*August 11, 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 Donald F. Norris, served March 14, 1980, awarding reparation. The Settlement Officer found that Sea-Land Service, Inc. violated section 17 of the Shipping Act, 1916 (46 U.S.C. 816) in billing Cotton Import and Export Co. (Complainant) for deficit weight charges resulting from Sea-Land's substitution of 40-foot containers for 35-foot containers without notifying Complainant.

Complainant alleges that it had ordered 35-foot containers on shipments of cotton, and that Sea-Land substituted for its own convenience 40-foot containers, without the knowledge or consent of Complainant. Consequently, the shipments did not meet the minimum weight requirements for 40-foot containers. Complainant alleges that it was billed for and paid deficit weight charges as a result of Sea-Land's action, and requests reparation in the amount of \$2,327.87.<sup>1</sup>

Sea-Land, by letter to the Settlement Officer dated October 17, 1979, admitted error in its action, stating in part:

It is our understanding that Sea-Land did not notify the shipper that larger equipment would be substituted for the ordered equipment. Had the shipper been made aware of the substitution of equipment, the shipper's loading pattern could have been changed to accommodate the larger box, thereby precluding the billing of deficit charges.

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\* Chairman Daschbach filed a separate opinion.

<sup>1</sup> This figure is allegedly the sum of \$683.93, \$415.35, and \$1,273.59, supposedly the deficit weight charges on each of three trailers. The figures add up to \$2,372.87, however.

The issue, therefore, is a carrier (Sea-Land) substituting equipment for its own convenience and the shipper being penalized for the carrier's actions.

Sea-Land urges the Settlement Officer to award reparation in the amount of \$2,327.87 as claimed.<sup>2</sup>

By letter dated September 18, 1979, the Settlement Officer requested additional information from Complainant, including, *inter alia*:

... evidence that your Company was billed and subsequently paid the additional charges "for deficit weights" in the amount claimed, \$2,327.87.

Complainant's response, dated November 20, 1979, addressed this query merely by stating:

We enclose photo-copy of our check in the amount of \$2,338.87, which is the amount under claim.

Attached was a copy of the front of a check dated April 18, 1979, made out to Sea-Land Service, Inc. Complainant did not respond to the Settlement Officer's request for proof of billing. Nor was the new figure of \$2,338.87 explained. The Settlement Officer, however, awarded reparation in that amount.

Upon its review of the Initial Decision, the Commission was troubled by several aspects of Complainant's case: there remained, despite the Settlement Officer's request, no evidence that Sea-Land sent a bill for the deficit weight; the copy of the check did not indicate endorsement; and the variance in amounts claimed was unexplained. Pursuant to the Commission's instructions, a letter from the Commission's Secretary was sent to Complainant on May 19, 1980, requesting clarification on these matters by June 15, 1980.<sup>3</sup>

Complainant's response was received July 8, 1980. Despite the tardiness of the submission, the Commission accepts the submission for consideration. Complainant enclosed three copies of billings from Sea-Land for the three trailers in question, but again failed to produce a bill for deficit weight charges. Complainant resubmitted the copy of the front of its check to Sea-Land, but the July 8, 1980 submission contains calculations not on the copy of the check submitted on November 20, 1979. On the check is written:

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<sup>2</sup> Sea-Land's letter also makes use of the erroneously-added \$2,327.87 figure.

<sup>3</sup> The Secretary's letter requested the following information:

(1) Evidence of Sea-Land's billing to you for the freight charges involved; (2) Evidence of your payment of the charges (if by check, show face *and* back of check); and (3) An explanation of the discrepancy between the alleged billing of Sea-Land of \$2,338.87 and the amount claimed of \$2,327.87.

971-869525	-	1284.59
961-869516	-	638.93
961-869503	-	415.35
		<hr/>
		2338.87 <sup>4</sup>

Complainant also submitted a copy of a back of a check endorsed by Sea-Land and dated by the bank May 20, 1980. The discrepancy in amounts was explained:

The correct difference is \$2,327.87 and due to an error in addition, we paid \$2,338.87.

#### DISCUSSION AND CONCLUSION

Because the Commission is not satisfied that Complainant has met its burden of proof, the reparation award is denied and the decision of the Settlement Officer is reversed.

Complainant's responses to the Settlement Officer's and the Commission's inquiries have raised more questions than they answered. There remains not the slightest indication of where the various numbers adding up to \$2338.87, \$2327.87, or \$2372.87 came from, nor is it clear whether the \$1,284.59 and \$638.93 figures written on the copy of the check or the \$1,273.59 and \$683.93 figures listed in the complaint and concurred with by Sea-Land are the basis of the amount claimed. The exact amount of the deficit weight charges would be expected to appear on the bill which Complainant asserts it received from Sea-Land, but despite two requests, Complainant has failed to produce any documentation verifying its claim that it in fact was billed for deficit weight.

Moreover, the validity of the copies of the check has not been established to the satisfaction of this Commission. If Complainant indeed submitted copies of the front and back of the same check, the question arises as to why a check dated April 18, 1979<sup>5</sup> was not endorsed until May 20, 1980. Complainant's submissions indicate that Sea-Land held the check for over a year, and endorsed it twelve days after the Commission expressed its concern about the check's validity at its open May 8, 1980 meeting. Thus, the parties' original contention that the "bill" for deficit weight had been "paid" appears to have been misleading. Complainant's inability or unwillingness to establish the basic premises of its complaint -- *i.e.*, that it was billed for and paid deficit weight charges in an identifiable amount -- precludes a finding that it has met its burden of proof.<sup>6</sup>

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<sup>4</sup> Compare with calculations in complaint. See n.1, *supra*.

<sup>5</sup> Even this date is questionable. The copy submitted by Complainant shows that the line on which the date is typed is broken in several places, suggesting that the date of the check was, at some point, altered.

<sup>6</sup> It is therefore unnecessary to address the issue of whether the facts, if established, amounted to a violation of section 17 of the Shipping Act.

**THEREFORE, IT IS ORDERED,** That the Initial Decision of the Settlement Officer is reversed; and

**IT IS FURTHER ORDERED,** That Cotton Import and Export Co.'s request for reparation is denied; and

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

(S) FRANCIS C. HURNEY  
*Secretary*

**CHAIRMAN DASCHBACH'S SEPARATE OPINION.**

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 302.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The settlement officer's decisions in informal dockets do not have precedential value, therefore Commission review imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.



# FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-17

WESCOT INTERNATIONAL, INC.

v.

SEA-LAND SERVICE, INC.

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## ORDER ADOPTING INITIAL DECISION

*August 13, 1980*

This proceeding was initiated as a result of a complaint filed by Wescot International, Inc. seeking a refund of freight charges from Sea-Land Service, Inc. Its claim was based on an alleged error in the measurement of bundles of iron pipe. Sea-Land admitted all allegations in the complaint.

Administrative Law Judge Paul J. Fitzpatrick issued an Initial Decision in which he awarded reparation in the full amount claimed by Wescot, and in addition, awarded interest at 12 percent from the date of payment of the freight charges. Sea-Land filed Exceptions only as to the award of interest.

Though Sea-Land recognizes that an award of interest could be proper in a case such as this one, it argues that the Commission should exercise its discretion and vacate the award of interest. Sea-Land alleges: (1) it was not responsible for the erroneous mismeasurement of the cargo; (2) the error was not known to it, nor did it have the ability to ascertain it; and (3) Wescot did not seek an award of interest.

The Commission is not persuaded by Sea-Land's arguments. Sea-Land had a non-delegable duty to assess its freight charges on the basis of the actual measurement of the commodity being shipped. In this case particularly it is difficult to understand how Sea-Land lacked the ability to assess this cargo. The iron pipes in question were presented to the carrier in slings and were not hidden away in containers. Their correct measurement could have been easily ascertained.

Sea-Land should further understand that an award of interest in this proceeding is not meant as a penalty for some perceived malefaction on its part. Rather, the award of interest simply serves to make this shipper whole. Sea-Land after all has had the benefit of this shipper's overpayment from the date the freight charges were paid.

The Presiding Officer's decision to award interest was clearly consistent with our policy statement of May 8, 1980, concerning interest on

awards of reparation. The circumstances of this case do not warrant an exception to this general policy.

**THEREFORE, IT IS ORDERED,** That the Exceptions filed by Sea-Land Service, Inc. are denied and the Initial Decision in this proceeding is hereby adopted; and

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

By the Commission.\*

(S) **JOSEPH C. POLKING**  
*Assistant Secretary*

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\*Commissioner Leslie Kanuk would not award interest in situations where a strong showing is made that the error in measurement was due to erroneous entries made by shippers in the documentation which follows the shipment.

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-17  
WESCOT INTERNATIONAL, INC.

v.

SEA-LAND SERVICE, INC.

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Through a combination of error in supplier's preparation of a packing list and carrier's corresponding billing in reliance thereof, complainant was overcharged for shipment of ductile iron pipe. Reparation awarded.

*Everett S. Layman, Jr. and Edward Winslow* for complainant.

*John M. Ridlon* for respondent.

## INITIAL DECISION OF PAUL J. FITZPATRICK, ADMINISTRATIVE LAW JUDGE <sup>1</sup>

*Adopted August 13, 1980*

By complaint served March 26, 1980, Wescot International, Inc., of San Francisco, California (Wescot or complainant), seeks a refund of freight charges resulting from an alleged error in the calculation of weight applied to a shipment of ductile iron pipe. Wescot requested that the proceeding be handled under the Shortened Procedure provided by the Commission's Rules of Practice and Procedure (46 C.F.R. 502.181-187). Sea-Land Service, Inc. (Sea-Land), consents to handling of the matter under the shortened procedure and in essence admits to all of the allegations and contentions included in the numbered paragraphs of the complaint.

Wescot, an exporter of goods manufactured in the United States, entered into a contract with Misato Kogyo & Co., Ltd., of Naha City, Okinawa, to provide, among other commodities, certain ductile iron pipe. It also entered into a contract with P. E. O'Hair and Company of Pittsburg, CA, a supplier, to purchase the iron pipe to be delivered F.O.B. Dock San Francisco. The shipment moved under Sea-Land bill of lading dated May 15, 1979, on *SS LEADER*, Voyage 14 W on May 20, 1979.

The gravamen giving rise to the requested refund concerns the cubic measurement reflected in the bill of lading. Item .004 of the bill of lading specifies 26 Slings-Cast Iron Pipe-72.395 KG (Gross Weight) and

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<sup>1</sup> 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).

a measurement of 223 CBM.<sup>2</sup> According to the complainant a refund for the freight charges incurred is due for 98,598 CBM which is the difference between the measurement of 223 CBM and 124,402 CBM or the actual cube size of the involved slings. Apparently the error was spotted after management examined the file and after the cargo had already been unloaded at destination. The error itself is attributed to the supplier's preparation of the packing list. Evidently the supplier's typist in not referring to the underlying work copies showed all slings as 19 feet high, 48 inches long and 48 inches wide. In using this standard, the involved slings yields an equal distribution of 304 cubic feet per sling or a total of 7,794 cubic feet. And because of the error it is claimed that the actual cubic feet represents a difference of 3,526 cubic feet from that reflected on the packing list used by Sea-Land.<sup>3</sup> In order to substantiate the difference in measurement the Pacific Cargo Inspection Bureau, located in San Francisco, was requested to inspect and measure "As Shipped" samples at the supplier's yard. The Bureau measured the bundles of pipe which were said to be identical to the slings shipped under the bill of lading. The results of these measurements were shown to be as follows: 9 slings at 5.256162 = 47.305 CBM; 12 slings at 4.798752 = 57.585 CBM; and 4 slings at 3.828348 = 15.313 CBM or a total of 120.203 CBM for 25 slings. Although the remaining sling (composed of 4" and 6" pipe) was not available for measurement it was calculated by the complainant to be 4.199 CBM and apparently Sea-Land agrees with that measurement. As a result of its explanation of the error and the Bureau's measurements, complainant seeks a refund of \$20,774.59.<sup>4</sup>

<sup>2</sup> In addition to the slings, Item .004 included 1 Bundle Cast Iron Pipe-1,451 KG with a measurement of 2.747 CBM. The measurement and freight charges assessed here are not in controversy.

<sup>3</sup> The supplier claims the actual measurements to be as follows:

*Units 1 to 9*

8" Ductile Iron Pipe (12 Pcs 4 Pcs Wide by 3 Rows High) Length 19 Feet Width 40 Inches Height 29 inches = 184.7 Cubic Feet Per Unit

*Units 10 to 21*

6" Ductile Iron Pipe (18 Pcs 6 Pcs Wide by 3 Rows High) Length 19 Feet Width 44 Inches Height 29 inches = 168.4 Cubic Feet Per Unit

*Units 22 to 25*

4" Ductile Iron Pipe (27 Pcs 9 Pcs Wide by 3 Rows High) Length 19 Feet Width 45 Inches Height 23 inches = 136.6 Cubic Feet Per Unit

*Unit 26*

4" and 6" Ductile Iron Pipe Mixed Unit (9 Pcs Wide by 3 Rows High) Length 19 Feet Width 45 Inches Height 25 Inches = 148.4 Cubic Feet Per Unit

<sup>4</sup> The calculation is based upon the following:

Actual charge		223.000 CBM
Pipe as remeasured		124.402 CBM
		<hr/>
98.598 CBM	x \$155.00	98.598 CBM
AB	10.00	\$15,282.69
		<hr/>
Subtotal		\$16,268.67
BS	5.00	492.99

Under the circumstances presented here, it is found that the complainant is entitled to reparation in the full amount. Initially, a complainant is not bound where the misdescription of cargo results from a shipper's (complainant's) unintended mistake or inadvertence<sup>5</sup> and even a showing of a lack of equitable justification on the part of a shipper (complainant) has not precluded an award where it is considered that an overcharge would operate as a windfall to that carrier.<sup>6</sup> Here the error leading to the misdescription by the supplier has been well-documented and confirmed by an independent measurement. In addition, the complainant has supplied other appropriate documentation to support the relief requested.<sup>7</sup>

One final matter requires consideration. Although complainant does not request an award of interest in addition to the overcharges on the shipment of its goods, the Commission in a recent policy statement declared an intention to grant interest on awards of reparation in cases involving the misrating of cargo and arising under section 18(b)(3) of the Act.<sup>8</sup> And while exceptions from this general policy will be considered on a "case-by-case basis" and this proceeding involves a misdescription rather than a misrating of cargo, it would seem that the current policy would apply here as well.

### ULTIMATE CONCLUSION

Complainant is awarded reparation in the sum of \$20,774.59, with interest, computed at a rate of 12 percent, from the date of payment of the freight charges.

(S) PAUL J. FITZPATRICK  
*Administrative Law Judge*

Washington, D. C.  
May 16, 1980

HDL	11.00	1,084.57
CU	18.90	2,928.36
		<hr/>
		\$20,774.59

<sup>5</sup> *Western Publishing Company v. Hapag-Lloyd A.G.*, Docket No. 283(I), 13 S.R.R. 16, 17 (1972).

<sup>6</sup> *Union Carbide Inter-America v. Venezuelan Line*, 17 F.M.C. 181, 182 (1973), *Cf. United States v. Columbia S.S. Company*, 17 F.M.C. 8, 10 (1973).

<sup>7</sup> For example, among other material, it submitted the commercial invoice, the bill of lading, its packing list and its supplier's packing list.

<sup>8</sup> *Interpretations and Statements of Policy - Interest on Awards of Reparations*, dated May 8, 1980.

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-18

PORT OF NEW YORK OCEAN FREIGHT FORWARDERS'  
CONFERENCE (AGREEMENT NO. 8370)

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## REPORT AND ORDER

*August 13, 1980*

BY THE COMMISSION: (RICHARD J. DASCHBACH, *Chairman*;  
THOMAS F. MOAKLEY, *Vice Chairman*; JAMES V. DAY, LESLIE  
KANUK AND PETER N. TEIGE, *Commissioners*)

On March 27, 1980, the Commission ordered the 22 independent ocean freight forwarders participating in FMC Agreement No. 8370 to show cause why the Agreement should not be cancelled. The Commission's Order explained that no business had been conducted under the Agreement since 1958 and that if activities were resumed it would be necessary for the parties to justify the Agreement's price-fixing provisions under the *Svenska* doctrine.<sup>1</sup>

The Respondents were given until April 30, 1980 to respond to the Commission's Order, but have yet to do so. Instead, a request for 30 days additional time was filed on April 28, 1980. This request was found to be unjustified under section 502.102 of the Commission's Rules (46 C.F.R. 502.102) and was denied.<sup>2</sup> On May 22, 1980, a second extension request was submitted asking for 120 additional days. This request incorporated an intervening letter dated May 9, 1980 which stated that only 5 of the original 22 parties remained interested in the Agreement, but that 34 additional parties wished to further consider joining a New York area freight forwarder "conference." No attempt was made to dispute or explain Respondents' 26 years of inactivity or to justify the Agreement in terms of present transportation benefits. Under these circumstances, Agreement No. 8370 will be disapproved.<sup>3</sup>

THEREFORE, IT IS ORDERED, That Agreement No. 8370 between the 22 independent ocean freight forwarders listed in the Commission's March 27, 1980 Show Cause Order is disapproved; and

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<sup>1</sup> *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), affirmed the need for proponents of anticompetitive section 15 agreements to demonstrate the existence of off-setting transportation benefits.

<sup>2</sup> Order of May 12, 1980.

<sup>3</sup> Interested ocean forwarders may submit a new agreement (and justification statement) for Commission consideration at any time.

IT IS FURTHER ORDERED, That this proceeding is terminated.

(S) FRANCIS C. HURNEY  
*Secretary*

# FEDERAL MARITIME COMMISSION

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INFORMAL DOCKET NO. 798(1)

KOBRAND CORPORATION

v.

SEA-LAND SERVICE, INC.

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## ORDER PARTIALLY ADOPTING DECISION OF SETTLEMENT OFFICER

*August 15, 1980*

This proceeding is before the Commission upon its determination to review the decision of Settlement Officer Donald F. Norris awarding reparation without interest to Kobrand Corporation for violation by Sea-Land Service, Inc. of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817).

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 date of payment of freight charges. *Interpur, A Division of Dart Industries, Inc. v. Barber Blue Sea Line*, 22 F.M.C. 679 (1980). See also, Policy Statement - Interest on Awards of Reparation, 46 C.F.R. 530.12. The circumstances in this proceeding do not warrant an exception to this general policy. The award of reparation in this proceeding will therefore be with interest at 12 percent.

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

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. pay to Kobrand Corporation 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) JOSEPH C. POLKING  
*Assistant Secretary*

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\* Commissioner Leslie L. Kanuk would not award interest. The separate opinion of Chairman Richard J. Daschbach is attached.



*Chairman Daschbach's separate opinion.*

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 CFR 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The settlement officer's decisions in informal dockets do not have precedential value, therefore Commission review imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 798(I)  
KOBRAND CORPORATION

v.

SEA-LAND SERVICE, INC.

DECISION OF DONALD F. NORRIS, SETTLEMENT OFFICER<sup>1</sup>

*Partially Adopted August 15, 1980*

## *Reparation Awarded*

By its complaint filed with the Commission on February 28, 1980, the Kobrand Corporation (Kobrand) claims \$409.22 of Sea-Land Service, Inc. (Sea-Land), this amount representing an alleged overcharge arising out of Kobrand shipment transported by Sea-Land from Fos-sur-mer, France to Miami, Florida, pursuant to a bill of lading (No. 967-707359) dated either in October or November, 1978. This shipment comprised cases of "still wines" whose total weight amounted to 16960 kilograms (kgs) according to the bill of lading. Kobrand claims that this is in error, that the actual weight amounted to only 13585 kgs, and that the resulting disparity of 3.375 kilo tons entitles it to the sum claimed.

By way of reply, Sea-Land states correctly that Kobrand has the burden of proving its case inasmuch as the cargo in question has long since left Sea-Land's possession. If, however, reparation is in order Sea-Land submits that the amount of that should be \$431.16, Kobrand having used an incorrect rate in structuring its claim.<sup>2</sup>

At the outset, Kobrand's standing to press the claim probably ought to be discussed. Kobrand appears on the bill of lading as the consignee with another firm, Miami Crown Distributors (Crown), as the notify party. Freight and charges were payable at destination. Crown in fact paid the freight which amounted to \$2,166.64. Subsequently, Crown notified Kobrand of the overcharge, and the latter credited \$415 to Crown's account in the form of a credit memo (#4097) dated June 29, 1979. Has Kobrand acquired standing by right of subrogation? The Settlement Officer (S.O.) will hold that it has despite the fact that any

<sup>1</sup> Both parties having consented to the informal procedure of the Commission's Rules of Practice and Procedure (46 CFR 502.301-304), this decision will be final unless the Commission elects to review it within 30 days from the date of service thereof.

<sup>2</sup> Kobrand calculated its claim on the basis of a rate of \$121.25 per 1,000 kgs rather than the rate applicable at the time of shipment, \$127.75 per kilo ton as per the terms and conditions of the controlling tariff, that of the Med-Gulf Freight Conference, Freight Tariff No. 3 - FMC 3, 26th revised page 136.

small, lingering doubt would be dispelled had Kobrand remitted the overcharge by check or in cash so that Crown could have enjoyed full discretion in disbursing the sum received.

The principle controlling in resolving this matter, as the S.O. views it, is that laid down in *Union Carbide Inter-America v. Norton Line*, 14 F.M.C. 263 (1971). Briefly summarized, that case stands for the proposition that what is actually shipped in any instance, not necessarily what appears upon the bill of lading as shipped, as controlling for classification and rating purposes. By analogy, this principle should extend to quantities as well.

According to the bill of lading, the shipment consisted of 675 cases of "12 x 24 oz still wines" claimed by Kobrand to have weighed 18 kgs each, and another 70 cases of "24 x 12 oz still wines" each of which is alleged to have weighed 20.5 kgs, the total amounting to 13.585 kilo tons. In support of its contentions, Kobrand has submitted as evidence (a) a supplier's invoice which is easily associable with the bill of lading; and (b) copies of twenty other bills of lading involving similar shipments of wines transported by Sea-Land and six of Sea-Land's competitors. The former serves to substantiate expressly Kobrand's assertion; and at least nine of the twenty bills, all involving the same shipper as here, either expressly or by eduction, clearly corroborate. Accordingly, reparation in the amount of \$431.16 representing the discrepancy in weights (3.375 kilo tons x \$127.75) is in order.<sup>3</sup> However, by this decision, Kobrand is directed to credit an additional \$16.16 to Crown's account. So ordered.

Kobrand did not request interest. However, it is now the Commission's "intention" to "... grant interest on awards of reparations in cases involving misclassification of cargo and arising under section 18(b)(3). Exceptions from this general policy will be considered on an ad hoc basis. Moreover, interest shall ... be calculated at the rate of 12%, accruing from the date of payment of freight charges." *Interpur, A Division of Dart Industries v. Barber Blue Sea Line*, 22 F.M.C. 679, April 8, 1980.<sup>4</sup> The S.O. assumes that this policy is intended to extend to misdeclarations of weights as well, inasmuch as the controlling tariff here reflects the universal commercial practice of assessing rates on the basis of actual quantities of cargoes shipped. Assessments of freight on any other basis, unless clearly sanctioned by appropriate tariff, are violative of section 18(b)(3) of the Shipping Act, 1916.

<sup>3</sup> No surcharges of any sort were being assessed at the time of the shipment.

<sup>4</sup> The language here indicates to the S.O. that it is the Commission's intention to award interest on an annual, either pro-rated or compounded as appropriate, rather than a simple basis. Recent decisions by other S.O.'s raise a question. Whatever, until advised accordingly, this S.O. will proceed on that principle, that all interest is on an annual basis which should be compounded, or pro-rated, as circumstances require.

The problem here, however, is that the person preparing the bill of lading is the cause of the error resulting in the weight discrepancy which is the foundation of the claim. Kobrand contends that Sea-Land prepared the bill of lading whereas Sea-Land asserts: "We have been advised by our office in Europe that: 1. Sea-Land provides blank bill of ladings forms 2. B/L 967-707359 (that involved here) was prepared by Kobrand 3. The B/L was issued by our agent Agena on S/L's behalf." In order to determine the commercial practice in the trade involved, the S.O. contacted employees of four of those lines whose names appeared on copies of the twenty bills of lading submitted by Kobrand. Three declared flatly that shippers prepare bills of lading issued in France. The fourth stated that this was the case "90%" of the time. From this it is reasonable to conclude that Kobrand is mistaken, and that the bill of lading was prepared by the shipper, S.T.R. Aubrey, of Chalon-sur-Saone, or its agent.

Without question, Sea-Land can be conceived of as having had the "use" of the sum awarded here since that day when Crown paid the freight. By the same token, an award of interest here, estimated to amount to some \$75, if interest is compounded on an annual basis, in effect penalizes Sea-Land for a mistake for which it is innocent.

The bill of lading here, and all copies of the twenty bills submitted by Kobrand, indicate that all shipments were "house-to-house" movements in containers. This means that the shipper is responsible for "stuffing" or loading the container, and the consignee for "stripping" or discharging it. The carriers involved saw nothing else but the containers and paper purporting to state what was in them. Further, the Sea-Land bill of lading and some of the twenty submitted by Kobrand are claused "shippers load and count" and in Sea-Land's case, "stow".

There are equities involved here, or so it seems to the S.O. Sea-Land is not at fault for the discrepancy, and probably neither is Kobrand given the fact that S.T.R. Aubrey was the shipper. Whatever, in the circumstances, the S.O. cannot see any reason why interest should be awarded. So ordered.

(S) DONALD F. NORRIS  
*Settlement Officer*

May 30, 1980

# FEDERAL MARITIME COMMISSION

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## TITLE 46 - SHIPPING

### CHAPTER IV - FEDERAL MARITIME COMMISSION

#### SUBCHAPTER B - REGULATIONS AFFECTING MARITIME

#### CARRIERS AND RELATED ACTIVITIES

[DOCKET NO. 80-36; GENERAL ORDER 46]

#### PART 520 - EXEMPTION OF HUSBANDING AGREEMENTS

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*August 15, 1980*

**ACTION:** Final Rule

**SUMMARY:** The Federal Maritime Commission hereby exempts certain husbanding agreements from the filing and approval requirements of section 15 of the Shipping Act, 1916.

**DATE:** Effective August 21, 1980

#### **SUPPLEMENTARY INFORMATION:**

The Federal Maritime Commission solicited comment on a proposed rulemaking by notice filed in the *Federal Register* on June 4, 1980 (45 F.R. 37703) to exempt certain husbanding agreements between persons subject to the Shipping Act, 1916, from the filing and approval requirements of section 15 of the Shipping Act, 1916, (46 U.S.C. 814). Husbanding agreements generally fall into two categories. The first consists of those agreements that deal with routine vessel operating activities in port such as notifying port officials of vessel arrivals and departures; ordering pilots, tugs, linehandlers; delivering mail; transmitting reports and requests from the Master to the owner/operators; arranging bunkers, stores, repairs, water, garbage disposal; assisting with passengers and crew matters; and related services. The second consists of those agreements which in addition to the foregoing, also cover agency matters involving the solicitation and booking of cargoes and signing of contracts of affreightment and bills of lading.

Section 35 of the Shipping Act, 1916, (46 U.S.C. 833a) provides that the Commission, upon application or on its own motion, may by order or rule exempt any class of agreement 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.

The first category of husbanding agreements has such minimal competitive impact that continued regulation of these agreements through

the section 15 review process serves no substantive purpose. The delay involved in the regulatory process is not offset by any corresponding regulatory benefit under the Act, provided that such agreements do not preclude the agents from servicing other carriers. These agreements are rarely protested, nor are they frequently made the subject of formal Commission proceedings to determine their approvability under the standards of the Shipping Act. Exemption from the filing and approval requirements of section 15 is warranted for this category of agreements as it will present no impairment to the Commission's effective regulation of the parties' activities, nor will it be unjustly discriminatory or detrimental to commerce. The exemption will not confer antitrust immunity; however section 15 approval consideration will remain available to parties requesting it.

The second category of husbanding agreements has a potential for competitive impact which requires a thorough analysis of the relationships between the parties involved. This category is presently under review for consideration for possible exemption in a separate proceeding.

The comments support the exemption of husbanding agreements from the filing and approval requirements of section 15 of the Shipping Act.

The Commission has adopted one suggested change in the requirement that exempted husbanding agreements be available for public inspection at the agent's office. After considering what is fair to the parties affected by the rule, no reason was found to now require the agreement, including rate schedules, to be made public. Thus, exempted agreements shall be kept by the parties and shall be available for the purpose of inspection by the Commission only.

The same comment also suggested that all agency agreements be exempted from the filing and approval requirements of section 15 with certain exceptions. The Commission is limited in affording relief to the scope of its published proposed rule. Therefore, we will treat this comment as a suggestion for further study.

**NOW, THEREFORE**, pursuant to sections 15, 35, and 43 of the Shipping Act, 1916, (46 U.S.C. 814, 833a, and 841a), and section 4 of the Administrative Procedure Act, (5 U.S.C. 553), **IT IS ORDERED**, That, effective upon publication in the *Federal Register*, Title 46 C.F.R. is hereby amended by the addition of Part 520 as follows:

#### **PART 520 - EXEMPTION OF HUSBANDING AGREEMENTS**

Sec.

- 520.1 Purpose
- 520.2 Definition
- 520.3 Exemption
- 520.4 Termination of Approved Husbanding Agreements

## 520.5 Compliance with the Filing and Approval Requirements of Section 15

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

### 520.1 *Purpose*

(a) Section 15 of the Shipping Act, 1916, requires that certain agreements between common carriers by water and other persons subject to the Act be filed with and approved by the Commission prior to implementation. Section 35 of the Act, as pertinent in this context, provides that the Commission may by order or rule exempt any class of agreements between persons subject to the Act where it finds that such exemption will not impair effective regulation by the Commission, be unjustly discriminatory, or detrimental to commerce.

(b) In the interest of minimizing unnecessary delay in the implementation of routine husbanding agreements between persons subject to the Act and to avoid the cost of unnecessary regulation, the Commission is exempting certain husbanding agreements from the filing and approval requirements of section 15.

### 520.2 *Definition*

As used in this part, husbanding agreements are agreements between a common carrier by water and another person subject to the Shipping Act, 1916, through which the carrier contracts with an agent to handle routine vessel operating activities in port, such as notifying port officials of vessel arrivals and departures; ordering pilots, tugs, and linehandlers; delivering mail; transmitting reports and requests from the Master to the owner/operators; dealing with passenger and crew matters; and providing similar services related to the above activities. The term does *not* include agreements which provide for the solicitation or booking of cargoes, signing contracts or bills of lading and other related matters, nor does it include agreements that prohibit the agent from entering into similar agreements with other carriers.

### 520.3 *Exemptions*

Husbanding agreements between persons subject to the Act are hereby exempted from the filing and approval requirements of section 15. Exempted agreements shall be kept by the parties and shall be available for inspection by the Commission during the term of the agreement and two years thereafter.

### 520.4 *Termination of Approved Husbanding Agreements*

Husbanding agreements which have received section 15 approval shall continue to be approved for the duration of their term or until terminated by the parties.

*520.5 Compliance with the Filing and Approval Requirements of Section 15*

Notwithstanding the provisions of this part, persons who desire approval of husbanding agreements may continue to submit such agreements to the Commission for section 15 consideration in accordance with ordinary filing procedures.

By the Commission.

(S) JOSEPH C. POLKING  
*Assistant Secretary*



# FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-7  
THE MENNEN CO.

v.

mitsui O.S.K. LINES

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## PARTIAL ADOPTION OF INITIAL DECISION

*August 21, 1980*

This proceeding is before the Commission upon Mitsui O.S.K. Lines' Exceptions to the Initial Decision of Chief Administrative Law Judge John E. Cogrove. The Presiding Officer found that Mitsui had violated section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817), and awarded the Mennen Co. reparations "in the amount of \$3,005.12 with interest at the rate of 12% from the date of shipment."

Mitsui excepts only to the award of interest insofar as it is calculated to accrue from date of shipment. Mitsui cites the Commission's policy that interest shall accrue from date of payment of freight charges, and requests that the award of interest in this proceeding reflect that policy. See *Interpur, A Division of Dart Industries, Inc. v. Barber Blue Sea Line*, 22 F.M.C. 679 (1980); see also, Policy Statement - Interest on Awards of Reparation, 46 C.F.R. 530.12. Mennen did not respond to Mitsui's Exceptions.

The Commission agrees that its policy on accrual of interest should be applied here. The award of interest on the reparation will be amended to accrue from date of payment of freight charges.

**THEREFORE, IT IS ORDERED,** That the Initial Decision is adopted except as indicated; and

**IT IS FURTHER ORDERED,** That Mitsui O.S.K. Lines pay the Mennen Co. 12 percent interest on the award of reparation, accruing from date of payment of freight charges; and

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

By the Commission.

(S) JOSEPH C. POLKING  
*Assistant Secretary*

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-7  
THE MENNEN CO.

v.

—————  
MITSUI. O.S.K. LINES  
—————

Respondent Mitsui found to have violated section 18(b)(3) of the Shipping Act, 1916.  
Reparation awarded.

*M. Robert Livesey* for complainant.

*George E. Dalton* for respondent.

## INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE<sup>1</sup>

*Partially Adopted August 21, 1980*

The Mennen Company alleges that Mitsui has violated section 18(b)(3) of the Shipping Act, 1916, on two shipments of Mennen's products. Mennen requested that the case be tried under the shortened procedure provided in Rules 181 to 187 of the Commission's Rules of Practice and Procedure and Mitsui acquiesced.

The first shipment which complainant says consisted of 2,069 cases of Shaving Cream, Hair Tonic and Baby Lotion was described on the bill of lading as:

Consumer Commodities ORM-D (Toilet Preparations) Toilet Preparations

The second shipment alleged to consist of 1,960 cases of Hair Tonic and Baby Bath was described on the bill of lading as:

687 Cases Consumer Commodities ORM-D (Hair Tonic); 1263 Cases Toilet Preparation

On this shipment the 687 cases of Hair Tonic were as complainant admits correctly rated as Hair Tonic. With the exception of the 687 cases of hair Tonic, all the commodities were classified by Mitsui as "Toilet Preparations N.O.S." and rated at \$167.00 per cubic meter plus an 8% currency adjustment factor. Under this rate complainant paid a total of \$9,875.26 in freight charges.

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<sup>1</sup> This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure 46 CFR 502.227).

At the time of the shipments Mitsui's tariff contained the following classifications.<sup>2</sup>

Item No. 553.0010.40 Shaving Cream: \$94.00 W/M

Item No. 553.0020.60 Hair Tonic: \$102.00 W/M

Item No. 553.0035.48 Baby Lotion: \$121.00 W/M

Item No. 554.1000.00 Soap N.O.S.: \$120.00 W/M

In support of the complaint, Mennen has submitted the packing lists for the two shipments to show that the commodities rated as Toilet Preparations N.O.S. were actually:

1584 cases Hair Tonic--31.403 cu. m., 3564 lbs.

203 cases Baby Lotion--2.937 cu. m., 2760 lbs.

75 cases Shaving Cream--1.076 cu. m., 1106 lbs.

180 cases Shaving Cream--1.019 cu. m., 900 lbs.

1273 cases Baby Bath--10.817 cu. m., 11457 lbs.

Mennen argues that the commodities in the two shipments should have been rated as follows:

255 cases of Shaving Cream (180 cases of brushless shave and 75 cases of sof. stroke regular): 2.095 cu. m. at \$94.00 per cu. m. plus 8% CAF = 212.68 under Item No. 553.0010.40 (Tariff No. 27 p. 367)

1584 cases Hair Tonic, 31.403 cu. m. at \$102.00 per cu. m. plus 8% CAF = 3459.36 under Item No. 553.0020.60 (Tariff 27, p. 367)<sup>3</sup>

230 cases Baby Lotion, FAS value over \$300/2000 lbs. 2.937 cu.m. at \$121.00 per cu. m. plus 8% CAF = \$383.81 under Item No. 553.0038.48 (Tariff 27 p. 368)

Mennen claims that the correct total for the above is \$6,852.14 and claims reparation in the amount of \$3,005.12.

Mitsui moves to dismiss<sup>4</sup> Mennen's complaint on two grounds. First, Mitsui contends that the use of the classification Toilet Preparations N.O.S. was proper because it was based upon Mennen's own description of the commodities shipped. Second Mitsui urges that Mennen has not met the heavy burden of proof required by the Commission in cases such as this.

The first argument made by Mitsui was disposed of in the very case cited by Mitsui in support of its second argument. In *Western Publishing Co. v. Hapag-Lloyd A.G.*, 13 S.R.R. 16 (1972), the Commission expressly held that a shipper is entitled to reparation for overcharges if he can show what actually moved notwithstanding an incorrect description which the shipper or forwarder may have placed on the bill of lading.

<sup>2</sup> The applicable tariff is the Far East Conference Tariff No. 27 (FMC No. 10).

<sup>3</sup> The 687 cases of Hair Tonic which moved in the second shipment were correctly rated under Item No. 553.0020.60.

<sup>4</sup> Although entitled "Motion to Dismiss," Mitsui asks that the pleading be considered its memorandum of law under Rule 183.

The "heavy burden of proof" referred to by Mitsui and imposed by the Commission has subsequently been explained by the Commission as referring "to the shipper's difficulty in obtaining the necessary evidence rather than the weight to be given to such evidence." *Pan American Health Organization v. Moore McCormack Lines Inc.*, Docket No. 387(I) FMC Report on Remand, September 12, 1979.

In support of its charge that Mennen has failed to sustain its burden of proof, Mitsui refers only to the bills of lading and the export declarations covering the two shipments and which were attached to the complaint. As already noted except for 687 cases of Hair Tonic, all the articles were described as "Toilet Preparations." The export declarations variously describe the articles shipped as "Shaving Preparation, Hair Preparation Cosmetic creams, lotions and Bath Preparations." Mitsui claims that this only confuses matters and that on the export declarations the articles "are not accurately described."

Mitsui makes no mention on the "packing lists" and "sales literature" which were also attached to the complaint. The packing lists describe the articles as "Mennen Brushless Shave," "Mennen Soft Stroke Reg.," "Mennen Hair Tonic," "Mennen Baby Lotion," "Mennen Hair Groom," and "Mennen Baby Bath." The sales literature demonstrates that these descriptions coincide with the items Shaving Cream, Hair Tonic, Baby Lotion and Soap N.O.S. cited above and appearing in Mitsui's tariff at the time of shipment. In a great many previous cases the Commission has accepted just such evidence as sustaining the required burden of proof. See *e.g.*, *Western Publishing Company v. Hapag Lloyd A.G.*, *supra*; *Abbott Laboratories v. Alcoa S.S. Company*, 18 F.M.C. 376 (1975); *Union Carbide v. Venezuelan Line*, 17 F.M.C. 185 (1974).

On the basis of the foregoing I conclude the complainant has proved that respondent Mitsui has violated section 18(b)(3) of the Shipping Act, 1916, by improperly classifying the shipments under consideration here. Complainant Mennen is awarded reparation in the amount of \$3,005.12 with interest at the rate of 12% from the date of shipment.

(S) JOHN E. COGRAVE  
*Administrative Law Judge*

Washington, D. C.  
May 27, 1980

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 79-94

ALL-FREIGHT PACKERS & FORWARDERS, INC.  
INDEPENDENT OCEAN FREIGHT FORWARDER  
LICENSE APPLICATION

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## ORDER ADOPTING INITIAL DECISION

*August 26, 1980*

This proceeding was initiated by Order of Investigation and Hearing served October 29, 1979, to determine:

1. Whether All-Freight Packers and Forwarders, Inc. violated section 44(a), Shipping Act, 1916 by engaging in unlicensed forwarding activities;
2. Whether civil penalties should be assessed against All-Freight Packers & Forwarders, 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 All-Freight Packers & Forwarders, Inc. 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.

On May 16, 1980, Administrative Law Judge Joseph N. Ingolia issued an Initial Decision finding that All-Freight Packers and Forwarders engaged in forwarding without a license, but that the applicant was nevertheless fit, willing and able to carry on the business of forwarding. Exceptions to the Initial Decision were filed by All-Freight, to which the Commission's Bureau of Hearing Counsel, replied.

### THE INITIAL DECISION

The Initial Decision first makes certain findings of fact concerning the three issues raised in the Order, and then concludes that: (1) All-Freight engaged in six instances of forwarding without a license; (2) a civil penalty of \$5,000 be assessed for these violations; (3) All-Freight is nevertheless 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; and (4) within 90 days of the Commission's adoption of the Initial Decision, All-Freight must file a statement with the Commission,

affirming that it established reasonable accounting procedures for recording its ocean freight forwarding transactions.

With respect to the penalty issue, the Presiding Officer advises that the \$5,000 amount reflects the fact that the violations were unintentional in nature, few in number, that All-Freight received no compensation for its unlawful forwarding, that All-Freight cooperated fully during the investigation and took steps to correct the situation once it learned it was acting improperly. The Presiding Officer further points out that this penalty is sufficient to remind freight forwarders that they act in a fiduciary capacity and must maintain a high standard of conduct which requires knowledge of and adherence to Commission rules and policies.\*

When considering the fitness issue, the Presiding Officer takes into account numerous mitigating factors, to wit, that: the applicant has an untarnished business reputation and an unblemished past; there were few violations; there was no attempt to conspire with others to deceive or mislead the Commission; the violations did not involve acts of moral turpitude or false statements or result in unjust enrichment. In short, the Presiding Officer concludes that there is nothing to indicate that All-Freight would be deficient in the operation of freight forwarding or should be deprived of an opportunity to engage in such business.

#### POSITION OF THE PARTIES

All-Freight restricts its Exceptions to a challenge of the amount of penalty assessed in the Initial Decision. It urges the Commission to reject the finding that a \$5,000 penalty be assessed and, instead, "refer the matters of penalties to the Commission's Office of General Counsel for assessment of civil penalties consistent with mitigating factors relevant to this proceeding. . . ." Besides recapitulating the mitigating factors cited by the Presiding Officer, All-Freight submits that its financial condition and losses already suffered by the delay in processing its license application also be considered.

In its Reply to All-Freight's Exceptions, Hearing Counsel points out that the Commission's rules and regulations provide that "assessment of civil penalties may be made only in a formal [section 22] proceeding . . . [and that] . . . Hearing Counsel shall participate as attorney for the Commission . . . entering into stipulations and settlements." (46 C.F.R. 505.3). Hearing Counsel also notes that *formal assessment proceedings* against All-Freight were instituted by the Commission pursuant to sections 22 and 32 of the Shipping Act, 1916, and that All-Freight's

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\* *Harry D. Kaufman D/B/A International Shipping Co. of N.Y., Independent Ocean Freight Forwarder License*, 16 F.M.C. 256, 271 (1973); *Dixie Forwarding Co., Inc., Application for License*, 8 F.M.C. 109 (1964).

request to refer this matter to General Counsel for negotiations is therefore inappropriate.

Moreover, Hearing Counsel asserts that the mitigating factors cited by All-Freight in its Exceptions were considered by the Presiding Officer in determining the \$5,000 penalty amount. Hence, Hearing Counsel urges the Commission to reject the Exceptions and to adopt the Initial Decision.

#### DISCUSSION AND CONCLUSION

The Commission, after a thorough review of the record in this proceeding, finds that the conclusions reached in the Initial Decision are proper and well founded. The contentions advanced by All-Freight regarding the reasonableness of a \$5,000 civil penalty merely reargue matters already considered and correctly disposed of by the Presiding Officer. Accordingly, payment of the recommended amount will be required.

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

**IT IS FURTHER ORDERED,** That the Exceptions of All-Freight Packers & Forwarders, Inc. are denied; and

**IT IS FURTHER ORDERED,** That within thirty (30) days of the date of this Order All-Freight Packers & Forwarders, Inc., contact the General Counsel of the Federal Maritime Commission to arrange for payment of the assessed penalty; and

**IT IS FURTHER ORDERED,** That within ninety (90) days of the Commission's adoption of the Initial Decision, All-Freight Packers & Forwarders, Inc., file a statement with the Commission, affirming that it has established reasonable accounting procedures for recording its ocean freight forwarding transactions and describing in sufficient detail the nature and operation of those procedures, including but not limited to the nature of original books of entry, retrieval capability, and the availability of financial statements.

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

(S) JOSEPH C. POLKING  
*Assistant Secretary*

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 79-94

## ALL-FREIGHT PACKERS & FORWARDERS, INC. INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION

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**Held:**

1. All-Freight violated section 44(a) of the Shipping Act by engaging in the business of ocean freight forwarding without a license, in at least six separate instances.
2. Where All-Freight's principal officer believed one could forward ocean freight without a license if no "compensation" were received; and where it stopped forwarding ocean freight after being advised it was illegal to do so, except in one or two inadvertent instances; and where, after being advised it was illegal to forward ocean freight without a license it instructed its employees not to do so, and referred its customers to other licensed ocean freight forwarders, it is held that a penalty of \$5,000 shall be assessed against All-Freight under section 32(e) of the Shipping Act.
3. Where the applicant applied for an ocean freight forwarder's license and cooperated fully with the Commission's investigation into its activities, and in light of the facts set forth in paragraph 2 above, it is held that All-Freight 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; it is further held that within 90 days of Commission adoption of this decision, All-Freight file a statement with the Commission describing its accounting procedures regarding its ocean freight forwarding activities.

*Carlos Rodriguez* for respondent, All-Freight Packers & Forwarders, Inc.  
*John Robert Ewers* and *Joseph B. Slunt* as Hearing Counsel.

### INITIAL DECISION<sup>1</sup> OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

*Adopted August 26, 1980*

This proceeding was instituted by a Commission Order of Investigation and Hearing issued October 29, 1979. The issues set forth in the Commission's Order and under consideration in this proceeding are:

1. Whether All-Freight Packers & Forwarders, Inc. violated section 44(a), Shipping Act, 1916 by engaging in unlicensed forwarding activities;
2. Whether civil penalties should be assessed against All-Freight Packers & Forwarders, Inc., pursuant to 46 U.S.C. 831(e), for violations of the Shipping Act, 1916, and, if so, the amount of

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<sup>1</sup> This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).



any such penalty which should be imposed taking into consideration factors in possible mitigation of such a penalty;

3. Whether All-Freight Packers & Forwarders, Inc. 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.

In accordance with the Commission's Order, the parties submitted original and reply memorandums of law, together with several affidavits. They later agreed that no oral testimony or cross-examination was necessary and that the case should stand submitted on the basis of the written material already in the record. The various documents in the record and the respective exhibit number assigned to each are as follows:

Document	Exhibit No.
Affidavit of Carlos D. Niemeyer	1
Affidavit of Robert-James Klapouchy	2
Affidavit of Eleanor V. Navickas (12/4/79)	3
Affidavit of William M. Adams	4
Affidavit of Eleanor V. Navickas (1/29/80)	5

#### FINDINGS OF FACT

1. On June 14, 1978, Mr. William M. Adams, President of All-Freight Packers & Forwarders, Inc. (All-Freight) voluntarily telephoned the Commission's San Francisco office. He asked for information about how he might acquire an independent ocean freight forwarder license. Mr. Adams stated he had forwarded some ocean shipments and wanted a license so he could collect compensation on future shipments. (Ex. 1, par.'s 2 & 3; Ex. 4, par. 3.)

2. At the time Mr. Adams telephoned the Commission's San Francisco office, he and All-Freight believed it was not improper to forward without a license as long as compensation was not collected. (Ex. 4, par. 3.)

3. Mr. Adams was informed that section 44, Shipping Act, 1916, and General Order 4 require a license before forwarding any ocean shipment, and he was advised not to forward any more shipments by water until such time as he was licensed. (Ex. 1, par. 4.)

4. By letter dated June 14, 1978, Mr. Adams was sent a Form FMC-18 (Application for a License as an Independent Ocean Freight Forwarder), copies of General Order 4, and sections 1 and 44 of the Shipping Act, 1916. The letter specially directed Mr. Adams to the

need to obtain a license before engaging in the business of forwarding. (Ex. 1, par. 5.)

5. On June 21, 1978, Mr. Adams was interviewed by an investigator in the Commission's Los Angeles Office, Pacific District. At that time all records were made available to the investigator and Mr. Adams fully cooperated. Mr. Adams stated All-Freight had only recently applied for a freight forwarder's license in order to accommodate a few requests from customers for ocean freight shipments and that All-Freight forwarded two ocean freight shipments, but did not collect forwarding compensation from the ocean carriers. (Ex. 3, par.'s 2, 4; Ex. 4, par. 6.)

6. The Commission's investigator verified what had transpired with respect to the two shipments by contacting third parties and learned that All-Freight has not received any brokerage fees from the two shipments. (Ex. 3, par.'s 5 & 6.)

7. Sometime between July 1, 1978, and October 1978, All-Freight filed its application for an independent ocean freight forwarder license.<sup>2</sup> By letter dated November 22, 1978, the Commission's Office of Freight Forwarders acknowledged receipt of the application and advised All-Freight that if it engaged in freight forwarding before receiving its license, it would be subject to penalties provided by law and might prejudice the issuance of its license. (Ex. 2, par. 4; Ex. 4, par. 21.)

8. In July of 1978, All-Freight advised its employees that they should not offer ocean freight forwarding services until the company received its license from the Commission. (Ex. 4, par. 10.)

9. Beginning in the summer of 1978, All-Freight advised some of its customers that it was not licensed to engage in ocean freight forwarding and referred them to licensed ocean freight forwarders such as API Maritime Services, Inc. (API); Senderex Cargo, Inc. (Senderex); and Amerford International Corporation (Amerford). (Ex. 4, par.'s 9 & 10; Ex. 5, par. 6.)

10. During the period from July 14, 1978, until October 29, 1979, All-Freight has handled packing for at least twenty ocean export shipments, all of which were referred to licensed forwarders. (Ex. 4, par. 17.)

11. On January 4, 1979, the Commission investigator again interviewed Mr. Adams in All-Freight's offices. Files dating back to the company's inception were provided. It was found that no ocean shipping journals were maintained by All-Freight. A review of its sales invoices indicated that in addition to the two ocean shipments described

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<sup>2</sup> Mr. Adams affirms that the application was filed on July 1, 1978, at Washington, D.C. (Ex. 4, par. 21.) The affidavit of the Commission's investigator states the application was received in the Pacific District's San Francisco office on October 10, 1978. (Ex. 5, par. 13.) Since letters of recommendation were sent to the San Francisco office in September, it would appear the application was filed before October of 1978. Mr. Adams also affirmed that the Pacific District Office told him the application had been "sitting on someone's desk."

in paragraph 6, there were seven other ocean shipments as set forth below:

All-Freight Invoice Date	Shipper	Carrier, Vessel and Bill of Lading
1. 01/10/79	Kaynar Mfg. Co.	Johnson Scanstar, "Antonio Johnson," V-40E, B/L No. 530176
2. 11/15/78	Globe Union	APL, "President Fillmore," V-73, B/L No. 053347
3. 07/14/78	Plasticos Modernos	Delta Line, "Delta Africa," B/L No. 7
4. 06/09/78	Abdul Al Alami	Maersk Line (B/L unavailable)
5. 04/24/78	North Supply Co.	Matson Line, "Transoneida," V-35, B/L No. T-42880
6. 02/23/78	Sun Marketing	Hoegh Line, "Hoegh Elite," V-31, B/L No. LA-16
7. 10/24/77	Kaynar Mfg. Co.	Johnson Scanstar, "San Francisco," V-40E, B/L No. 430172

(Ex. 3, par. 9.)

12. All-Freight did not receive any forwarding compensation with respect to any of the above shipments, nor did it receive any brokerage fees. (Ex. 3, par. 16; Ex. 4, par. 20.)

13. The bill of lading relating to the 1979 Kaynar Mfg. Co. shipment does not list anyone as the forwarding agent, although the Commission's investigator affirms that the Department of Commerce Shipper's Export Declaration lists All-Freight as "agent of exporters (Forwarding Agent)." The signature "J. S. JETTE" appears as the "Duly authorized officer or employee of exporter or named forwarding agent for All-Freight Packers and Forwarders, Inc." Mr. Adams indicates he does not recall All-Freight performing any freight forwarding services and that since the time of the shipment Kaynar had been using Amerford for over a year, and he believed "the only services besides packing provided by us had to do with the labeling and documentation relating to the shipping of hazardous cargo . . ." (Ex. 4, par.'s 13 & 15; Ex. 5, par. 11.)

14. The bill of lading relating to the Globe Union shipment indicates that All-Freight was the forwarding agent. All-Freight does not dispute this fact, but avers the shipment was unintentional, isolated and inadvertent. (Ex. 3, par. 10; Ex. 4, par.'s 13, 15 & 16.)

15. The bill of lading relating to the Plasticos Modernos shipment lists Amerford as the forwarding agent. (Ex. 3, par. 10.)

16. The bill of lading relating to the 1977 shipment of Kaynar Mfg. Co. lists Amerford as the forwarding agent. (Ex. 3, par. 10.)

17. All-Freight is a California corporation, formed on October 15, 1976, with principal offices at Anaheim, California. It is a packer for firms and individuals who are involved in the transportation of goods in export and domestic trades. (Ex. 4, par. 1.)

18. All-Freight has been an air freight forwarder (IATA) since May 22, 1978. (Ex. 4, par. 2.)

19. IATA agents are required to secure a license if they collect compensation for their services. A person may forward air freight without a license if no compensation is collected. (Ex. 4, par.'s 2 & 3.)

20. All-Freight employs twelve persons and nets less than \$500 per month. (Ex. 4, par. 23.)

21. William M. Adams, the qualifying officer, after graduating from Brigham Young University, worked in the transportation industry as follows:

1971 - Began working for Airborne Freight Corporation.

1971-1972 - Sales Representative for International Department.

1972-1974 - Salesman for Air-Sea Forwarders. Promoted to Assistant General Manager working closely with both air and ocean department coordinating shipments and preparing documents for customers.

1974-1976 - Vice-President of Marketing for Airport Packers & Forwarders. Supervised air and ocean sales and operations. Reviewed special project documentation, consular work.

1976 to Present - President of All-Freight Packers & Forwarders. Directed all operations and sales activities for the company. Works closely with operations manager in reviewing documents and coordinating shipments for various customers.

22. From early 1979 through June 6, 1979, Mr. Adams had several conversations with Commission employees in the Office of Freight Forwarders. On May 14, 1979, he was told there were "no serious" problems with the application. However, on June 5, 1979, he was told the application would be recommended for denial. (Ex. 4, par. 21(4).)

23. By letter dated July 12, 1979, Mr. Adams was informed that the Commission intended to deny the application, whereupon he timely requested a hearing on behalf of All-Freight.

#### ULTIMATE FINDINGS OF FACT

24. All-Freight violated section 44(a) of the Shipping Act, 1916, by forwarding ocean freight without a license, albeit without compensation.

25. Prior to being informed that one could not forward ocean freight without a license from the Commission, All-Freight's qualifying officer believed that, as in the case of air freight, one could forward ocean freight without a license if he did not receive compensation for it.

26. After being advised by the Commission that it was unlawful to forward ocean freight without a license, All-Freight advised its employees not to do so and, after informing some of its customers that it (All-Freight) could not forward ocean freight, referred them to other licensed freight forwarders in at least twenty instances. In one or two instances, All-Freight did list itself as freight forwarder or perform an

isolated freight forwarder activity after being advised not to do so, but these instances were inadvertent, unintentional oversights, not willful acts meant to bypass the Commission, the law or the regulations promulgated under it.

27. A civil penalty of \$5,000 assessed under sections 32(a) and (e) of the Shipping Act is proper and adequate as it recognizes the lack of willfulness or intentional disregard of the law and regulations, and at the same time is deterrent enough to indicate that freight forwarders act in a fiduciary capacity and must maintain high standard of conduct which requires knowledge of and adherence to the Commission's regulations and policies.

28. All-Freight 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.

## DISCUSSION

### ISSUE NO. 1 - VIOLATION OF SECTION 44(A)

Section 44(a) of the Shipping Act, 1916, provides:

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.

This issue is basically a factual one and there is no dispute in the record regarding the fact that All-Freight did carry on the business of forwarding without having obtained a license to do so from the Commission. While the parties disagree as to the exact number of times the unlicensed forwarding occurred, even if All-Freight were given the benefit of the doubt in each of the disputed instances, it still would have violated section 44(a) in the following six instances:

### Schedule of Shipments

	Date	Shipper	Carrier, Vessel and Bill of Lading
1.	11/15/77	Sun Marketing	Hoegh Line, "Roeh Orchid," V-22, B/L No. LA-7
2.	12/05/77	Sun Marketing	Hoegh Line, "Not Legible," V-17, B/L No. LA-12
3.	11/15/78	Globe Union	APL, "President Fillmore," V-73, B/L No. 053347
4.	06/09/78	Abdul Al Alami	Maersk Line (B/L unavailable)
5.	04/24/78	North Supply Co.	Matson Line, "Transoneida," V-35, B/L No. T-42880
6.	02/23/78	Sun Marketing	Hoegh Line, "Hoegh Elite," V-31, B/L No. LA-16

It is held that All-Freight violated section 44(a), Shipping Act, 1916, by engaging in unlicensed forwarding activities.

#### ISSUE NO. 2 - CIVIL PENALTIES

Section 32(a) of the Shipping Act provides in pertinent part that:

. . . whoever violates . . . section 44 of this Act . . . shall be subject to a civil penalty not to exceed \$5,000 for each such violation.

Further, section 32(e) of the Shipping Act states:

. . . the Commission shall have authority to assess or compromise all civil penalties provided in this Act.

Since it has already been determined that All-Freight has violated section 44(a) of the Shipping Act by engaging in the business of freight forwarding without a license, what remains to be determined is the amount of civil penalty to be assessed under the above sections. Hearing Counsel takes the view that:

A penalty of \$40,000, \$5,000 for each of the eight violations of section 44(a) could be assessed against All-Freight. In consideration of the limited amount of fees collected by All-Freight and the fact that it nets less than \$500 per month (Respondent's Memorandum at 13), we submit that . . . a \$5,000 penalty is appropriate.

In answer, the respondent asserts that a lesser penalty, or none at all should be assessed because it was unaware it was unlawful to forward ocean freight without a license if one did not collect compensation, and because it has already been sufficiently punished because of "the inordinate delay" in processing its application. Hearing Counsel replies:

. . . the delay in the processing of respondent's application has been a direct result of the applicant's own activities. If All-Freight had not engaged in carrying on the business of forwarding without a license, its application would have been processed in the normal time. Any delay which resulted from the respondent's activities should not be a factor in reducing the amount of a civil penalty.

And further:

Likewise, respondent's claim that it did not realize that its activities were unlawful . . . should not serve to reduce the proposed penalty as Mr. Adams has several years of experience in the forwarding industry, and All-Freight continued to carry on the business of forwarding after it was warned not to do so.

It is clear that given a statute providing for a civil penalty of \$5,000 for *each violation*, and given the fact that the word "each" refers to individual transactions (here, it is each shipment), there is a wide area of discretion as to the amount of the penalty which might be assessed

and as to the factors which one should consider. In essence, it is an area one might traverse ranging from a purely unintentional, technical violation which damages or unjustly enriches no one, to a willful and flagrant illegal act, intended to unjustly enrich the person perpetrating it to the detriment of others. Here, the record will not support a holding that the violations which occurred were willful or deliberate. Rather, they support a holding that All-Freight (Mr. Adams) forwarded ocean freight without compensation and believed the lack of compensation obviated the need for a license.<sup>3</sup> Further, he voluntarily applied for a license and, once he was advised by the Commission that he was in error in forwarding freight without a license, he took steps to correct the error.<sup>4</sup> Also, the record is devoid of any unjust enrichment from any service, directly or indirectly related to the unlicensed ocean forwarding and there is no falsification or duplication of records.

As to Hearing Counsel's averment that the delay in this case resulted from the fact the respondent forwarded without a license, there is no doubt that a portion of the period June 1, 1978, to July 12, 1979, was taken up in the investigation of that wrongdoing. However, one must read the record myopically to conclude that the delay was due entirely to the respondent.

On the other hand, the respondent avers that it has been sufficiently punished because of the "inordinate" delay in processing its application. A portion of that delay was attributable to its own actions, and in any event the record contains no evidence of how any delay would or should monetarily affect the amount of the penalty.<sup>5</sup> For example, it would seem appropriate to show the exact period of delay which was "inordinate" and what financial damage was suffered during that period of time. In short, the mere fact that there was some delay, inordinate or not, should not of itself serve to reduce what otherwise would be a proper civil penalty.

The respondent argues further that the civil penalty should be less than \$5,000 because "Hearing Counsel's proposed sanction represents All-Freight's net profit for a whole year of operation." However true and unfortunate that fact may be, standing alone it cannot be allowed to govern the amount of civil penalty to be assessed. The record contains no evidence as to why All-Freight's net profit is low in the

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<sup>3</sup> This argument was advanced in *Concordia International Forwarding Corporation - Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916*, Docket No. 78-34, served December 18, 1978, (21 F.M.C. 587) and rejected by the Commission which botomed its decision on differentiating the word "compensation" from the word "consideration."

<sup>4</sup> Findings of Fact 8, 9, 10, where the respondent advised his employees not to offer ocean freight services until licensing was obtained and where he referred clients to other licensed freight forwarders pending his own receipt of a license.

<sup>5</sup> The citation of *Fabio A. Ruiz D/B/A Far Express Company*, 15 F.M.C. 242, 247, relying on *Independent Ocean Freight Forwarder License Application - Guy G. Sorrentino*, 15 F.M.C. 127, is not helpful since it lacks specificity and refers to the general question of fitness.

year in question. Even if it did, the correlation between net profit and the amount of penalty is vague. If there is a true inability to pay as opposed to a low net profit, that aspect could more properly have been addressed initially with Hearing Counsel in settlement negotiations, and even now may still be raised if it has any validity. So here the mere assertion that yearly net profit is less than the penalty to be assessed does not by virtue of the assertion itself warrant any real consideration.

In his brief, Hearing Counsel, in support of his argument, states that, "The shipments were forwarded in order to hold on to clients that the respondent had no right to serve." The record does not support such a far-reaching conclusion. It is based on assumption rather than fact and is elaborated upon in a later portion of this opinion. Also, Hearing Counsel's argument that the respondent's claim that it did not realize its activities were unlawful should not serve to reduce the proposed penalty is not valid. Certainly, a knowing violation is more abhorrent than one which is unintentional, and although both are nonetheless violations, the equal application of a penalty to both would be erroneous. Further, the fact that Mr. Adams had some experience as an ocean freight forwarder does not serve to establish that he *knew* he had to be licensed before forwarding ocean freight without compensation. That he should have known is indisputable, that he did know is debatable. Finally, as to carrying on the business of forwarding after being warned not to do so, there appears to be one inadvertent instance (Globe Union) where a shipment was made after the warning was given, two others where some incidental freight forwarding *may* have occurred after the warning was given, and over 20 others where shipments were referred to licensed forwarders. Mr. Adams says the one incident was inadvertent, and since there is nothing in the record to refute that statement, it has been so held as a fact. The other instances where some freight forwarding services may have been performed were also inadvertent.

So here, while we do not agree with all of his reasoning, we do agree with Hearing Counsel that a civil penalty should be assessed against All-Freight and that the amount of that penalty, taking into consideration the factors in mitigation, should be \$5,000. That figure gives adequate consideration to the unintentional nature of the violation, the fact that there was no deviousness or unjust enrichment, that the number of violations was not great and that All-Freight did cooperate fully during the investigation and took steps to correct the situation once it learned it was acting improperly. On the other hand, it is a deterrent enough to signal that freight forwarders act in a fiduciary capacity and that they must maintain a high standard of conduct which



requires knowledge of and adherence to Commission rules and policies.<sup>6</sup>

### ISSUE NO. 3 - APPLICANT'S FITNESS

Section 44(b) of the Shipping Act provides in pertinent part:

A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant is, or will be, an independent ocean freight forwarder as defined in this Act and 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, and that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936; otherwise such application shall be denied.

Hearing Counsel in making his argument concludes that:

. . . in view of the clear prohibition of section 44(a) not to forward ocean shipments without a license and the applicant's disregard of warnings from the Commission not to do so, All-Freight does not qualify for licensing.

The conclusion is erroneous. It is based on the applicant's "disregard of warnings" from the Commission, a fact which has no real support in the record. To the contrary, as has been noted, the record shows and we have found as fact that once the Commission "warned" the applicant, he advised his employees not to offer clients ocean freight forwarding services and referred his customers to other licensed forwarders. The record contains documentary evidence from the employees, forwarders and shippers to this effect. Again, while there are three instances where All-Freight was involved in ocean shipments after the Commission "warning," only in one instance was it listed as the ocean freight forwarder. We have found as fact that incident, as well as any other incidental act of forwarding, was unintentional, and they hardly justify the leap to a holding that All-Freight disregarded Commission "warnings" not to forward without a license.

As to the cases cited by Hearing Counsel, we do not disagree with the import of the cases or the quoted language setting forth general tenets to be followed. However, the issue here is basically factual and when one looks behind the broad language and compares the specific facts, the cases cited are clearly distinguishable from what is involved in this proceeding or have no specific application to the issue to be decided. In *Harry Kaufman, supra*, the facts clearly show an involved scheme whereby the holder of an ocean freight forwarding license sold

<sup>6</sup> *Independent Ocean Freight Forwarder License Application, Guy G. Sorrentino, supra; Harry D. Kaufman D/B/A International Shipping Co. of N.Y., Independent Ocean Freight Forwarder License, 16 F.M.C. 256, 271 (1973); Dixie Forwarding Co., Inc., Application for License, 8 F.M.C. 109 (1964).*

his business to another party whose freight forwarder's license had already been revoked by the Commission, and allowed his own license to be used by the other party -- all without any notice to the Commission. The situation in *Kaufman* is so aggravated that when compared with the facts involved in the instant case, one is hard pressed to find any correlation between the two cases except to note the basic difference as to how the violation occurred. As to the citation of *Independent Ocean Freight Forwarder License Application, Guy G. Sorrentino*, 15 F.M.C. 127, 128 (1972), there the Commission ultimately approved issuance of the license and Hearing Counsel does not make any relevant factual comparisons to the instant case. The general language is pertinent, but its application is what is at issue. As to *Independent Ocean Freight Forwarder Application, Lesco Packing Co., Inc.*, 19 F.M.C. 132, 136-137 (1976), once again the general statement cannot be disputed, but the denial of the freight forwarder license involved the same party who was involved in *Kaufman, supra*, who had been convicted of criminal fraud, willfully and knowingly made false statements in applying for a prior ocean freight forwarding license, and who had previously violated the export control laws. These kinds of facts are not involved in this proceeding, so that the case cited is clearly distinguishable.

Hearing Counsel cites *Concordia International Forwarding Corporation - Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916*, Docket No. 78-34, served December 18, 1978 (21 F.M.C. 587), to support the argument that:

Mr. Adams, the qualifying officer of the applicant, had four years of experience in the forwarding industry. In addition, the applicant received at least two oral and two written warnings that to carry on the business of forwarding without a license . . . The applicant's disregard of the Shipping Act and these warnings demonstrates that it is not fit and cannot be found to be willing to conform to the provisions of the Shipping Act and the Commission's regulations. Therefore, All-Freight's application for an independent ocean freight forwarder license should be denied.

The only similarity between *Concordia* and the instant case is that both respondents averred that they believed they could engage in ocean freight forwarding if they did so without charge, but that lone similarity is hardly material here. When one compares the other facts in these cases, he is apt to conclude that *Concordia*, inferentially at least, supports All-Freight more than it does Hearing Counsel. In *Concordia* the applicant was initially an individual and principal employee of Concordia. He had many years of experience in freight forwarding, including 12 years in ocean freight forwarding, where he had supervised over 46 people in the ocean freight division of a corporation. In the instant

case, Mr. Adams has experience as a forwarder since 1972. While the record indicates some experience in ocean freight forwarding, it is apparent that Mr. Adams did not ever engage in the business on a full-time basis. His activities have been conducted on a small-scale basis.

Even more compelling is the fact that in *Concordia* the individual involved worked for another company as an ocean freight forwarder and, immediately after he left the old company to go to Concordia (the new company), Concordia forwarded ocean freight for his customers without a fee. Six other employees had already moved from the old company to Concordia. The Commission saw through these machinations holding that while Concordia did not receive "compensation" it certainly did not perform the services without "consideration." In this proceeding, there are no similar facts, although Hearing Counsel contends that Mr. Adams continued to forward ocean freight after being warned not to do so because he wanted to "hold onto clients which respondent had no right to serve." The evidence underlying such a conclusion is woefully weak. The Commission investigator affirmed (Ex. 3, par. 11) that:

Mr. Adams stated that he continued to forward ocean freight shipments after he had been warned he was in violation of General Order 4 because he feared losing his air cargo customers who occasionally made ocean shipments.

Mr. Adams states that while he may have told the investigator "one always fears losing its clients by referring them," the fact was that once informed of the unlawfulness of forwarding without a license, all of All-Freight's shipments, with one concrete inadvertent exception, were referred to licensed forwarders. The customer involved in the exception was not an Air-Freight customer. The record is replete with documents verifying these facts. Further, as to Mr. Adams' contentions regarding the original statement made by the investigator, the investigator's responding affidavit avoids dealing with whether or not Mr. Adams ever made the specific statement attributed to him, but rather says:

I relied solely on what Mr. Adams told me about his fear of losing air cargo customers. . . . I have made no attempts to verify whether All-Freight's clients were or were not air cargo customers.

Based on the above, it has been found as a fact that All-Freight *did not* intentionally continue to forward ocean shipments after being warned not to do so. To find that it did so is not supportable on the facts, and to find that it did so to retain air freight customers is the kind of judicial "bootstrapping" one should avoid. For example, here such a fact would have to be based on the sworn statement of one person (the Commission investigator) as to what another person (Mr. Adams) told him, where the other person (Mr. Adams) denied making the statement, where the documentary evidence of record refutes the statement, and

where, given the opportunity to amplify on the statement, the person originally advocating it (the investigator) desists. So here, we believe Hearing Counsel's argument and its use of *Concordia* is misplaced.

In essence, we think this case presents a situation where the applicant, while experienced, was not so experienced as to be all-knowing. Consequently, it made a mistake, a mistake which was brought to light by its own voluntary act. Once aware of the mistake, it took measures to avoid making it again. The record shows that the applicant, and its principal officer have an untarnished business reputation. There is no record of prior wrongdoing of any nature either in maritime or in other matters, and statements from established financial institutions and business associates attest to their business reputation and acumen. As to the initial act of forwarding without a license, All-Freight's activities were much less serious than in the cases that usually come before the Commission. There was not a large number of violations; there was no attempt to conspire with others to deceive or mislead the Commission; no act of moral turpitude; no false statement; no unjust enrichment.<sup>7</sup> In short, there was nothing to indicate that if granted an ocean freight forwarder's license, All-Freight would be deficient in the operation of such a business or should be deprived of an opportunity to engage in that business. *Application for Freight Forwarder License, Carlos H. Cabezas*, 8 F.M.C. 130 (1964).

Therefore, it is held that All-Freight is fit, willing and able properly to carry out 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. In so holding, there is one further point which needs to be addressed. The record indicates that throughout the investigation of this application, All-Freight kept a poor set of books, or none at all, regarding its ocean freight forwarding activities. From time to time it either had no record of a transaction or was "at a loss" to explain what it did on a particular shipment. It seems clear that the import of the law and regulations require anyone engaged in the business of freight forwarding to keep books and records accurately recording those transactions occurring on a day-to-day basis. Accordingly, within 90 days of the date the Commission adopts this decision, in whole or in part, All-Freight is directed to file a statement with the Commission affirming that it has established reasonable accounting procedures for recording its ocean freight forwarding transactions and describing in sufficient detail the nature and operation of

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<sup>7</sup> Cf. *Application for Freight Forwarding License, Dixie Forwarding Co., Inc.*, 8 F.M.C. 109 (1964); *Investigation of Practices, Operations, Actions and Agreements of Ocean Freight Forwarders*, 6 F.M.B. 327 (1961); *Independent Ocean Freight Forwarder License, E. L. Mobley, Inc.*, Docket No. 77-26, Report and Partial Adoption of Initial Decision served March 12, 1979; *Independent Ocean Freight Forwarder License Application, L.T.C. Air Cargo, Inc.*, 13 F.M.C. 267 (1970); *York Forwarding Corp., J.B. Wood Shipping Co., Inc. & Edwards Fay Corp.*, 15 F.M.C. 114 (1972).

those procedures, including but not limited to the nature of original books of entry, retrieval capability, and the availability of financial statements.

(S) JOSEPH N. INGOLIA  
*Administrative Law Judge*

Washington, D.C.  
May 16, 1980

# FEDERAL MARITIME COMMISSION

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INFORMAL DOCKET NO. 566(1)  
EXCAM, INC.

v.

LYKES LINES AGENCY, INC.  
AND COSTA LINES

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## ORDER

*August 28, 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 reviewing the record, found that Complainant had failed to sustain its burden of proof, and, by Order on Remand served April 17, 1980, directed the Settlement Officer to offer Excam a further opportunity to demonstrate that the commodity shipped was in fact "Replica Arms," and to issue another decision setting forth his supplemental findings. On June 4, 1980, the Settlement Officer issued a Supplemental Decision reaffirming his Initial Decision, citing additional findings in support of his earlier ruling.<sup>1</sup> Unexplainably, the Settlement Officer did not, as directed by the Commission, offer Excam a further opportunity to present evidence in support of its claim.

The Commission remains unconvinced that the shipments at issue were indeed "Replica Arms," as alleged, and not "Firearms." The four additional "findings" that are offered in support of the Presiding Officer's Supplemental Decision, have little probative value in the resolu-

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<sup>1</sup> These include: (1) the fact that Complainant has been trying since June 17, 1976 to petition the Med-Gulf Conference for a reduced rate on "Replica Arms;" (2) that there was no doubt on the part of the carriers that the cargo shipped was "Replica Arms;" (3) that on May 3, 1977, a special freight tariff and commodity classification was created for Replica Arms Muzzle-Loading, finished or kits, accessories and parts; and (4) that the shipments in question were made after the new rate was created.

tion of this controversy. The Settlement Officer's particular reliance upon the admission of the carriers that the cargo shipped was "Replica Arms" is misplaced in a misrating proceeding.

Rather than remanding this proceeding for a second time, the Commission will directly offer Complainant a further opportunity to produce convincing evidence (e.g., invoices, bills of lading, manifests) which would serve to corroborate the assertion that the commodity shipped was different than the description stated on the bill of lading.<sup>2</sup>

THEREFORE, IT IS ORDERED, That Excam, Inc. submit to the Commission by September 26, 1980 evidence to support its contention that the commodity shipped was "Replica Arms" and not "Firearms;" and

IT IS FURTHER ORDERED, That if this information is not submitted within the time prescribed above, the Settlement Officer's Supplemental Decision will be reversed and the reparation prayed for will be denied.

*Chairman Daschbach, not participating.*

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The Settlement Officer's decisions in informal dockets do not have precedential value, Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

By the Commission.

(S) FRANCIS C. HURNEY  
Secretary

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<sup>2</sup> This principle was enunciated 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.

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 681(F)  
SANRIO COMPANY, LTD.

v.

MAERSK LINE

## ORDER ADOPTING INITIAL DECISION

*September 5, 1980*

The Commission has before it the Exceptions of the Trans-Pacific Freight Conference of Japan/Korea (TPFC)<sup>1</sup> to the April 21, 1980 Initial Decision of Administrative Law Judge Norman D. Kline in the above-captioned matter. Replies to Exceptions were filed by the Complainant, Sanrio Company, Ltd.

This is a complaint proceeding in which an importer of goods manufactured in Japan alleges it was overcharged for 42 different commodities shipped on Maersk Line vessels from Tokyo to Oakland, California in November and December, 1977, under the provisions of TPFC's Tariff FMC No. 6. If proven, each such overcharge would represent a violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)) for which reparations may be awarded. The Presiding Officer ultimately concluded that 38 of the 42 products were incorrectly rated by Maersk,<sup>2</sup> but withheld his decision on the amount of reparation due Sanrio until a reparation statement is filed pursuant to Section 502.252 of the Commission's Rules. (46 C.F.R. 502.252). TPFC now argues that the Initial Decision is erroneous for giving undue weight to Sanrio's evidence and for failing to consider the policy ramifications of awarding reparations when a shipper is responsible for the carrier's misrating of the commodities shipped. Sanrio supports the Initial Decision in all respects.

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<sup>1</sup> TPFC is an association of steamship lines operating under an agreement approved by the Commission (FMC No. 150). Maersk Line, the Respondent in this proceeding, is a member of TPFC and is governed by its tariff. The Conference was granted leave to intervene on March 4, 1980 in order to present Maersk's viewpoint from a broader prospective.

<sup>2</sup> Commodity rates for "Stationery," "Bags, Baskets and Luggage," "Artist's Materials," "Travel Kits," "Paper Manufactures," "Toys," "Personal Ornaments," "Ceramicware," "Plastic Manufactures," "Brushes (under \$1,000)," "Hari Clip," "Tape," "Cart," "Printed Matter," "Towel Bar" and "Novelty Pencil" were found to apply instead of the "Cargo, N.O.S." rate.



## POSITION OF THE PARTIES

*Respondent/Intervenor*

TPFC's primary contention is that the Commission is following an unwise policy by adjudicating section 18(b)(3) claims exclusively upon the evidence presented as to what was actually shipped.<sup>3</sup> TPFC states that this policy is not legally mandated and that a more flexible approach could be taken both in determining whether violations have occurred and whether reparations should be awarded under section 22 of the Shipping Act, 1916 (46 U.S.C. 821). This proposition is supported by citations to *State of Israel v. Metropolitan Dade County*, 431 F.2d 925 (5th Cir. 1970) and *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 621-622 (1966).

TPFC believes the Commission should adopt a policy of considering the respective "culpability" of the parties and the purposes of the Shipping Act, 1916, before awarding damages for misratings. The Conference further alleges that it is experiencing increased difficulties with cargo rating disputes which arise after the goods leave the carrier's custody and believes shippers deliberately furnish vague commodity descriptions with the intention of subsequently recovering overcharges if a section 18(b)(3) violation occurs. TPFC advises that Sanrio itself has eight overcharge claims pending against Conference lines.

In the instant case, TPFC claims that Maersk Line was blameless because the containerized goods were loaded by the shipper before they reached the carrier and the ocean bills of lading were prepared by a freight forwarder retained by the shipper.<sup>4</sup> Sanrio therefore should not be awarded reparations.

TPFC alternatively argues that Sanrio's evidence is insufficient under existing Commission standards which recognize the carrier's difficulty in rebutting after the fact allegations concerning the nature of the goods shipped.<sup>5</sup> Sanrio is a subsidiary of Sanrio, Ltd., from whom the goods were purchased in Japan and the shipping documents were prepared by representatives of one or the other of these companies. TPFC would have Sanrio explain why it initially described its goods as "General Merchandise" (which receives a clearly higher "Cargo, N.O.S." rate); waited over a year to file its claim; provided no inventory records covering the goods in question; and entered descriptions on U.S. Cus-

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<sup>3</sup> See *Durite v. Sea-Land Service, Inc.*, 20 F.M.C. 674, *aff'd without opinion*, 610 F.2d 1000 (D.C. Cir. 1979); *Pan American Health Organization v. Moore-McCormick Line, Inc.*, Order on Remand, 22 F.M.C. 98 (1979); *Western Publishing Company v. Hapag-Lloyd*, 13 S.R.R. 16 (1972); *Mueller v. Peralta* 8 F.M.C. 361 (1965).

<sup>4</sup> TPFC alleges that the preparation of rated bills of lading by freight forwarders is a firmly established practice in Japan.

<sup>5</sup> The Commission requires that shippers provide corroborating evidence to supplement their unilateral assertion that the bill of lading incorrectly described the goods. *E.g., Pacific Freight Audit v. American President Lines*, 22 F.M.C. 207 (1979).

toms documents different from those on the Bill of Lading and the Sales Invoice.

### *Complainant*

Sanrio claims that any policy change made for reasons extending beyond the immediate facts of this case would violate its procedural rights and further asserts that TFFC's proposal is inappropriate in light of the Shipping Act's clear intention that the ocean carrier be responsible for accurately rating the cargo it transports.<sup>6</sup> Once the carrier breaches this duty, section 18(b)(3), and analogous provisions of the Interstate Commerce Act, require the imposition of liability without fault. *See Penn Facing Mills Co. v. Ann Arbor Ry.*, 182 I.C.C. 614 (1932). No other approach is consistent with the overriding statutory purpose of eliminating unjust discrimination between shippers. *See generally, Louisville & Nashville Ry. v. Maxwell*, 237 U.S. 94 (1915); *United States v. Pan American Mail, Inc.*, 359 F.Supp. 728, 733-735 (S.D.N.Y. 1972); *Tyson & Jones Buggy Company v. Aberdeen & Asheboro Ry.*, 17 I.C.C. 330 (1909).

Finally, Sanrio argues that it did adequately prove its assertion that the bill of lading was incorrect by introducing catalogs and samples which corroborated the entries on its packing lists and invoices.

### DISCUSSION

The record in this proceeding presents the Commission with no reason for altering its position concerning the proper rating of cargo. This function is and must remain a nondelegable duty of the ocean carrier. It is true that this task becomes more difficult when containerized cargo moves on a "House-to-House" basis, but the very difficulty of the process makes it even more important that carriers take the steps necessary to ascertain what is being shipped *before* freight charges are assessed or collected. The Shipping Act would be virtually unenforceable if carriers were entitled to rely upon cargo descriptions provided by shippers, and the halfway measure of denying reparations to shippers otherwise in compliance with the law would also discourage the type of industry conduct necessary to effectuate the present statutory scheme of strict tariff adherence.<sup>7</sup>

The Commission fully recognizes that reparation awards are discretionary under section 22, *see First International Development Corp. v.*

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<sup>6</sup> It follows, Sanrio argues, that any cargo rating functions performed by an ocean forwarder are performed as an agent of the carrier and it is the carrier that must be held accountable for any errors made in this regard.

<sup>7</sup> Section 16 Initial Paragraph (46 U.S.C. 815) imposes civil penalties upon shippers which knowingly or willfully, by means of any unfair device or method, obtain or attempt to obtain transportation at rates less than those otherwise applicable. The unintentional furnishing of inaccurate information to a carrier would not ordinarily violate this section.

*Ship's Overseas Services, Inc.*, 20 S.R.R. 209 (1980), but continues to believe that its discretion is best exercised by awarding reparations for overcharges in situations where the shipper was merely negligent in preparing shipping documents.

The *State of Israel* decision, requires no contrary result. There, a terminal tariff provision was construed as *conditioning* a favorable "standby" berthing rate for cruise ships upon the receipt of notice that a vessel was in a nonloading status.<sup>8</sup> The Maersk Line rates involved in this proceeding were not subject to a condition precedent, but even if they had been expressly dependent upon the shipper's furnishing some specific and reliable type of cargo description, they might not have been lawful in light of the holding in *Kraft Foods, Inc. v. Federal Maritime Commission*, 538 F.2d 445 (D.C. Cir. 1976).<sup>9</sup> See also *Union Carbide Corporation v. American and Australian Steamship Line*, 17 F.M.C. 177 (1973); *The Carborundum Company v. Royal Netherlands Steamship Company*, 19 F.M.C. 431 (1977); *Cone Mills Corp. v. Trailer Marine Transport Corp.*, 20 F.M.C. 143 (1977), regarding the need for any such condition to be reasonably related to transportation circumstances.

The Commission has reviewed the evidence presented by Sanrio and believes it sufficiently demonstrates that the two shipments in question consisted of the articles alleged by Sanrio to have been present and that the Presiding Officer properly determined which tariff rates should have been applied to each item.

**THEREFORE, IT IS ORDERED**, That the Exceptions of the Trans-Pacific Freight Conference of Japan-Korea are denied and the Initial Decision served on April 21, 1980 is adopted as the final decision of the Commission; and

**IT IS FURTHER ORDERED**, That Sanrio, Inc., submit a reparations statement to the Presiding Officer pursuant to section 502.252 of the Rules within 30 days from the service date of this order (with copies to all parties of record).

By the Commission.

(S) FRANCIS C. HURNEY  
Secretary

<sup>8</sup> After failing to give notice, a vessel operator later attempted to obtain the lower rate by demonstrating that the ship had actually been in a nonloading status. The Court denied relief on the grounds that the notice requirement was reasonably implied by the tariff because knowledge of operating status was a matter particularly within the knowledge of the vessel operator.

<sup>9</sup> The *Kraft* decision overturned a Commission order denying reparation because a shipper failed to comply with a tariff rule requiring freight adjustment claims based upon alleged errors in cargo description, weight or measurement to be brought to the carrier's attention before the cargo left the carrier's custody. The Court held that a rule of this nature could not be used to deny the shipper's right to seek reparations under section 22 of the Shipping Act, 1916, even if it limited the carrier's obligation to voluntarily correct rating errors.

# FEDERAL MARITIME COMMISSION

## INFORMAL DOCKET NO. 681(F) SANRIO COMPANY, LTD.

v.

### MAERSK LINE

Complainant, an exporter of small products designed mainly for children, filed claims for overcharges with respondent Maersk Line claiming that Maersk had misrated 42 products which the shipper or its forwarder had described as "General Merchandise" on the bills of lading, the carrier allegedly violating section 18(b)(3) of the Shipping Act, 1916. After Maersk declined to consider the merits of the claims because of a tariff rule, complainant filed a complaint with the Commission, furnishing evidence of the nature of the products, such as packing lists, invoices, catalogs, actual samples, sales literature and employee's sworn statements. Maersk and intervenor Conference argue that complainant's evidence is unreliable, that complainant has not met its "heavy burden of proof," and that present Commission law and policy in overcharge cases are harmful and ought to be changed. It is held that:

- (1) Complainant has submitted the type of evidence customarily relied upon in cases of this type, which evidence has enabled complainant and sometimes respondent to show the correct rate that should have applied to 38 of the 42 products shipped.
- (2) The Commission's policy is to permit shippers to show what actually moved on the basis of a preponderance of the evidence, notwithstanding incorrect bill of lading descriptions originally presented to carriers. The shipper must however set forth sufficient facts to prove with reasonable certainty and definiteness the validity of its claim. Its "heavy burden of proof" refers to the difficulty the shipper will have in obtaining evidence long after the shipment. The "preponderance of the evidence" standard is the traditional standard employed in administrative and most civil cases.
- (3) The principles of law governing cases of this type are derived from tariff, not contract law. Tariff law is much stricter than contract law, ordinarily not allowing for mistakes or even misrepresentations, because of an overriding purpose of preventing discrimination. However, the Conference's and respondent's argument that the Commission ought to reverse its present views on the law because of alleged harm to carriers and departure from contract law is a policy matter for the Commission to decide.
- (4) Complainant must submit a reparation statement under Rule 252, if this decision is adopted by the Commission, so that the total amount of reparation to be awarded can be determined.

*Daniel L. Goldberg*, for complainant Sanrio Company, Ltd.

*R. Frederic Fisher*, for respondent Maersk Line.

*Charles F. Warren and George A. Quadrino*, for intervenor Trans-Pacific Freight Conference of Japan/Korea.

INITIAL DECISION<sup>1</sup> OF NORMAN D. KLINE,  
ADMINISTRATIVE LAW JUDGE*Adopted September 5, 1980*

This is a complaint proceeding which began with the filing of a complaint by a claimant known as Sanrio, Inc. which, on April 20, 1979, had filed with the Commission's Secretary a complaint under the Commission's informal settlement procedures contained in Subpart S, 46 C.F.R. 502.301 to 304. In this complaint, Sanrio, Inc., an importer located in Foster City, California, had alleged that respondent Maersk Line, a member of the Trans-Pacific Freight Conference of Japan/Korea, had overcharged Sanrio on some 42 different articles imported from Japan moving under three separate bills of lading, two of which bore dates inserted as November 3, 1977, and the final one, December 29, 1977. All of the bills of lading were stamped "Freight Prepaid." Most of the allegedly overcharged commodities moved under the first two bills of lading on the vessel ANDERS MAERSK on Voyage 7710 out of Tokyo. The last shipment moved on the vessel ALBERT MAERSK on Voyage 7802 out of the same port.

Before filing the complaint, three claims for the alleged overcharges were presented to Maersk by an entity known as "Traffic Associates" on behalf of Sanrio, Inc., the Importer. These claims were broken down to correspond to the shipments on each of the three bills of lading and were designated as "Claim SA-81," "Claim SA-82," and "Claim SA-83." They were submitted to Maersk by letter dated December 5, 1978. Together with the claim letter, Traffic Associates furnished Maersk with ocean bills of lading, invoices, packing slips, and worksheets. Maersk had also been furnished with the Sanrio, Inc., catalog and specific information on the packing slips showing the tariff items which Sanrio believed should have been applied instead of the rate actually assessed. Traffic Associates did indicate in their transmittal letter that although they believed that some of the products should have been rated under the tariff's toy rate rather than the stationery rate, they had been conservative and requested the carrier's opinion as to the correct rate. (See Exhibit A-3.)

On January 5, 1979, Maersk Line declined the claims on the ground that Rule 59 of the Conference tariff required claimants to submit claims seeking adjustment of freight charges because of alleged errors in description, weight and/or measurement in writing before the shipment involved had left the custody of the carrier. (Ex. A-4.) Thereafter, in April, as noted above, the claims were filed with the Commission under the Commission's informal procedures. As provided by the Com-

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<sup>1</sup> This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 318, Rules of Practice and Procedure, 46 C.F.R. 502.318).

mission's regulations, the claims were assigned to a Settlement Officer, were docketed as Informal Docket No. 681(I), and were served on Maersk. (See service letter of July 9, 1979.) On July 23, 1979, Maersk requested that the case be handled under the formal procedure set forth in Subpart T, 46 C.F.R. 502.311 to 321 and stated that it would need additional time to locate a number of documents in Tokyo and that claimant had not submitted readable copies of complete bills of lading so that the carrier's task could be accomplished. Thereafter, in September 1979, the case was transferred to the formal procedures and began to be processed accordingly.

Upon assignment to me, I examined the file and determined that there were basic jurisdictional problems which required immediate attention. The main problem concerned the question of Sanrio's standing to seek reparation. Since the shipping documents indicated that it was the Japanese shipper, Sanrio Company, Ltd., and not the importer, Sanrio, Inc., which had paid the freight, it appeared, according to pertinent case law, that the nominal complainant, Sanrio, Inc., had no standing to seek recovery of the alleged overcharges unless it obtained an assignment of the various claims. I therefore instructed Sanrio, Inc., to clarify its status. (See Order to Complainant to Show Standing to Seek Reparation, September 28, 1979.) I also instructed respondent to file its answer, which had not been done, although the complaint had been served on July 9, 1979, within 10 days after service of my ruling concerning the question of standing. (See Order to Respondent to File Answer, September 28, 1979.)

In response to the above rulings, Mr. Daniel L. Goldberg of Traffic Associates, a registered F.M.C. practitioner representing Sanrio, Inc., advised me that he would substitute the Japanese shipper, Sanrio Company, Ltd., for the importer, Sanrio, Inc., and that he would furnish evidence that he was authorized to represent the Japanese shipper in this matter. An amended complaint substituting Sanrio Company, Ltd., for Sanrio, Inc., was filed on October 19, 1979, and thereafter served on Maersk.<sup>2</sup> Maersk retained counsel for the first time, who requested additional time to file a comprehensive and informative answer to the complaint. The request was granted and the answer together with detailed accompanying materials dealing with each of the 42 products was filed (mailed) on November 16, 1979. Thereafter, on December 4, 1979, complainant Sanrio Company, Ltd., through Mr. Goldberg, mailed its Reply Memorandum in Answer to Respondent, as permitted

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<sup>2</sup> I had cautioned complainant to consider that the two-year statute of limitation in section 22 of the Shipping Act might bar an assignment or amended complaint unless such complaint were filed promptly. (See Order to Complainant, cited above, page 6, note 2.) Since the amended complaint was filed on October 19, 1979, it fell within the two-year period which had begun on or about November and December 1977.

under Rule 313, 46 C.F.R. 502.313. These pleadings are quite detailed and deal with each of the 42 items in question.

#### THE NATURE OF THE ISSUES

As noted above, the claims in this case have been classified into three shipments according to the three separate bills of lading. In each of the three claims, designated as "SA-81," "SA-82," and "SA-83," complainant has identified the product by the Sanrio catalog number and has furnished various materials, including invoices, packing lists, the Sanrio catalog, actual specimens of some of the products, pictures from the sales manual, a statement in a letter from a distribution manager employed by Sanrio, Inc., consumption entries, and arrival notices. A general survey of the Sanrio catalog as well as the accompanying materials indicates that Sanrio Company, Ltd., appears to manufacture or sell a variety of relatively small, inexpensive products designed primarily for children, and according to the complainant, for children aged 7 to 12. (See Reply Memorandum by Complainant in Answer to Respondent, p. 3.) Thus, Sanrio's present catalog (Ex. A-28) shows a variety of products classified under the following headings: "Kitchen and Dining Ware, Toiletries and Grooming Aids, Beauty Items, Personal Accessories, Items for Room Decor, Mascots and Miniatures, Dolls, Bags, School Supplies and Stationery, Origami Gift Books, and The Strawberry." The invoices for the three shipments show that the products consisted of a number of different items such as "Paper Clips, Box Eraser, Pencil Sharpener, Dear Diary, Mini Seal, Pack Memo, Petite Elegance, Mini Stamp Set, Vanity Set, Bath Kit, Tiny Clip Board, Phone Pal, Doll Pencil, Friendly Message, Coin Purse, Mini Sketching Set, Hankie Set, Towel Hanger, Strawberry Newspaper, Adhesive Tape, Barrette, Scissors, Key Chain Phone Book, Happy Tooth Brush, Little Mascot, Charming Holder, and Ponytail Holder." (See list of these descriptions shown in the complaint, page 3, line 22 to page 5, line 3.)

On the first two shipments, (Claims "SA-81" and "SA-82") Maersk rated the items as "General Merchandise" which was the description on the bills of lading for each shipment. The rate for this description was the Cargo N.O.S. rate (Item 9999-00) of the Conference's tariff. The last shipment (Claim "SA-83") was rated under various tariff items for "toys," "scissors," "stationery," "general merchandise," and "brush." (See Ex. A-22.) It is not quite correct to allege, as complainant does, that the "entire shipment was rated under Item 9999-00, 'Cargo's NOS,' of the tariff" unless only the first two shipments are meant. Complainant alleges that its products should have been rated under the Conference's Tariff Items for Travel Kits, Stationery, Toys, Plastic Mfgs. and not as Cargo NOS, and it disputes Maersk's use of tariff items which were assessed against the third shipment.

Maersk has checked each of the items which Sanrio now identifies specifically from its catalog as products other than general merchandise shown on the first two bills of lading or than the items listed in the third bill of lading. In the majority of instances, Maersk appears to agree with Sanrio, assuming the evidence to be determinative, on the rate that should have been applied. (See Answer to Complaint, pp. 3-8.)<sup>3</sup> However, on 18 of the products identified by Sanrio, Maersk disagrees with Sanrio's contentions that they were incorrectly rated even if the evidence shows the items to be what Sanrio claims them to be. In almost all of these disputes (15), Sanrio claims the products are "toys" and should be rated as such while Maersk claims they were not "toys" and should be rated as "stationery," "Cargo NOS." "Bags, Baskets, & Luggage." or "Artist's Materials."<sup>4</sup> In the other three instances, Sanrio claims the products to be "Stationery," "Travel Kit," and "Paper Mfg. (Mixed Shipment)." On these last three products, Maersk claims the proper tariff rate to be "Cargo NOS." Obviously the definition of a "toy" for tariff rating purposes is critical to this case since it will decide 15 of the 18 outstanding disputes. However, before resolving these disputes, it is necessary to clear away a number of ancillary issues dividing the parties.

Complainant asserts that respondent was provided with invoices and packing lists so that it could rate the products properly. Respondent denies that this is so except for the last shipment where respondent rated the products as items other than general merchandise (i.e., Cargo NOS) in its tariff. Respondent also asserts that it rated the products on the basis of what the shipper had represented to it according to "shipper's load and count" and that it had minimal opportunity to confirm the shipper's representations without breaking into the sealed containers, the shipments having all moved "house to house," i.e., between containeryards in sealed containers. Respondent also calls upon complainant to furnish "import declarations" prepared for the U.S. Custom's Service and denies the probative value of documents passing between one Sanrio affiliate and another, i.e., between Sanrio in Japan and its affiliate in the United States because they were not subject to "outside verification." Respondent contends that the Commission is being asked to accept complainant's "revised" representations as to

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<sup>3</sup> Maersk does not admit that it improperly rated any of the products and states in its answer that it denies that any of the products were something other than what was indicated on the bills of lading. However, in agreeing that if the products were in fact what Sanrio now claims them to be, the majority of the products would take the tariff classifications which Sanrio seeks, Maersk seems to be saying that Sanrio would be entitled to reparation if the evidence supported Sanrio. In each instance of this halfway agreement by Maersk, Sanrio has presented evidence showing what the product specifically was, usually tracing it to the catalog.

<sup>4</sup> For ready reference, these 15 commodities which Sanrio claims to be "toys" while Maersk claims them mostly to be "stationery" but sometimes other things for tariff rating purposes, are listed in Brief of Respondent Maersk Line in Support of Answer to Complaint, page 5, note 5.



what it in fact shipped nearly two years ago. Respondent summarizes its position by stating:

As matters presently stand, complainant has failed to meet its heavy burden of proof in establishing that the nature of the goods shipped was different than indicated on the bills of lading. This is so because: (1) the bills of lading were based upon complainant's representations; (2) complainant did not contradict these representations when the bills of lading were issued or at any time when the goods were in respondent's custody; (3) complaint's supporting documentation is entirely internal in nature, not subject to verification by outside parties; and (4) complainant has omitted information of great evidentiary weight, in the form of customs declarations, from its complaint. (Brief of Respondent Maersk Line in Support of Answer to Complaint, pp. 4, 5.)

#### DISCUSSION AND CONCLUSIONS

The basic principle of law which has governed overcharge cases arising under section 18(b)(3) remains essentially what the Commission held in the leading case of *Western Publishing Company v. Hapag-Lloyd A.G.*, Docket No. 283(I), May 4, 1972, 13 S.R.R. 16. In that case, interestingly also involving a claim that part of the shipment should have been rated as "toys," the Commission dealt with the contention that the shipper should have been held to what he had described on the bill of lading, that the carrier had relied on the shipper's description in the bill of lading, that the carrier might have special problems in defending itself once the goods had left its custody, and that the evidence relied upon by complainant consisted essentially of commercial invoices and packing lists. In dealing with all of these problems the Commission stated:

Furthermore, we have recently taken the approach that the description on the bill of lading should not be the single controlling factor in cases of this nature. Rather, the test is what claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description. In rating a shipment the carrier is not bound by shipper's misdescription appearing on the bill of lading. Likewise, claimant is not bound at least where the misdescription results from shipper's unintentional mistake or inadvertence. 13 S.R.R. at 16-17.

Having freed the shipper from his own misdescription of the goods which he or his forwarder had placed on the bill of lading and having allowed the shipper to show what actually moved notwithstanding bill of lading descriptions, the Commission appeared to soften the blow on the carriers who no longer had custody of the goods and could not verify the shipper's claims by actual examination of the goods by

establishing a "heavy" burden of proof on the shipper. In this regard the Commission stated:

But where the shipment has left the custody of the carrier and the carrier is thereby prevented from personally verifying claimant's contentions, the claimant has a heavy ultimate burden of proof to establish his claim. 13 S.R.R. at 17.

The statements quoted have remained essentially unchanged since that time and continue to govern cases of this nature. However, the Commission has, in later decisions, clarified the meaning of the *Western Publishing* decision in certain significant respects. Thus, while repeating the doctrine that the shipper is entitled to prove what actually moved based upon all the evidence notwithstanding descriptions in bills of lading, the Commission has adopted language showing that this means that the shipper "must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim." See *Merck Sharp & Dohme v. Atlantic Lines*, 17 F.M.C. 244, 245 (1973) and the cases cited therein; *Sun Co. v. Lykes Bros.*, 20 F.M.C. 68, 70 (1977); Informal Docket No. 387(I), *Pan American Health Organization v. Moore-McCormick Lines, Inc.*, 22 F.M.C. 98, 99-100 (1979). The decision is issued furthermore after consideration of "all the evidence of record with no single document or piece of evidence necessarily being controlling." *Kraft Foods v. Moore McCormick Lines, Inc.*, 19 F.M.C. 407, 410 (1976).

The fact that the Commission has frequently stated that the complainant has a "heavy burden of proof" in these cases has required some clarification. In an earlier case in which the presiding officer had believed the standard of proof to be "beyond a reasonable doubt," the Commission expressly disavowed such a test. See *Johnson & Johnson International v. Venezuelan Lines*, 16 F.M.C. 84, 85 (1973). Such a test, of course, applies in criminal proceedings. In traditional proceedings before courts there have been recognized three different degrees of the burden of proof. These are, in ascending order of difficulty: preponderance of the evidence, clear and convincing, and beyond a reasonable doubt. See McCormick, *Evidence* (2d Ed. 1972) § 339 p. 793. The normal burden of proof in most civil cases is "preponderance of the evidence." *Id.* Similarly, in administrative proceedings, the usual standard is that of "preponderance of the evidence." *Sea Island Broadcasting Corporation of S.C. v. F.C.C.*, 627 F.2d 240 (D.C. Cir. 1980); McCormick, *op. cit.*, § 355, p. 853; *Ollin Construction Co. v. OSHRC*, 525 F.2d 464 (2d Cir. 1975). As the court stated in the *Sea Island* case:

The use of the "preponderance of evidence standard" is the traditional standard in civil and administrative proceedings. It is the one contemplated by the APA, 5 U.S.C. 556(d). (Footnote citation omitted) 627 F.2d at 243.

Whenever an agency has been told to use a stricter standard of proof, i.e., "clear and convincing" evidence, this has been done because of a particularly valuable or vital interest involved such as deportation of a person or revocation of a valuable license upon which a person may depend for his living. See *Sea Island Broadcasting Corporation v. F.C.C.*, 627 F.2d at 243; *Collins Security Corp. v. SEC*, 562 F.2d 823 (D.C. Cir. 1977). Likewise, the higher standard of proof has been held to be applicable in certain types of extraordinary civil cases involving such things as fraud, establishment of the terms of a lost will, proceedings to set aside written transactions, etc. McCormick, *op. cit.*, § 355; § 340, pp. 796-797.

In recent cases the Commission has explained its use of the term "heavy burden of proof." That term, which has no counterpart in the courts or administrative law, as far as I am aware, has been explained by the Commission to refer to the fact that the claimant will have difficulty in proving its case after much time has elapsed after the shipment because of the difficulty of obtaining evidence. Furthermore, the Commission has also indicated that the usual standard of preponderance of the evidence is to be followed in cases of this kind notwithstanding the continual reiteration of the phrase "heavy burden of proof." Thus in Informal Docket No. 387(I), *Pan American Health Organization v. Moore McCormick Lines, Inc.*, the Commission was asked by a reviewing Court of Appeals to explain what standard of proof it required of complainants in this type of case. The Commission responded as follows:

With respect to the burden of proof, although the shipper is conclusively presumed to have knowledge of the carrier's tariff (citation omitted) the Commission has recognized that bona fide errors may occur in the preparation of shipping documents and a complainant seeking reparation under section 22 of the Shipping Act, 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.* (Citation omitted.) 22 F.M.C. at 99-100. (Emphasis added.)

The Commission furthermore explained the term "heavy burden" of proof as follows:

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. (Citing *Western Publishing.*) *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. 22 F.M.C. at 100, n. 9. (Emphasis added.)<sup>5</sup>

The Commission repeated its holding that these cases are to be decided on a preponderance of the evidence and that the term "heavy burden of proof" merely referred to the difficulty in obtaining evidence shortly after the report in *Pan American Health Organization*, quoted above. In Docket Nos. 78-24 and 78-25, *Pacific Freight Audit, Inc. v. American President Lines, Sea-Land Service, Inc. and American President Lines' Ltd.*, 22 F.M.C. 207, 209 (1979), the Commission stated:

One final matter needs to be addressed. In his Initial Decision, the Presiding Officer advised that the Complainant in these cases bore a "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* . . . There the Commission explained that references in carrier 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."

The Commission has indicated in other cases that such decisions are based upon a weighing of the evidence in such a way as to suggest that it has been using a preponderance of the evidence test even when it has not specifically said so. See, e.g., *European Trade Specialists v. Prudential-Grace Lines*, 21 F.M.C. 888, 891 (1979) ("official notice . . . contravenes the weight of the record evidence."); Docket No. 78-27, *Merck Sharp & Dohme International v. "K" Line*, 22 F.M.C. 396, 399 (1979) ("We conclude that these findings [of the Presiding Officer] are contrary to the weight of the record evidence.").

The Commission has also established that it is of no consequence whether the shipper should have been more careful in filling out the commodity descriptions in the bill of lading, although acknowledging that a carrier has a right to expect the shipper to fill in the bills of lading correctly.<sup>6</sup> Furthermore, even if the carrier relies on the erroneous information prepared by the carrier and is not expected to check export declarations or other shipping documents when rating the shipment, as it has not been required to do,<sup>7</sup> the Commission has found

<sup>5</sup> The Court of Appeals has recently affirmed the Commission's Report on Remand. See P.A.H.O. v. F.M.C., No. 78-1690, "Judgment," February 22, 1980.

<sup>6</sup> *United States of America v. Farrell Lines, Inc.*, 16 F.M.C. 42, 48 (1972); *Ocean Freight Consultants, Inc. v. Itaipacific Line*, 15 F.M.C. 314, 319 (1972); *Sun Co. v. Lykes Bros.*, 20 F.M.C. 67, 70 (1977); *Carborundum Co. v. Royal Netherlands Steamship Co.*, 19 F.M.C. 431, 435 (1977).

<sup>7</sup> *Royal Netherlands Steamship Co. v. FMB*, 304 F.2d 938, 4 S.R.R. 20,276, 20,281 (D.C. Cir. 1962).

violations of section 18(b)(3) and has awarded reparation. In other words, the lack of equities on the part of the shipper has not prevented the shipper from receiving a reparation award and the carrier is held to a standard of absolute liability, i.e., liability without fault, under section 18(b)(3).<sup>8</sup> Thus, in *Union Carbide Inter-America v. Venezuelan Line*, 17 F.M.C. 181 (1973), *Abbott Laboratories v. Alcoa Steamship Company*, 18 F.M.C. 376 (1975), and *Carborundum Co. v. Royal Netherlands Steamship Co.*, 19 F.M.C. 431 (1977), the Commission held that equities were irrelevant in cases of this kind. In *Union Carbide Inter-America v. Venezuelan Line*, the Presiding Examiner had denied a claim because of the lack of equities on the part of the shipper and because of failure to meet the standard of proof which he believed to be "beyond a reasonable doubt." 17 F.M.C. at 185. He found that it would have been inequitable to award reparation to the shipper, "a large corporation, engaged in marketing products as to which the exact technical description is known to it," who "furnished the carrier with a description which was applicable to an item set forth in the tariff." Furthermore, the Examiner found the carrier to have acted without fault, stating that "[i]nsofar as may be determined, the carrier had no reason to doubt the veracity of that description. That carrier was without fault. Complainant was solely responsible for the error, if an error was made . . . ." *Id.* The Commission, however, totally rejected the Examiner's equity theory although stating that "we are not without sympathy for the carrier . . . 17 F.M.C. at 181. The Commission felt that the carrier was not entitled to retain an overcharge because it was required to adhere to the rate specified in its tariff. Hence, in the Commission's view, "[t]o permit the carrier to retain the overcharge would in fact provide the carrier a windfall." 17 F.M.C. at 182. The Commission reiterated its position that "what is actually shipped determines the rate to be applied" but stated that the equities would be considered in determining whether enforcement penalties should be sought against the carrier. *Id.*

In *Abbott Laboratories v. Alcoa Steamship Company*, the Commission found itself again unhappy with the shipper's careless practice in describing goods shipped on the bill of lading and in sympathy with the carrier who relied on the inaccurate descriptions. Nevertheless the Commission awarded reparation to the shipper expressing its belief that it had no equitable powers which, if it had, would have resulted in

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<sup>8</sup> Rates, Hong Kong-United States Trade, 11 F.M.C. 168, 178-179 (1967); *Union Carbide Inter-America v. Venezuelan Line*, 17 F.M.C. 181 (1973); *European Trade Specialists v. Prudential-Grace Lines*, 21 F.M.C. 888, 891 (1979); *Carborundum Co. v. Royal Netherlands Steamship Co.*, 19 F.M.C. 431, 435-436 (1977); *United States v. Pan American Mail Line, Inc.*, 359 F. Supp. 728, 734-735 (S.D.N.Y. 1972).

denial of the claim. 18 F.M.C. at 379.<sup>9</sup> A similar result occurred in *Carborundum Co. v. Royal Netherlands Steamship Co.*

To recapitulate, the present status of the case law governing overcharge claims filed under section 18(b)(3) is that the complainant is entitled to show what was actually shipped notwithstanding descriptions which the shipper or its agent may have entered on a bill of lading and notwithstanding the fact that the shipper or his agent may have acted carelessly when filling in the bill of lading and that the shipper may not have relied upon a lower rate before shipping the goods. Where the shipment has left the custody of the carrier, the shipper may have problems in obtaining evidence but the shipper must nevertheless set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim. The Commission will decide the case on the basis of a preponderance of the evidence after consideration of all the evidence of record with no single document or piece of evidence necessarily controlling. This statement disposes of respondent's first two contentions set forth in its Brief regarding complainant's erroneously described bills of lading and alleged misrepresentations relating thereto. There remain questions concerning the type of evidence which complainant has submitted and which respondent disputes as lacking credibility.

#### THE TYPE OF EVIDENCE CUSTOMARILY UTILIZED

A survey of overcharge cases reveals that the Commission has relied upon various types of evidence in determining the nature of the commodity involved. Such things as commercial invoices, packing lists, export declarations, sales literature, dictionary definitions, letters, actual samples, as well as oral expert testimony have all played a role in one case or another. See Rules 304(a); 311 to 313 (46 C.F.R. 502.304(a); 502.311 to 502.313). In the case which first enunciated the doctrine allowing the shipper to prove what actually moved notwithstanding bill of lading descriptions, *Western Publishing Company v. Hapag-Lloyd A.G.*, the evidence of record consisted only of commercial invoices and packing slips. (See 13 S.R.R. at 17.) In *Abbott Laboratories v. Alcoa*

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<sup>9</sup> Notwithstanding this belief that the Commission must grant reparation to shippers whenever a violation of section 18(b)(3) is found regardless of equities, the Commission has in one case denied reparation precisely because its sense of equity had been offended even though a violation of section 18(b)(3) had occurred. In *United States of America v. Columbia Steamship Company, Inc.*, 17 F.M.C. 8 (1973), the shipper, who was the United States Government, sought to recover an overcharge on a shipment of unboxed trucks. The carrier had charged a rate above that published in its tariff and had therefore violated section 18(b)(3). However, because the Government had negotiated that higher rate with the carrier prior to shipment and had expected to pay it, the Commission refused to allow the shipper to renege on its agreement although the carrier had failed to file the agreed-upon rate. The Commission held that relief under section 22 "is discretionary and permissive, and the mere fact that a violation of the Act has been found 'does not in itself compel a grant of reparation.'" 17 F.M.C. at 9, 10. To award the shipper reparation in that case, according to the Commission, would be to grant it a "windfall which it neither anticipated nor bargained for." 17 F.M.C. at 10.

*Steamship Company*, the evidence was limited to the same two documents plus an export declaration. (See 18 F.M.C. at 377.) In *Union Carbide v. Venezuelan Line*, 17 F.M.C. 181, the only evidence of record was an invoice and a letter. (17 F.M.C. at 185.) Moreover, in reversing the Examiner and awarding the claim, the Commission relied upon the invoice alone. (17 F.M.C. at 182.)

In *European Trade Specialists v. Prudential-Grace Lines*, the record included oral testimony, actual samples, and dictionary definitions, although the latter were characterized as being useful for purposes of aiding memory and understanding rather than as evidence in the strict sense. 21 F.M.C. at 891.<sup>10</sup> In Docket No. 78-27, *Merck Sharp & Dohme International v. Kawasaki Kisen Kaisha, Ltd.*, the critical evidence on which the case turned was complainant's sales literature which showed the purpose of the commodities in question which were found to be pharmaceuticals rather than animal feed. 22 F.M.C. at 399. In *Kraft Foods v. Moore McCormick Lines*, cited above, 19 F.M.C. 407, a case in which the issue concerned measurement of the commodity shipped, the evidence included a sales invoice, bill of lading, dock receipt, and a sales brochure price list. 19 F.M.C. at 410.

In Docket No. 78-2, *Organic Chemicals (Glidden-Durkee) Division of SCM Corporation v. Atlantrafik Express Service*, 21 F.M.C. 1082 (1979), the evidence used to prove the measurement of drums which had been shipped but which were no longer available was entirely indirect, consisting of evidence of standard drum measurements of the type involved in the shipment and affidavits based on random sampling indicating that the drums that were shipped conformed to the standard. Thus, indirect evidence consisting of hearsay has been used to determine what was actually shipped and the Commission has utilized such evidence to draw reasonable inferences although the product shipped was incapable of being retrieved for remeasurement.

In accepting documents, affidavits, sales literature, letters, etc., in cases of this kind, the Commission has obviously not followed the strict rules of evidence observed by the courts. This approach is entirely consistent with administrative law in which it has long been held that the strict rules pertaining to courts should not apply to the more informal administrative process. As early as 1934, this Commission's predecessor recognized "that a regulatory body . . . ought not to be hampered in its proceedings by the hard and fast rules as to pleading and practice which govern courts of law" and "that even when acting in a quasi-judicial capacity the strict rules which prevail in suits between private parties do not apply, and that inquiries should not be too

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<sup>10</sup> But in Informal Docket No. 653(I), *J. T. Baker Chemical Company v. Yamashita-Shinnihon Line*, 22 F.M.C. 553 (1980), the Commission relied heavily on dictionary definitions without limiting their evidentiary value.

narrowly constrained by technicalities . . . .” *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B. 308, 311 (1934). This Commission has continued to follow the principle established in the Administrative Procedure Act and by case law that “[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.” APA, 5 U.S.C. 556(d); Rule 156, 46 C.F.R. 502.156 (“In any proceeding under the rules in this part, all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative shall be admissible.”). In keeping with current views of administrative law, furthermore, the Commission has decided cases involving serious matters such as rebating and approval of pooling agreements under section 15 of the Act in reliance upon hearsay even if that hearsay has been uncorroborated by direct evidence. *See, e.g., Malpractices-Brazil/United States Trade*, 15 F.M.C. 55 (1971), relying upon *Richardson v. Perales*, 402 U.S. 389 (1971); Docket No. 77-43, *Agreement No. 10286*, 21 F.M.C. 676, 679 (1979). *See also, Unapproved Sect. 15 Agreements-S.African Trade*, 7 F.M.C. 159, 167-170; 178-184 (1962). In the last case cited, the Commission found that internal correspondence culled from the files of the parties was admissible and reliable. Furthermore, contrary to respondent’s contentions in this case, the fact that the documents were intra-company correspondence did not detract from their probative value. The Commission specifically found that “in our view this enhanced rather than detracted from their evidentiary value because the communications contained completely candid utterances bearing directly on the subject of the inquiry.” 7 F.M.C. at 183. In that case, furthermore, the Commission emphasized the principle that its proceedings were not governed by strict technical rules of evidence observed in the courts (7 F.M.C. at 167-168) citing the Administrative Procedure Act and numerous cases. One reason for this principle “is that administrative agencies, unlike the lay juries for whom the exclusionary rules were meant, are presumed competent to judge the weight that should be given evidence.” 7 F.M.C. at 167. For that reason, too, Maersk’s comments that certain affidavits submitted by Sanrio’s Distribution Manager are “self-serving post hoc affidavits of complainant’s employees (such as Exhibit A-31) . . . of no value” (Brief of Maersk, page 9, n. 9) are not quite correct. As the Commission stated in *Unapproved Sect. 15 Agt.-Coal to Japan, Korea*, 7 F.M.C. 295, 302 (1962):

Testimony does not become sacrosanct when uncontradicted nor is self-serving testimony automatically to be discredited. These are but factors to be considered in determining the validity and probative value of the testimony and the inferences that may properly be drawn therefrom in light of all the evidence.



As a final matter, respondent has contended that Sanrio should have furnished verification of its claims in the form of "import declarations made to United States Customs in connection with these shipments." (Brief of Respondent Maersk Line in Support of Answer to Complaint, p. 4). Maersk states that these declarations are entitled to great evidentiary weight according to the Commission's decision in *Chevron Chemical Co. v. Mitsui O.S.K. Lines, Ltd.*, 20 F.M.C. 216, 217 (1977). In *Chevron*, the document in question was an export declaration since the shipment moved in the export not import trade, unlike the present case. In the case of imports, the pertinent document is a "consumption entry" which is prepared by a customhouse broker for the purpose of paying the proper customs tariff duty. See *Equality Plastics, Inc. et al.*, 17 F.M.C. 217, 227-228 (1973). In its reply pleading in this case, Sanrio did furnish the consumption entry prepared by the broker, W.J. Brynes & Co. (See Reply Memorandum by Complainant in Answer to Respondent.) As the Commission noted in *Equality Plastics*, however, these entries are prepared for purposes other than conformance to ocean carriers' tariffs and do not necessarily show the contents of shipments for tariff-rating purposes. 17 F.M.C. at 227. The Commission stated that "ocean carrier tariffs have no real relationship to the TSUS [the Tariff Schedule of the U.S.]" and that "consumption entries are not prepared based on knowledge of the actual contents of the shipments." *Id.* Indeed, although the broker had not used the TSUS entry for "toys" in connection with the products shipped in that case but had used another customs item under "electrical machinery and equipment," the Commission nevertheless found that one of the products, a battery-operated drink mixer, was a "toy" for ocean tariff rating purposes. *Id.* Even in the *Chevron* case, cited by Maersk, the Commission indicated in a later ruling that it considered export declarations only as part of the entire body of evidence since it was the Commission's "well established policy of considering any type of evidence by which a shipper may show the true nature of his cargo." *Chevron Chemical Co. v. Mitsui O.S.K.*, 20 F.M.C. 216, 218 (1977).

#### THE PRODUCTS WHICH WERE SHIPPED

An analysis of the complaint and answer reveals that there were 42 separate products which were involved in the three claims ("SA-81," "SA-82," and "SA-83") which constitute the substance of the complaint. Of the 42 products, it appears that 24 concern products as to which Maersk agrees with Sanrio regarding the proper tariff classification provided Sanrio's evidence identifying the products is reliable and probative. Of the remaining 18 products, Maersk disagrees with Sanrio as to the proper tariff classification even if Sanrio's evidence identifying them is to be believed. Of these 18, 15 products are claimed by Sanrio to be ratable as "toys" whereas Maersk claims they should be rated as

"stationery" for the most part. Finally, there are three products remaining which Sanrio claims to be ratable as "stationery," "travel kit," and "paper manufactures" but which Maersk claims to be ratable under different tariff items, again assuming the evidence identifying them is to be believed.

The first category of 24 products is shown in the following table identified by catalog numbers and by the tariff commodity description which both Sanrio and Maersk agree would apply if Sanrio's evidence is considered to be sufficiently reliable and probative.

**24 Commodities as to Which Parties Agree as to Proper Tariff  
Classification if the Evidence is Sufficient**

<i>Old Catalog No.</i>	<i>Commodity</i>	<i>New Catalog No.</i>	<i>Agreed Tariff Item</i>
C/No. 3024/14-19	Box Eraser		Stationery (Item 5820-10)
C/No. 3040/1-20	Pencil Sharpener		Stationery (Item 5820-10)
C/No. 3041/1-10	Pencil Sharpener		Stationery (Item 5820-10)
C/No. 2010/1-14	Mini Seal		Toy (Item 6020-00)
C/No. 2011/1-20	Mini Seal		Toy (Item 6020-00)
C/No. 2012/1-20	Mini Seal		Toy (Item 6020-00)
C/No. 2013/1-20	Mini Seal		Toy (Item 6020-00)
C/No. 2018/1-17	Petite Elegance		Personal Ornament (Item 6260-15)
C/No. 2019/1-17	Petite Elegance		Personal Ornament (Item 6260-15)
C/No. 1010/1-88	Vanity Set	A-211-1	Plastic Manufactures (Item 9460-00)
C/No. 1011/1-2	Vanity Set	A-211-2	Plastic Manufactures (Item 9460-00)
C/No. 3020/1-50	Doll Pencil		Novelty Pencil (Item 6020-00)
C/No. 1029/35-75	Towel Hanger	A-109-1	Towel Bar (Item 4360-00)
C/No. 1-2	Cart		Cart (Item 5420-00)
C/No. 1-25	Strawberry Newspaper		Printed Matter under \$1200 (Item 5760-05)
C/No. 6-8	Adhesive Tape		Tape (Item 6560-00)
C/No. 1014/1-10	Barrette	A-213-1	Hair Clip (Item 6400-00)

24 Commodities as to Which Parties Agree as to Proper Tariff Classification if the Evidence is Sufficient—Continued

<i>Old Catalog No.</i>	<i>Commodity</i>	<i>New Catalog No.</i>	<i>Agreed Tariff Item</i>
C/No. 1016/1-20	Scissors	A-310-1	Stationery (Item 5820-10)
C/No. 1010/1-65	Vanity Set	A-211-1	Plastic Manufactures (Item 9640-00)
C/No. 1011/1-85	Vanity Set	A-211-2	Plastic Manufactures (Item 9640-00)
C/No. 1018/1-30	Happy Tooth Brush	A-106-1	Brushes under \$1000 (Item 5940-05)
C/No. 1019/1-50	Happy Tooth Brush	A-106-2	Brushes under \$1000 (Item 5940-05)
No. 2001/1-20	Little Mascot		Ceramicware (Item 1320-00)
C/No. 1003/1-26	Ponytail Holder		Plastic Manufactures (Item 9640-00)

There appears to be little reason to linger over these 24 products. Sanrio has submitted evidence consisting of pictures, specimens, packing lists, and invoices which identify these products. Most of these products were rated as "Cargo N.O.S." because of the fact that the shipper or the forwarder provided no specific descriptions in the first two bills of lading by which the Maersk's rating clerk could have selected the proper tariff item. Maersk apparently now recognizes that specific tariff items would have been applicable had the specific descriptions been entered although Maersk does not concede that Sanrio's evidence is adequate to carry its "heavy burden of proof." I have already discussed the fact that the Commission has invariably relied upon just the type of evidence which Sanrio has produced to determine whether the commodity can be reasonably found to be included in the tariff commodity description, e.g., sales literature, invoices, packing lists, actual samples, pictures.

Most of the products in the above table are identifiable by their names alone. For example, the box eraser, pencil sharpener, mini seal, doll pencil, towel hanger, cart, Strawberry Newspaper, adhesive tape, barrette, happy tooth brush, and ponytail holder are erasers, pencil sharpeners, seals, pencils, hangers, carts, newspapers, tape, etc. The invoice, packing list, and catalog give additional description to these items. For example, the box eraser which Maersk agrees would be rated as "stationery" is shown on the invoice (Ex. A-8) and the packing list (Ex. A-11) which state that 720 of them were shipped. In the new catalog, box erasers are shown under "School Supplies and Stationery." (See Ex. A-28, p. 42.) The other products are also listed on the invoice

and packing list, in most instances, and pictures or samples are provided. In some instances the name of the product is not self-explanatory but the packing list, invoice, catalog, pictures, or actual samples are provided which show what these products really are. For example, the "Petite Elegance" is a "pendant" made of glass and metal according to the invoice (Ex. A-9). Pictures of this product are shown on Exhibit A-40. It appears indeed to be a "personal ornament" as both Sanrio and Maersk seem to agree it should be rated. The "Vanity Set" is also not self-descriptive. However, the invoice describes it as a "(Book Shaped Mirror & Comb Set) Plastic 80%, Mirror 20%." (Ex. A-9 Sanrio's later catalog shows a picture of a "Vanity Set K/T" which corroborates the invoice description of the earlier catalog set. (See Ex. A-28, p. 14.) Both Sanrio and Maersk agree that the set would be rated as "plastic manufactures." Both the packing list and invoice show several thousand pieces of "Mini Seal." (See Exs. A-8, A-9, A-11, A-12.) A picture of the "Mini Seal" is shown on Exhibit A-40. They appear to be tiny images of children, bicycles, pistols, buckets, of no great value with no serious function or use. Both parties would rate them as "toys." The pencil sharpener is listed on the packing list and invoice (Exs. A-11 and A-8) and a picture of a Sanrio pencil sharpener is shown in the later catalog (Ex. A-28, p. 45) under "School Supplies and Stationery." Both Sanrio and Maersk would rate this product as "stationery." The doll pencil is identified on both packing list and invoice and a picture and actual sample are provided. (See Exs. A-13, A-10, A-36, A-40) The evidence shows it to be a type of pencil with a kitty's head on the top and bright writing on the side. Both Sanrio and Maersk would rate it as a "novelty pencil." Similarly, the towel hanger, Strawberry Newspaper, adhesive tape, barrette, scissors, happy tooth brush, and ponytail holder are identified on the pertinent packing list and invoice, and in most instances the same or similar products can be seen in the catalogs (Exs. A-28, A-40). In other instances, e.g., the Cart, the product is described only on the packing list and invoice but the parties agree on the proper rate ("Cart") rather than "Cargo N.O.S" if the invoice and packing list are to be believed. Finally, the "little mascot" appears on the invoice for the third claim (SA-83) which identifies the product as "Ceramic 100%." (See Ex. A-24.) A picture of these little objects is shown on Exhibit A-40. Both Sanrio and Maersk would rate them as "ceramic-ware."

In summary, as regards the above 24 products, Sanrio has furnished evidence which is sufficient to indicate with reasonable definiteness that the products were not "Cargo N.O.S.," as most of them were rated, but were in fact specific commodities for which Maersk would in all probability have rated them under specific tariff commodity items had they been properly identified on the bills of lading. Although a picture of these products is not provided in every instance and sometimes only

a picture of the later Sanrio catalog item bearing the same or similar name is shown, the packing lists and invoice show what the products were with sufficient detail to permit rating them by a specific tariff commodity item. Indeed, now that Sanrio has provided the packing list and invoice and other evidence, Maersk has gone down the list of products and has rated them in agreement with Sanrio, insofar as these 24 products are concerned, although not conceding that the evidence is adequate. Even the product which is described by the least amount of evidence (the Cart, which is listed on the packing list and bill of invoice. Exs. A-15, A-16, and described as consisting of a cart body and iron handle with a price of \$46) is shown with reasonable definiteness to qualify for the tariff rate for "Carts." It will be recalled that in the very case which established the doctrine that the shipper could show what actually moved notwithstanding bill of lading descriptions, *Western Publishing Co. v. Hapag-Lloyd*, the only evidence describing the commodity consisted of the packing list, invoice, and the bill of lading.<sup>11</sup>

Since the evidence establishes what each of the above products was and both Sanrio and Maersk have agreed on the proper tariff rate which was not assessed because of inadequate bill of lading descriptions at the time of the shipments, the only reason to deny the claims on each of the above products would be on the basis that the evidence is not sufficient to establish the true nature of the commodity for rating purposes. However, as discussed above, this type of evidence has traditionally been relied upon by the Commission in deciding overcharge cases and the shipper is not held to a standard of proof requiring that his evidence show what the commodity was by "clear and convincing" evidence or "beyond a reasonable doubt." The requirement is only that the shipper prove the validity of the claim with reasonable certainty and definiteness by a preponderance of the evidence. As to the above 24 products, although I do not applaud Sanrio's careless habit of providing uninformative descriptions on bills of lading, I find that Sanrio has made the requisite showing and met the pertinent standard of proof. The more difficult issues in this case relate to the next two categories of products in which Maersk does not agree with Sanrio on the tariff commodity item that should apply. The first of these two categories concerns 15 products which Sanrio alleges to be ratable as "toys" and is now discussed.

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<sup>11</sup> Later cases, as discussed earlier, have established that the shipper may show what actually moved regardless of bill of lading description and have cited the *Western Publishing* case as the basis for this doctrine. It is interesting, however, to note that in *Western Publishing* the bill of lading did show the commodity shipped to be "pre-school puzzles" as well as "crayons" and the Commission accordingly found that the carrier should have rated that portion of the mixed shipment which consisted of puzzles as "toys" rather than "crayons." In *Western Publishing*, therefore, the shipper had provided an adequate description on the bill of lading.

### THE DISPUTES CONCERNING "TOYS"

The bulk of the really viable disputes involve Sanrio's contention that 15 commodities should have been rated as "toys" whereas Maersk claims that they should be rated under various tariff items, namely "stationery," "Bags, Baskets, & Luggage," or "Artist's Materials." A list of these 15 commodities is set forth below together with Sanrio's old and new catalog numbers where available, and Maersk's contentions:

#### *15 Commodities Which Sanrio Claims to be "Toys"*

<i>Old Catalog Number</i>	<i>Commodity</i>	<i>New Catalog Number</i>	<i>Maersk Claims They Are</i>
C/No. 3005/1-14	Paper Clips (Plastic)	B12-1	"stationery"
C/No. 3049/36-100	Dear Diary	D31-1	"stationery"
C/No. 3050/26-100	Dear Diary	D31-2	"stationery"
C/No. 3054/1-25	Pack Memo		"stationery"
C/No. 3055/1-25	Pack Memo		"stationery"
C/No. 3001/1-10	Tiny Clip Board	D52-1	"stationery"
C/No. 3002/1-3	Tiny Clip Board		"stationery"
C/No. 3011/1-17	Phone Pal		"stationery"
C/No. 4006/1-63	Friendly Message		"stationery"
C/No. 1004/1-8	Coin Purse	A311-1	"bags, baskets, & luggage"
C/No. 3009/18-84	Mini Sketching Set		"artist's materials"
C/No. 3010/14-84	Mini Sketching Set	D4-2	"artist's materials"
C/No. 4013	Key Chain Phone Book		*
C/No. 2015/1-7	Charming Holder (Key Holder)		*
C/No. 2017-18	Charming Holder (Key Holder)		*

\*Maersk does not state in its answer what it believes the proper rate to be.

Sanrio claims that all of the above products should be rated as "toys." It states that the Commission has ruled that in determining the essential character of an article, the starting point should be the shipper's catalog, sales efforts, common understanding of what is for sale, and samples of the commodities themselves, and believes that it has furnished evidence in these respects. Sanrio contends that its evidence shows that the articles are designed to appeal to children age 7 to 12 and that they are advertised in its magazine known as "The Strawberry" which is heavily oriented toward children and contains slogans such as "Kitty delivers your letters personally on her little tricycle" and "Little writing sets for hand deliveries." Sanrio asserts that it is unusual for children of the ages stated to keep diaries, write letters, or record phone numbers as a matter of habit and that the products are of such small size as to preclude any practical use for adults. (See Reply

Memorandum of Complainant.) Although Sanrio concedes that it does manufacture some articles included in its catalog as "School Supplies and Stationery" which may not be "toys" (Complaint, paragraph 3 L), nevertheless the bulk of its articles and those listed above, albeit in some instances educational, Sanrio contends are not intended or suitable for practical use, i.e., that they are not "fit and appropriate for the end in view." (*U.S. v. American & Paterson*, 9 Ct. Cust. App. 244, 245) (Complaint, paragraph 3 I). Sanrio states furthermore that "it is an unreasonable practice to make the shipper determine whether each toy might have some minuscule ulterior purpose outside its normal intended use." *Id.* To summarize, Sanrio contends that the products in question were manufactured and marketed for children as playthings and are not really suitable or intended for practical use. Furthermore, Sanrio believes that it has furnished the type of evidence which the Commission has relied upon in the past in determining validity of claims for overcharges. As to the reliability of invoices and packing lists sent from one Sanrio affiliate to another, which Maersk disputes because of lack of outside verification, Sanrio claims that these documents are entitled to belief because they are kept in the regular course of business and fall within Federal Rule of Evidence 803(6), 28 U.S.C.A., the court rule which permits admission into evidence of records kept by a business on a regular basis notwithstanding the fact that they are hearsay.

Maersk claims that Sanrio has failed to meet its "extremely heavy burden of proof" established under the *Western Publishing* case. Maersk contends that Sanrio has changed its story regarding the nature of the commodities from what Sanrio had described at the time of shipment and that it is relying upon in-house documents which are not subject to outside verification by evidence such as customs documentation. As to the nature of the products in question, Maersk contends that they are mainly stationery designed for use by children but that they have practical uses and are "clearly suitable for, and intended for, use" as stationery. (Brief of Maersk, at 7.) Maersk cites its tariff definition of "toys" and numerous cases in the field of customs law which hold that smaller articles which are really junior editions of articles used by adults, such as boxing gloves, baseball gloves, cheap musical instruments, cheap phonographs, and table croquet sets, have been held not properly classifiable as "toys" for customs purposes. Maersk states that Sanrio's own literature never uses the word "toys" but appears to be marketing junior editions of adult articles. Finally, Maersk seems to rely upon two things: (1) its belief that the articles in question can be actually used to perform a function which is more than serving as a mere prop in a child's fantasy; and (2) upon its tariff definition of a "toy" (Item 6020-00) which it believes to rule out these articles because they can, in Maersk's opinion, be used for practical purposes or are suitable for such purposes.

Most of Maersk's contentions regarding Sanrio's evidence have been discussed in my treatment of applicable principles of law. It has long been established that the shipper is permitted to depart from the description first entered on the bill of lading and show what actually moved by various types of evidence including the types of evidence furnished by Sanrio in this case. Furthermore, as I have noted, the "heavy burden of proof" does not change the usual standard requiring a preponderance of evidence demonstrating the validity of the claim with reasonable certainty and definiteness but merely refers to the shipper's problems in obtaining evidence, according to recent decisions of the Commission. As to Maersk's contention that certain evidentiary documents such as the packing lists and invoices are not entitled to much weight because they were sent from one Sanrio affiliate to another, I agree with Sanrio that they are documents kept in the regular course of business and are therefore recognized in law as being trustworthy not only under Federal Rule of Evidence 803(6) but under well established principles of the law of evidence. See notes to Rule 803(6), 28 U.S.C.A., at 586-587. Even if Sanrio, the importer, is affiliated with Sanrio, the shipper, it is hard to believe that a company actively engaged in manufacturing and selling its products would keep inaccurate inventory records and invoices in the daily conduct of its business or that it would be sloppy when dealing with an affiliate in the conduct of its affairs.

Although I do not agree with Maersk's various contentions on questions of law regarding the propriety of using the type of evidence which Sanrio has furnished nor with Maersk's contentions that Sanrio has a "heavy burden of proof" if that is supposed to mean that Sanrio must meet a "clear and convincing" or "beyond a reasonable doubt" standard of proof, I find that Sanrio's evidence that the 15 products listed above are toys does not establish with reasonable certainty and definiteness the validity of its claims. In other words, the preponderance of credible evidence, in my opinion, does not establish that the small articles such as Paper Clips, Dear Diary, Pack Memo, Clip Board, Phone Pal, Friendly Message, and the like, are toys within the common meaning of that word, under various dictionary and court definitions, under the Commission's definitions, and finally, and perhaps most importantly, under the tariff definition of "toys." In the last analysis the evidence submitted shows that these products can perform useful functions and are not merely child's playthings having no practical use whatsoever. The fact that the products are aimed at children and are designed for small fingers does not establish that they are useless playthings any more than children's aspirins, diapers, articles of clothing, small forks, spoons, etc., are toys because they are designed for small people rather than for adults.



**GENERAL PRINCIPLES OF LAW AND DEFINITIONS OF TOYS**

Before discussing the specific evidence which Sanrio has furnished in support of its claims that the 15 products are all entitled to the tariff rate for "toys," a discussion of the various principles of tariff law and the meaning of the word "toy" is warranted.

Generally, Sanrio claims the 15 products to be toys because, according to Sanrio, they are small, cheap, designed for children's play, and are not suitable or intended for practical use. Maersk, on the other hand, contends that although they may have been designed for children they do have practical uses, i.e., that they are not merely playthings and that their construction, value, and transportation characteristics show them to be more like stationery for children than toys, and that Sanrio's own catalog and sales literature identify most of them as "School Supplies and Stationery" having practical uses. Maersk cites cases arising under customs law in which courts have followed the principle that an article of small size which resembles a practical object is in reality only a junior edition of the adult product and should be classified like the adult product rather than as a "toy." Essentially Maersk contends that the products have practical uses and are really junior editions of adult products.

As my discussion regarding the specific evidence will show, I agree with Maersk that the products have practical uses and are mainly stationery for children. Furthermore, as I also discuss, Sanrio's own sales literature and catalog never refer to the products as "toys," they describe them as having many uses and show them under "School Supplies and Stationery" or "Personal Accessories."

Ultimately, for Sanrio to prevail, it must show that its products qualify for the tariff item which describes "toys." As the Commission states in *United States of America v. Farrell Lines, Inc.*, 16 F.M.C. 41, 46 (1972):

The burden is on complainant to establish that the [article] shipped may reasonably be included in the tariff item.

It is also basic tariff law that terms in a tariff must be used in the sense in which they are generally understood and accepted commercially and that neither carriers nor shippers are permitted to urge a strained and unnatural construction for their own purposes. *Matson Navigation Company v. Port Authority of Guam*, 20 F.M.C. 506, 512 (1978); *European Trade Specialists v. Prudential-Grace Lines*, 21 F.M.C. 888, 890 (1979); *National Cable and Metal Co. v. American-Hawaiian S.S. Co.*, 2 U.S.M.C. 470, 473 (1941); *Corn Products Co. v. Hamburg-Amerika Lines*, 10 F.M.C. 388, 393 (1967); *National Van Lines, Inc. v. United States*, 355 F.2d 326, 332 (7th Cir. 1966). If there is no specific commercial meaning to a term, that term must be given its ordinary meaning and one can turn to the dictionary definitions as an aid. *European Trade Specialists v. Prudential-Grace Lines, Inc.*, 21 F.M.C. 890-891.

The tariff definition used by Maersk, the dictionary definitions, court definitions, and Commission decisions all appear to be very similar in their definitions of a "toy." Essentially they define toys as playthings usually designed for children chiefly for purposes of amusement or diversion and having no practical use. Thus, Maersk's tariff defines a "toy" as follows:

A toy is defined as a play thing for children or pets which is neither suitable nor intended for other use.

There are several dictionary definitions of a "toy." In *Equality Plastics, Inc. et al.*, 17 F.M.C. at 228 n. 13, the Commission quoted the following definition from "Webster's Third New Dictionary (1966)":

"toys" are defined as ". . . something designed for amusement or diversion rather than practical use . . . ."

The more complete definition contained in Webster's Third International Dictionary 2419 (Rev. Ed. 1971) is as follows:

Something designed for amusement or diversion rather than practical use; an article for the playtime use of a child either representational . . . and intended esp. to stimulate imagination, mimetic activity, or manipulative skill or nonrepresentational . . . and intended esp. to encourage manual and muscular dexterity and group integration; something diminutive esp. in comparison with others of the same general class (the tug was a toy beside the ship that it guided).

The Random House College Dictionary 1390 (Rev. Ed. 1975) defines a "toy" as follows:

1. an object, often a small representation of something familiar, as an animal, object, person etc. for children to play with; plaything; 2. something of little or no value or importance; trifle; 3. something diminutive, especially in comparison with like objects.

Webster's New World Dictionary 1505 (2d College Edition 1974) defines toys as follows:

2. a thing of little value or importance; trifle 3. a little ornament; bauble; trinket 4. any article to play with, esp. a plaything for children 5. any small thing, person, or animal; specif., a dog of a small breed.

The Tariff Schedule of the United States (TSUS) defines "toy" as follows:

Any article chiefly used for the amusement of children or adults. 19 U.S.C.A. 1202, Schedule 7, Part 5, at 613.

The above TSUS definition was quoted by the Commission in *Ross Products and Taub, Hummel & Schnall, Inc.*, 16 F.M.C. 333, 341 (1973). Furthermore, in *Equality Plastics, Inc.*, the Commission had occasion to determine whether a battery-operated vacuum cleaner, an immersion

heater, and a battery-operated drink mixer were "toys" for ocean tariff rating purposes. The Commission noted both the dictionary and TSUS definition of "toys" and determined that only the drink mixer could be rated as a toy under the carrier's tariff on the ground that the mixer did not have "a more practical use than one chiefly for amusement." 17 F.M.C. at 228. Although the drink mixer consisted of a jar with cocktail recipes printed thereon and a plastic cover with batteries which operated a stirring rod, the Commission nevertheless believed the mixer to be a toy because it did not work very well even with new batteries. 17 F.M.C. at 221. It would appear that the Commission agrees with Maersk that the "touchstone is whether the item can be used to perform a function." (Brief of Respondent Maersk, p. 8.)

The idea that something is a toy because it has no practical function and is suitable only for amusement, diversion, or play seems to be found not only in the preceding definitions but in various decisions of the courts under customs law cited by Maersk. In such cases as *Mego Corp. v. United States*, 405 F. Supp. 1088, (Cust. Ct. 1975); *New York Merchandise Co. v. United States*, 294 F. Supp. 971 (Cust. Ct. 1969) and other cases cited by Maersk in its Brief (page 8 n. 7), the Customs Court has held that little articles such as boxing gloves, baseball gloves, croquet sets, musical instruments, cheap music boxes, etc., are not toys but are really junior editions of adult articles which do perform practical functions, albeit on a reduced scale. In other cases arising under the TSUS, the courts have found articles to be toys when such articles had no practical functions but were used primarily for amusement or diversion. See, e.g., *U.S. v. Topps Chewing Gum, Inc.*, 440 F.2d 1384 (C.C.P.A. 1971) (metallic buttons with humorous sayings printed on them worn by children); *Henry A. Wess, Inc. v. U.S.*, 434 F. Supp. 650 (Cust. Ct. 1977) (battery-operated practical joke known as "Frisky Whiskey Bottle").

As will appear in my discussion below, the 15 products which Sanrio claims to be toys are not shown by the evidence to have no practical purpose. On the contrary, they appear to be usable for clipping paper, writing, holding keys, holding coins, drawing, sketching, etc., and nowhere does Sanrio's catalog indicate that they cannot or should not be used for those purposes. The fact that children may play with them, moreover, does not change their essential nature. It is the controlling or primary use, not possible use that should be considered if necessary to determine the nature of an article for tariff rating purposes. *Royal Netherlands Steamship Co. v. Federal Maritime Board*, 304 F.2d 938, 941 (D.C. Cir. 1962); *Continental Can Co. v. United States*, 272 F.2d 312, 315 (2d Cir. 1959); *Merck Sharp & Dohme International v. "K" Line*, 22 F.M.C. 396, 399 (1979). Indeed, possible use rather than controlling or primary use does not constitute a lawful basis for establishing different tariff charges. *Royal Netherlands Steamship Co. v. Federal Maritime*

*Board*, 304 F.2d at 941; *United States v. Baltimore & O. R. Co.*, 225 U.S. 326, 342 (1912); *Misclassification and Misbilling of Glass Articles*, 6 F.M.B. 155, 159 (1960); *Raymond International Inc. v. Venezuelan Line*, 6 F.M.B. 189, 191 (1961).

In finding that the 15 products are not toys as Sanrio contends but mainly stationery for children or other things, I recognize the fact that in cases of this nature it is not always easy to classify different articles under their proper tariff descriptions. Frequently reasonable persons may differ as to the proper classification and the answer is very close. As the court observed in *Continental Can Company v. United States*, "there is no justification for holding that one classification is so clearly right and the other wrong . . ." 272 F.2d at 316. In that case, as the court noted further, the Board's Examiner had reached one conclusion, the Board reached another with one member dissenting, and the court reversed the Board with three separate opinions. 272 F.2d at 316. My analysis of the evidence, however, convinces me that Sanrio has not carried its burden and has not shown that the 15 products qualify for Maersk's tariff definition of a toy as merely a child's plaything which is neither suitable nor intended for other use with reasonable certainty and definiteness by a preponderance of the evidence.

#### ANALYSIS OF THE EVIDENCE SHOWING THE NATURE OF THE 15 PRODUCTS ALLEGED TO BE "TOYS"

As with the 24 products discussed earlier where Sanrio and Maersk were able to agree upon the applicable tariff commodity item, Sanrio has furnished catalog pictures, sales literature, invoices, packing lists, actual samples, and statements of its distribution manager, Mr. Cameron, describing the purposes and uses of the products. This evidence certainly identifies the products so that they can be rated mostly as something other than General Cargo N.O.S. In most instances, furthermore, the description given in the above table is self-explanatory. The Paper Clips are described as "paper clips" on the invoice (Ex. A-8) and described to be "100% Plastic" with 15 pieces in a plastic case. Samples of them are attached as Exhibit A-36. They are about one and one-half inches in length and can clip paper together, as the sample provided shows. However, Sanrio claims that they are really toys because they "break easily" and would not hold up well as attachments, being more decorative than practical," (Reply Memorandum by Complainant, at 4). I grant that the paper clips are colorful and have little animal heads on the top so that they appeal to children. But they do perform a practical function and Maersk's tariff commodity item lists paper clips specifically under stationery (Item 5820-10, Tariff 8th rev. page 306).

Similarly, the Dear Diary, Pack Memo, Tiny Clip Board, Phone Pal, Friendly Message, Coin Purse, Mini Sketching Set, Key Chain Phone Book, as far as can be seen from the pictures and samples provided, can

perform practical functions, although aimed at children and designed for little fingers. Furthermore, many of these products are marketed and shown under Sanrio's later catalog (Ex. A-28) under the caption "School Supplies and Stationery." For example, the "Dear Diary" is shown in the catalog on p. 38 as an actual booklet of paper and is marketed in the catalog as "School Supplies and Stationery." It is shown together with a number of other products such as ballpoint pens, mechanical pencils, staplers, and other products which are shown lying on a desk (Ex. A-28, at 41). It is difficult to argue from this evidence that the products do not work, have no practical functions, and are mere playthings, especially when Sanrio itself does not list them as "toys" and advertises that the products have many uses. For example, in discussing many of these products, Sanrio's own sales literature states:

Other items in this line are miniature stationery items like the My Pockette memo book and the mini letter set. Mini color pencils delight the eye with their bright colors and compact shape, and the variety of charming holders available indicates their customer appeal. Petite push pins and *paper clips have many uses*, and the mascot stapler and refills are an attractive way for customers to get it all together. Also available are key charms and key chain phone book . . . . Children always enjoy *using things designed on a smaller scale with their fingers in mind*. As inexpensive and unusual gifts, these miniatures are unbeatable . . . . Ex. A-32. (Emphasis added.)

Sanrio's business now encompasses a wide range of fields, centering on the design, manufacture and wholesaling and retailing of merchandise for young people *and for those adults who have preserved youthful enthusiasm and joy*. (Ex. A-29.) (Emphasis added.)

Contrary to Sanrio's contentions that the Pack Memo, Tiny Clip Board, Phone Pal, Friendly Message, Coin Purse, Key Chain Phone Book, Charming Holder (key holder), are really tiny items having no practical use, they are in reality constructed and marketed as stationery or as items having many uses, albeit appealing to children aged 7 to 12. Where pictures are provided, usually in the later catalog (Ex. A-28), moreover, it is obvious that the products are constructed of paper and for purposes of writing, not for useless diversion or for turning into missiles or spitballs. As Maersk remarks, many of these products are really stationery for use by children and bear far more physical resemblance in terms of value and carriage to stationery than to toys which for the most part are less compact, not constructed of paper, and do not have the high value per cubic foot that stationery does. (Brief of Respondent Maersk, at 9.)

Most of the 15 products listed in the above table, or their close analogues, are shown in Sanrio's catalog (Ex. A-28) as "School Supplies

and Stationery” and are advertised as having uses, not as being wholly impractical. Having placed them together with stationery items and marketing them in its catalog under such nomenclature, Sanrio is not very convincing when it argues that they are really toys having no practical use. Such a contention contradicts its own marketing and advertising efforts. Evidence of the manner in which a company markets its goods has been considered probative in determining the nature of the product. See, *New York Merchandise Co. v. U.S.*, 294 F. Supp. 971, 976 (Cust. Ct. 1969); *Davis Products, Inc. v. U.S.*, 59 Cust. Ct. 226 (1967).

To recapitulate, of the above 15 products, the first nine, “Paper Clips” through the “Friendly Message,” are all in fact children’s stationery items made of paper and plastic materials capable of practical uses, according to Sanrio’s own sales literature and visual inspection of the actual samples and catalog pictures provided. In no instance is there any marketing or advertising in which the products are described as “toys” and in most instances they are listed under “School Supplies and Stationery” in Sanrio’s own catalog. I agree furthermore with Maersk which has re-rated these items without conceding that the evidence is reliable and sufficient, and contends that the products are ratable under the tariff item for “Stationery” (Item 5820). Not only do the products fit the generic description of stationery for children far better than toys but in most instances they or their analogues are specified in the tariff item cited.<sup>12</sup> Maersk has persuaded me that the nine products “may reasonably be included in the tariff item.” *United States of America v. Farrell Lines, Inc.*, 16 F.M.C. at 46.

Similarly, as to the next three products (Coin Purse and the two Mini Sketching Sets), Sanrio has failed to show by a preponderance of reliable and probative evidence that they are toys, i.e., that they are mere playthings having no practical functions whatsoever. The Coin Purse is shown on Exhibit A-36 where an actual sample is provided. It is several inches in size and comes with a little pencil and paper entitled “Shopping Memo.” The invoice (Ex. A-10) describes it as “Coin Purse w/One Pencil, Cotton 90%, Pencil 10%.” Sanrio’s later catalog carries it under “Personal Accessories, Useful and Handy.” (Ex. A-28, pp. 18, 19.) The product appears capable of carrying coins and enables children to write lists of things on the memo with the pencil. The other products shown in the catalog under the same heading “Personal Accessories” appear equally capable of performing useful functions and are more than mere playthings having no practical purpose. For example, under this heading in the catalog Sanrio also sells scissors, wallets, nail

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<sup>12</sup> For example, listed under the Stationery Item in the tariff are such things as: Clipboard, Diaries, Loose Leaf Books, Note Books and Blocks, Address Books, Letter Paper, Paper Clips, Paper Clamps. (See Tariff, 8th rev. page 306.)

clippers, sewing sets, etc., which could hardly be called useless "toys." Indeed, as noted earlier, even Sanrio agreed that scissors should not be rated as toys but as "stationery." I agree with Maersk and with Sanrio's catalog that the Coin Purse is "useful and handy" and is therefore not a "toy." I also agree with Maersk, assuming the evidence is acceptable and sufficient, as I so find, that the proper rate for the product is the tariff item for "Bags, Baskets, and Luggage" (Item 3440). That item not only includes bags but also lists such things as "Purses and Wallets." (See Conference Tariff, 17th Rev. Page 258.)

The Mini Sketching Sets are shown in Sanrio's catalog under "School Supplies and Stationery." (Ex. A-28, pp. 32-33.) The invoice (Ex. A-10) describes them as containing 14 color pencils in a plastic case with a sketch book in a vinyl case. The catalog further describes Sanrio's "School Supplies and Stationery" as "Aiding Study and Creativity." (Ex. A-28, p. 32.) Sanrio contends that the toy rate should apply but again I find that the product has an obvious practical function for drawing and sketching and Sanrio's own catalog indicates that the product as well as the other products shown on the same page and heading have practical purposes. I agree with Maersk's contentions, assuming the evidence to be sufficient, as I so find, that the proper tariff rate is for "artist's materials." In the tariff, "artist's materials" are specifically listed under the item for "stationery" (Item 5820, 8th rev. page 306).

The Key Chain Phone Book and two Charming Holders are the last products in the list. Again, Sanrio has failed to show that these products are toys having no practical uses. The Phone Book is shown on Ex. A-40, the previous Sanrio catalog. Other products on that exhibit have already been discussed and appear to be products made of paper for writing purposes (i.e., Phone Pal, Friendly Message) which I have already found to be functional. The invoice describes the Key Chain Phone book to be "Metal 40%, Paper 60%." (Ex. A-24.) Sanrio's sales manual discusses the Phone Book in the context of products having "many uses" and of children "using things designed on a smaller scale with their fingers in mind." (Ex. A-32.)<sup>13</sup> Sanrio has simply failed to provide a preponderance of evidence to sustain its burden of proof that the Phone Book is really a useless toy. On the contrary, the evidence suggests that the product cannot only hold keys but that names can be written into the little book. However, Maersk has not argued nor shown what the rate for this product should be other than Cargo N.O.S. It is not shown by Maersk that the little phone book which is smaller than the "Phone Pal" but is 60% paper qualifies for the "stationery" rate or any specific commodity rate other than Cargo N.O.S.

<sup>13</sup> I have quoted the pertinent language from the sales manual above which discussed such products as petite push pins, paper clips, mascot staplers, as well as key charms and the key chain phone book.

Finally, we come to the two Charming Holders. Pictures of these products from the previous Sanrio catalog are shown on Ex. A-40. They appear to be key holders with little images of little people attached to one end of a chain. The invoice (Ex. A-24) shows that the Charming Holder consists of "Plastic 70%, Mirror 10%, Metal 20%." From all that can be determined from the evidence relating to this product, the little key holder can do the job it appears designed to do, namely, hold keys. It was Sanrio's burden to prove that the key holder had no practical purpose and was a child's plaything useful for nothing else so as to qualify for the tariff rate for "toys." As in the case of the Key Chain Phone Book, Maersk has not re-rated this product and has not contended that it should be rated under a specific tariff item. I am cited to no evidence or specific commodity tariff item except by Sanrio which incorrectly claims they are ratable as "toys." For all that the record shows, therefore, they should be rated as Cargo N.O.S.

To conclude, I agree with Maersk on the re-rating of 12 of the above 15 products as being "stationery," "bags, baskets and luggage," or "artist's materials" within the meaning of the cited tariff items, and find that the evidence and Maersk's contentions regarding the proper tariff item are persuasive. As to the last three, there is neither persuasive evidence nor argument from either side showing that the products qualified for a specific commodity tariff item rather than for Cargo N.O.S. In no event do I find that any of the 15 products have no useful function so that they could qualify for the "toy" rate. On the contrary, in each instance the product appears to be useful for children and designed for their little fingers and Sanrio's own sales literature and catalog appear to belie its contentions that the products have no practical use.

### THREE OTHER COMMODITIES WHICH SANRIO CLAIMS WERE OVERCHARGED

There are three remaining products which Sanrio claims were overcharged but which Sanrio does not claim to qualify for the "toy" rate. These are its "Mini Stamp Set," "Bath Kit," and "Hankie Set," which Sanrio claims should have been rated as "Stationery," "Travel Kit," and "Paper Manufactures," respectively. The following table shows the products:

<i>Old Catalog No.</i>	<i>Commodity</i>	<i>Sanrio Claims</i>	<i>Maersk Claims</i>
C/No. 4022/72	Mini Stamp Set	Stationery	Cargo NOS
C/No. 1031/1-126	Bath Kit	Travel Kit	Cargo NOS
C/No. 1006/18-116	Hankie Set	Paper Manufactures (Mixed Shipment)	Cargo NOS



I find that Sanrio has shown with reasonable certainty and definiteness that the Bath Kit and Hankie Set were misrated. In the other instance there is a failure of proof.

The Mini Stamp Set, according to Sanrio, consists of four character stamps, two stamp pads, and name cards. Sanrio refers to the picture of this set in the later catalog (Ex. A-28, p. 25). (Reply Memorandum, p. 4.) Sanrio claims that the set is really a plaything for children and would have qualified for the "toy" rate but for the fact that rubber stamp sets over \$9.00 per gross were excluded from the "toy" rate. (Reply Memorandum, p. 4.) The invoice shows the stamp set to be "4 stamps, 2 color ink with message card in plastic case, Plastic 80%, Paper 10%, Ink 10%." (Ex. A9.) The later catalog (Ex. A-28) shows this set under "Mascots and Miniatures" and it appears to function for children to affix stamped images onto little cards. As Sanrio itself admits, the set could not qualify for the "toy" rate in the tariff because rubber stamp sets of its value were excluded from the "toy" rate. (Reply Memorandum, p. 4.) However, it cannot qualify for the "stationery" rate which Sanrio has selected in the alternative because, as Maersk points out, the "stationery" rate covers only "Rubber Stamps and Stamp Pads" but this set includes more than the pads and stamps, i.e., it includes ink and message cards. (Answer to Complaint, p. 5.) Since the burden is on Sanrio to show that the article shipped "may reasonably be included in the tariff item" (*United States v. Farrell Lines, Inc.*, 16 F.M.C. at 46), and since Sanrio has not shown that the set can qualify for either the "toy" rate or the "stationery" rate for the reasons discussed, it appears that Maersk's only alternative was to rate the set as Cargo N.O.S. I therefore cannot find that Sanrio has proven this particular claim.

The Bath Kit is identified in Sanrio's sales literature as a travel kit intended for that specific use. (See Ex. A-38.) A verified statement of Mr. Bruce Cameron, Sanrio's Distribution Manager, confirms that this item is intended for use as a travel kit which allows parents to wash and bathe children on trips, each kit containing a sponge, brush, towel, soap, and soap case. (Ex. A-39.)<sup>14</sup> Sanrio's later catalog (Ex. A-28, p. 10) shows a "Bath Kit" under two item numbers (1031 and 1050). They appear to contain the things that Mr. Cameron states they do. They are listed in the catalog under "Toiletries and Grooming Aids" together with such articles as a wash up kit, a towel hanger, hair brush, hand mirror, bath towel, face towel, etc. Sanrio therefore believes that the

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<sup>14</sup> As I discussed earlier, Maersk has argued that the verified statements of Mr. Cameron should not be given much weight because they are self-serving. However, as I noted, the Commission, in *Unapproved Sect. 15 Agt.-Coal to Japan, Korea*, 7 F.M.C. at 302, has held that self-serving testimony is not automatically discredited but is considered together with all the evidence. For a similar holding see *Builders Steel Co. v. Commissioner of Internal Rev.*, 179 F. 2d 377, 380 (8th Cir. 1950).

product qualifies for the Maersk tariff rate published for "Travel Kits (with or without toiletries)" (Item 3440-10). Maersk concedes that the Sanrio catalog mentions some items in relation to travel but argues that the plastic bag in which the toilet articles are held may be for storage purposes rather than travel, as far as the evidence shows. (Answer to Complaint, p. 5.) Maersk therefore urges a Cargo N.O.S. rate. I find that the evidence shows with reasonable certainty and definiteness that the Bath Kit is essentially made for travel purposes and that it is reasonably included in the Maersk tariff item for "Travel Kits . . ." As discussed earlier, the standard of proof is not "clear and convincing" evidence or evidence "beyond a reasonable doubt" but simply a preponderance of the evidence. Furthermore, Maersk's speculation that the travel bag may be used for storage purposes is not convincing or probative evidence. As discussed earlier, the primary purpose of the product is what determines its essential nature, not speculation as to possible uses. Maersk's tariff publishes a commodity item which reads:

Bags, Baskets and Luggage, includes: Travel Bags, Travel Cases and Travel Kits, with or without Toilet Articles. (Item 3440-00, 17th rev. page 258.)

The evidence shows with reasonable certainty that the Bath Kit is a travel kit with various articles included for use on trips. Maersk's argument that the Bath Kit cannot fit into the tariff item seems strained and unnatural. I would therefore grant this particular claim.

The final product is a Hankie Set which Sanrio claims should have been charged under the tariff rate for "Paper Manufactures." The relevant invoice (Ex. A-8) shows the set to consist of "Handkerchief and Tissue Paper in Vinyl Case." The packing list contains notations in pen stating that the set consists of "Plastic, Tissue, Cotton Cloth." (Ex. A-14.) Sanrio claims that the hankie set qualifies for the "Paper Manufactures" rate under the Conference's mixed shipment rule (44) which requires that a shipment of mixed goods be rated under the rate for the highest rated commodity included in the mixed set. (See Rule 44, attached as appendix 6 to Affidavit of Robert D. Grey, Conference Chairman.)

Maersk claims that the hankie sets were properly rated as Cargo N.O.S. because the shipper did not show Maersk separate valuations for the component parts of the shipment so that Maersk could apply Rule 44. The Conference agrees that Maersk was unable to apply Rule 44 because the commercial invoice was not furnished so that Maersk was forced to apply the Cargo N.O.S. rate.

Notwithstanding the failure of Sanrio to explain the nature of the hankie set at the time of shipment, Sanrio has now shown that it does consist of three different materials: paper, cloth, and vinyl. Furthermore, Sanrio has furnished an exhibit (Ex. A-51) attached to its Reply to the Conference which explains the application of Rule 44 and Rule

11 in the tariff, which latter rule pertains to valuation of the elements of the mixed shipment. The exhibit shows that if Rule 44 is applied, the hankie set should be rated under the rate for "Paper Manufactures" (\$118 WM) which is the highest of the rates, higher than the rates for plastic goods or cotton. Sanrio has now shown with reasonable certainty and definiteness the validity of its claim that the hankie sets are entitled to the "Paper Manufactures" rate of \$118 WM rather than the rate for Cargo N.O.S. As shown earlier, the failure of a shipper to provide full information on the bill of lading does not preclude the shipper from later showing the true nature of the cargo. I would therefore grant this particular claim.

#### PROCEDURE TO DETERMINE TOTAL AMOUNT OF REPARATION

As discussed above, there are 42 different products as to which Sanrio has filed claims alleging overcharges. This total can be divided into three groups. The first group consists of 24 products which both Sanrio and Maersk have agreed as to the proper tariff rate, although Maersk does not concede that Sanrio's evidence was adequate to prove the true nature of the products. The second group consists of 15 products which Sanrio claimed to be "toys" but which Maersk contends to be something else, mainly stationery products for children. Of this group, Maersk has shown persuasively that 12 of the products, while not toys, should be rated as "stationery," "bags, baskets and luggage," or "artist's materials." The third group consists of three products which Sanrio claims should have been rated under specific tariff items rather than Cargo N.O.S. I have found that Sanrio has proven that two of these three products (Bath Kit and Hankie Set) were misrated.

To summarize, I have found that the evidence and arguments presented by both Sanrio and Maersk show what the proper rate should have been on 38 products out of the 42 (24 from the first group, 12 from the second group, and two from the third group). Since Sanrio based its calculations of total overcharges on favorable findings for all 42 of its claims, it calculated total overcharges to be \$4,360.76. Maersk re-rated some of the products, without conceding that Sanrio's evidence was sufficient, and arrived at a figure of \$2,288.06. The record, therefore, does not contain an exhibit showing overcharge calculations based upon my findings that the proper rate has been shown for 38 products out of the 42.

Under these circumstances, the Commission's rules provide an appropriate procedure. Both Rules 251 and 252 (46 C.F.R. 502.251-252) permit parties to furnish exhibits showing reparation calculations when the record has not been fully developed on the question of reparation. Rule 251 provides that "[i]f complainant is found entitled to reparation,

the parties thereafter will be given an opportunity to agree or make proof respecting the shipments and pecuniary amount of reparation." Rule 252 provides that when "the amount cannot be ascertained upon the record . . . , the complainant shall immediately prepare a statement . . . . Complainant shall forward the statement . . . to the carrier . . . for checking and certification as to accuracy. Statements so prepared and certified shall be filed with the Commission for consideration in determining the amount of reparation due. Disputes concerning the accuracy of amounts may be assigned for conference by the Commission, or in its discretion referred for further hearing."

It is obviously necessary to follow the procedures set forth in the above rules. Furthermore, because the record shows the correct rate for 38 of the 42 products, I believe that the amount of overcharge on these 38 should be calculated rather than the overcharge on merely those 26 products as to which only Sanrio and Maersk or Sanrio alone have shown what commodity rate should have applied. Otherwise, if nothing is done to correct the rating on the 12 products which, although not toys, have been shown by Maersk to be ratable under specific tariff items, Maersk will retain freight even when Maersk itself has made a persuasive showing of the rate that should have been supplied. Had this simply been a case in which Sanrio had failed to prove the validity of its claims, the prevailing decisions of the Commission hold that the claims should be denied. See, e.g., *Pacific Freight Audit, Inc. v. Sea-Land Service, Inc.*, 22 F.M.C. 207 (1979); *Poirette Corsets, Inc. v. Consolidated Express, Inc.*, 22 F.M.C. 376 (1979); *Abbott Laboratories v. United States Lines, Inc.*, 18 F.M.C. at 264-265. But since Maersk has, admittedly without conceding that Sanrio's evidence is sufficient, shown what the correct specific commodity tariff rate should have been in 12 instances even when it disagreed with Sanrio's claims in those instances, the record permits those products to be re-rated so that Maersk will ultimately retain the correct freight. Under such circumstances, claims can be granted even when the claimant has not made the showing. See, e.g., *European Trade Specialists, Inc. and Kunzle & Tasin v. Prudential-Grace Lines, Inc.*, 19 F.M.C. 148, 163-164 (1976); Informal Docket No. 607(I), *Ideal Toy Corporation v. Atlantic Container Line*, Order Remanding Proceeding, October 31, 1979. Cf. *Union Carbide InterAmerica v. Venezuelan Line*, 17 F.M.C. at 182.<sup>15</sup>

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<sup>15</sup> On the other hand, where neither Sanrio nor Maersk has made a persuasive showing that the product should have been rated under a specific tariff commodity item, as is the case with four of the products in question, it would conceivably be a violation of due process to make *sua sponte* findings if neither side had had an opportunity to argue and litigate the matter. In other words, a new finding or new theory should not be utilized in a decision detrimental to a party when no party had notice that such findings would be made nor opportunity to present their arguments and evidence on the particular matter. See *N.L.R.B. v. Temple-Estex, Inc.*, 579 F.2d 932, 936 (5th Cir. 1978). Incidentally, in the present case, Sanrio had the last opportunity to reply to Maersk's re-rating of the 15 allegedly toy products and in that final reply continued to argue that the products were ratable as "toys."

Since findings concerning the proper re-rating of 38 products have been made, if these findings are affirmed by the Commission, the case can be closed quickly by submission of the relevant arithmetic calculations which both sides ought to be able to agree upon. Final determination of the proper rating for these products as well as the amount of reparation should also serve a useful purpose of curtailing the scope of the three other informal dockets involving similar claims now pending before Settlement Officers as well as future claims which Sanrio appears to be preparing, all leading toward quicker termination of formal dockets.

Accordingly, if this decision is adopted by the Commission, the complainant shall prepare an exhibit showing calculations of overcharges by re-rating the 38 products in accordance with the findings made in this decision, shall submit its calculations to Maersk for verification, and shall thereafter submit them to the Commission as provided by Rule 252 under such schedule as the Commission may devise. Unless disputed by Maersk, such exhibit will form the basis for determining the amount of reparation to be awarded.

#### THE CONTENTIONS OF THE TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN/KOREA

On February 12, 1980, the Trans-Pacific Freight Conference of Japan/Korea petitioned for leave to intervene. The Conference stated that this case is only one of at least four similar cases involving the same shipper and members of the Conference and that critical issues concerning its tariff were involved which justified its participation. Respondent Maersk supported the petition while complainant Sanrio opposed. I granted intervention so that the Conference could make known its views on matters concerning its tariff and on the evidentiary materials submitted by Sanrio and further instructed the Conference to file tariff pages and furnish explanations on certain matters which the original parties had failed to do. (See Intervention Granted, March 4, 1980.) The Conference complied fully with my ruling and furnished its arguments and an affidavit of the Conference Chairman, Mr. Robert D. Grey, within 16 days of the date of service of the ruling.<sup>16</sup>

The arguments of the Conference are directed to two problems: (1) the present state of Commission law which permits shippers to obtain reparation awards if they show what was actually shipped notwithstanding contrary or obscure bill of lading descriptions; and (2) the type

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<sup>16</sup> I accepted the filings of the Conference one day late because, as Conference counsel explained in a cover letter, unexpected absence of counsel overseas coupled with a heavy work load, made it impossible to file everything in 15 days. (See letter from George A. Quadrino to me, dated March 20, 1980.) Despite the short period of time granted the Conference to file all of the requested materials, counsel was able to furnish the record with explanatory evidence and critical missing tariff pages which proved to be of great benefit to me in understanding the opposing contentions.

of evidence submitted by Sanrio in this case which the Conference believes to be unreliable and contradictory. The affidavit submitted by the Conference Chairman, Mr. Grey, states that the present Commission law in this type of case encourages careless and negligent practices on the part of shippers and forwarders, interferes with the Conference's rate policing efforts, and encourages the growth of outside traffic consultants working for percentages of refunds. Mr. Grey asks the Commission to reconsider its decisions and recognize that the shippers they are protecting are "multimillion dollar, international corporations, well schooled in international transportation and well able to enter into binding contracts with carriers." (Affidavit, at 5.)

#### SANRIO'S REPLY TO THE CONFERENCE'S CONTENTIONS

Sanrio has replied to the Conference. Sanrio contends that the Conference, rather than help in determining how to interpret its tariff, their ostensible reason for intervening, has used this case "as a platform to air its criticism of prior Commission decisions and the profession of freight auditing in particular." (Reply by Complainant to Conference, at 2.) Sanrio contends that the Conference's idea that the bill of lading is a contract and that shippers are held to their cargo descriptions placed in the bills of lading contravenes principles of tariff law which hold that tariffs have the same status as statutes and take precedence over private contracts, citing a case that the Conference also cites, *State of Israel v. Metropolitan Dade County, Florida*, 431 F. 2d 925, 926 (5th Cir. 1970). Sanrio defends the reliability and authenticity of the evidence it has submitted, stating that the invoices and packing lists are dated at the time of the shipments and signed by a Mr. Z. Takahashi of the International Division, that the invoice is a record of transfer of merchandise by sale from Sanrio the shipper in Japan to Sanrio, Inc., the purchaser in California, and that the reference numbers on the invoices, packing lists, and bills of lading all correspond. Moreover, the invoice comprises a more detailed statement whereas the bill of lading constitutes only a summary, according to Sanrio's argument. Sanrio rebuts the Conference's assertion that customs declarations should be relied upon to show that the products alleged to be toys are not toys, stating that those declarations show only the opinion of the customhouse broker who prepared them for purposes of customs clearance, not for purposes related to carrier tariff classifications.

Sanrio strongly objects to certain statements of Conference Chairman Grey and Conference counsel that criticize shippers' use of outside freight consultants, considering some of the remarks "scandalous." Sanrio asserts that many shippers do not employ rate experts and rely upon outside professionals as needed and that the Conference is attempting to discredit a profession which serves the shipping public. Furthermore, Sanrio asserts that these cases were made necessary be-

cause of the Conference's own practices and rules under which Maersk had to deny the claims when first presented, although Sanrio filed the claims only a few months after the alleged classification errors were discovered. Sanrio contends, moreover, that it is the Conference which is unfair in its treatment of claims and that if, as alleged by Mr. Grey, some forwarders may be intentionally misdescribing goods on bills of lading, the Conference ought to begin verifying documents presented to them relating to the bills of lading. Furthermore, Sanrio contends that it is absurd to expect that shippers or forwarders would deliberately err in filling out bills of lading so that the shipments would be charged higher rates with the intent of recovering something later.

#### DISCUSSION OF ISSUES RAISED BY THE CONFERENCE

The Conference is asking the Commission to reverse its policy of awarding reparation on the basis of evidence showing what actually moved regardless of previous bill of lading descriptions. The Conference contends that this policy is contrary to contract law which holds that a contractor may not avoid its agreed-upon obligations by relying upon its own mistakes, is contrary to the decision of the Court in *State of Israel v. Metropolitan Dade County, Florida*, 431 F. 2d 925 (5th Cir. 1970), places carriers in extremely difficult and unfair positions in trying to defend against overcharge claims filed many months after the shipment when the goods have long since disappeared into the stream of commerce, and encourages purposeful inaccuracies by forwarders and shippers who may misdescribe commodities on bills of lading but nevertheless seek reparation later notwithstanding their own misdescriptions. Most of these arguments have been made in past cases. However, almost all of them have been rejected by the Commission which has invariably reversed any Administrative Law Judge or Settlement Officer who has denied reparation because of them.

The Commission has long held that a shipper is entitled to reparation for overcharges if he can show what actually moved notwithstanding an incorrect description which the shipper or its forwarder may have placed on the bill of lading. As discussed earlier, the leading case is *Western Publishing Co. v. Hapag-Lloyd A.G.*, but this was the Commission's view even before that case. See, e.g., *Union Carbide Inter-America v. Norton Line*, 14 F.M.C. 262, 264 (1971), and case cited therein. Moreover, the shipper has been granted reparation even when the shipper has failed to comply with tariff provisions regarding use of trade names in bills of lading or requiring the shipper to designate on the bill of lading that the cargo was proprietary in nature and therefore entitled to special, lower rates. See, e.g., *Pan American Health Organization v. Prudential Lines, Inc.*, 19 F.M.C. 412 (1976) (shipper awarded reparation despite its noncompliance with tariff trademark rule); *Abbott Laboratories v. Venezuelan Line*, 19 F.M.C. 426 (1977) (shipper's use of

trademark description no bar to recovery); *Carborundum Co. v. Royal Netherlands Steamship Co. (Antilles) N.V.*, 19 F.M.C. 431 (1977) (same); *Cities Service International, Inc. v. The Lykes Bros. Steamship Co., Inc.*, 19 F.M.C. 128 (1976) (shipper awarded reparation although not complying with tariff rule requiring shipper to indicate on bill of lading that cargo was proprietary); *Durite Corporation, Ltd. v. Sea-Land Service, Inc.*, 20 F.M.C. 674 (1978), Order on Reconsideration, November 8, 1978 21 F.M.C. 458;<sup>17</sup> affirmed without opinion, *Sea-Land Service, Inc. v. Federal Maritime Commission*, 610 F. 2d 1000 (D.C. Cir. 1979) (reparation awarded despite shipper's noncompliance with tariff provisions requiring specification of proprietary cargo on bills of lading); *Sun Co., Inc. v. Lykes Bros. Steamship Co., Inc.*, 20 F.M.C. 67 (1977) (reparation awarded despite shipper's failure to comply with tariff requirements governing specification of value of cargo, proprietary nature of cargo, and use of trade-name descriptions).

The Commission summed up its policy in this area of law by stating in the *Durite* case, 20 F.M.C. at 675:

The Commission has consistently held with respect to overcharge claims that what actually was shipped determines the proper rate and has permitted shippers, who had failed to comply with some tariff provision, to cure the defect by later introduced evidence. *Cities Service* followed this policy.

The Conference's arguments that the Commission's policy in these cases encourages careless or even deliberate misdescriptions on bills of lading and fosters the development of an industry of outside rate auditors, protects huge companies experienced in exporting and importing, etc., have also been heard, considered, and consistently rejected by the Commission. *Pan American Health Organization v. Prudential Lines, Inc.*, provides a good example of the present state of the law with respect to the Conference's arguments. In that case, as mentioned, the shipper was awarded reparation although the shipper had provided an inadequate description of the goods shipped on the bill of lading which not only ignored the tariff's commodity index but violated the tariff rule against using trade names. The Initial Decision discussed the fact that the carrier had little choice but to rely upon the shipper's poor description when initially rating the goods since it was not expert in identifying the shipper's merchandise and had a tariff rule specifically governing the situation. The decision emphasized the importance of shippers' describing goods correctly in bills of lading and the right of carriers to expect that a shipper will properly identify the shipment just as the shipper has

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<sup>17</sup> In the Order on Reconsideration, the Commission corrected a technical error in its decision by substituting reference to section 2 of the Interoceanic Shipping Act, 1933, for section 18(b)(3) of the Shipping Act, 1916, which had been inadvertently discussed by the Commission in this domestic off-shore case.



the right to expect the carrier to charge the proper rate for the type of goods actually carried. The decision stated that shippers were playing a "rating game" with the help of outside rate auditors by misdescribing goods on bills of lading and later claiming overcharges and believed that these practices should be discouraged. Finally, the decision suggested a more equitable policy by which carriers would be found in violation of law only in cases in which it was shown that the carrier made a mistake in classifying the commodity shipped to be determined merely by looking at the face of the description entered on the bill of lading. In other words, the carrier should be able to rely upon the shipper's description in the bill of lading and to rate the shipment accordingly and not to be held to a latent description made known to the carrier many months after the shipment. The precise words of this decision (19 F.M.C. at 414-415) give the full flavor of its sentiments and I quote them here:

It is usually the case, as it is here, that the carrier, in classifying and rating a shipment, must look to the information supplied him by the shipper. To require the . . . carrier to inquire of a shipper as to whether the supplied description of cargo is correct would place an undue burden on the carrier. We cannot expect the carrier to be a "mind-reader" (n.b. sealed drums) or a chemical analyst . . . .

The importance of declaring in bills of lading the correct description of the cargo shipped cannot be overemphasized. The carrier has the right to expect that a shipper will properly identify his shipment, just as the shipper has the right to expect the carrier to charge the proper rate for the type of goods actually carried . . . . The now-prevalent practice of some shippers to provide trade name descriptions for their cargoes, or vague descriptions that do not comport with anything listed on filed tariff commodity index lists, and a year or more later, to play the "rating game" by newly arguing (with documentation never before presented to the carrier) that some other tariff rate (lower, of course) should have been used, should be discouraged. The fact that there are firms that offer to "audit" shippers' records in the hopes of finding just such potential conflicts, with regard to long-completed shipments, does not make the practice any more palatable. (Footnote reference omitted.) A more equitable rule would seem to limit reparations to those cases where the actual language used on the face of the bill of lading indicates an improper misclassification or obvious disregard, by the carrier, of the descriptive language used by the shipper.

Notwithstanding all of the above, the Initial Decision granted reparation to the shipper, stating that:

Having said this, however, we must return to what the law is under present Commission policy and case interpretation, and

this requires a finding for the complainant. (Case citations omitted.) . . . Past Commission policy and precedent have unquestionably declared shipper's misdescriptions of cargo to be legitimate bases to award relief, even without fault on the part of the carrier. In cases involving alleged overcharges under section 18(b)(3) of the Act, the Commission has determined that the controlling test is what the complainant (shipper) can prove was actually shipped. (Case citations omitted 19 F.M.C. at 415.

The Commission adopted the Initial Decision with respect to these ultimate conclusions but not with respect to the sentiments expressed by the Administrative Law Judge regarding his belief that the present situation under Commission policy was unfair. See Notice of Adoption, 19 F.M.C. 412. In other cases the Commission has followed this same policy, reversing various Administrative Law Judges or Settlement Officers who have shared the sentiments of the Judge in the *Pan American Health Organization* case. Furthermore, the Commission has found no basis to deny reparation to shippers who have misdescribed goods on bills of lading merely because the shippers are large and well experienced in exporting and importing the goods they manufacture or even because the shipper has been inexcusably careless in describing the goods shipped on the bill of lading. For example, in *Abbott Laboratories v. Alcoa Steamship Company*, 18 F.M.C. 376 (1975), the Commission severely criticized the shipper for its "slipshod procedures" and its "will-nilly description of such items as corn oil and detergents as 'raw drugs' on a bill of lading," a practice which the Commission found to be "inexcusable." 18 F.M.C. at 379. The Commission stated that "we sympathize with a carrier who relies upon a drug-producing firm's own description of packaged goods as 'raw drugs' and assesses a raw drugs tariff rate based thereon." *Id.* The Commission also expressed "disfavor" towards Abbott's practice. *Id.* Nevertheless, the Commission awarded reparation to the shipper, stating that although such a decision might not be equitable, the Commission was unable to judge the case on the basis of equities, being without "equitable powers in cases such as this." *Id.*

Similarly, in *Johnson & Johnson v. Prudential-Grace Lines*, 18 F.M.C. 244 (1975), the Commission affirmed an Initial Decision which had awarded reparation to the shipper although the shipper had violated the tariff's trademark rule governing use of trademark descriptions. The carrier had argued on exceptions that such a decision was unfair because "it imposes no responsibility upon the shipper to describe his goods accurately while leaving the carrier open to later claims against which he may be unable to defend." 18 F.M.C. at 246.

In *Abbott Laboratories v. Venezuelan Lines*, the Commission, reversing the Initial Decision, granted reparation notwithstanding the contentions

of the respondent carrier that it had relied upon "information supplied by the party most informed about the nature of the commodity" who was a "knowledgeable" shipper. 19 F.M.C. at 429. The Commission held that it does not matter whether the carrier misrated the commodity knowingly or inadvertently. In either event, it is liable under section 18(b)(3) of the Act. However, as I have noted earlier, since the statute imposes liability without fault, the Commission refrains from seeking penalties although awarding reparation. *Id.*

In *The Carborundum Company v. Royal Netherlands Steamship Company (Antilles) N.V.*, and *Union Carbide Interamerica v. Venezuelan Line*, the Commission reversed two Initial Decisions which had denied reparation on equitable grounds, namely, that the shippers were large and knowledgeable exporters who should have described the goods properly on the bill of lading. In *The Carborundum* case the Commission again dismissed this type of carrier argument, stating:

[T]he Administrative Law Judge's conclusion is based on a discussion of equities regarding size and experience of shipper and frequency of shipments made. These considerations have nothing to do with proof of the nature of the commodity shipped, and in any event the Commission has previously disavowed equity theories regarding overcharge claims. (Footnote citation omitted (Emphasis added.) 19 F.M.C. at 435-436.

In the face of this overwhelming precedent, it is obvious that I cannot dismiss the complaint on the various grounds advanced by the Conference concerning the carrier's reliance on a large, knowledgeable shipper's descriptions placed by the shipper or its forwarder on bills of lading nor on the basis that this complaint had been prepared by an outside rate auditor some time after the shipment. Nor, since the Commission believes that allowing a carrier to retain freight based upon a higher N.O.S. or other rate later shown to be mistakenly applied in reliance on the shipper's description of the goods placed in the bill of lading would permit the carrier to enjoy "windfalls," can I follow the Conference's arguments that the continual sloppy practice of shippers in misdescribing their goods must be terminated by denying their claims because the practice interferes with the Conference's policing efforts. Moreover, in cases of this type the shipper is not attempting to misclassify the goods in order to obtain a lower rate in violation of section 16 first paragraph of the Act, such as occurred in *Equality Plastics, Inc., et al.*, and similar cases. Rather the shipper, through negligence, pays higher freight at the time of shipment than necessary and, as always, the extra money is passed on to the consignee. One might argue that such a practice is costly, inefficient, and bad business, but the Commission has not held it to be unlawful and, as so clearly seen by Commission decisions, has not precluded shippers from recovery of the overcharges. A change in the policy of the Commission, which the Confer-

ence is strenuously urging, is a matter obviously for the Commission, not for an Administrative Law Judge.

What is perhaps a new argument, however, is the Conference's contention that the Commission's policy contravenes contract law. The Conference argues that under contract law a contractor (i.e., the shipper) cannot renege on its promise to pay the applicable freight based upon the description of the goods which the shipper itself has placed on the bill of lading. This is so, argues the Conference, because the bill of lading on which the shipper placed its own description of the goods is a contract and if the contractor finds that it has made a mistake, it cannot later disavow its obligations under contract law. This argument provides further rationale for the old arguments of carriers in cases of this type that the shipper is bound to the description which the shipper or its agent placed in the bill of lading and upon which the carrier had a right to rely when rating the shipment. As we have seen, however, the Commission has consistently refused to bind the shipper to the bill of lading description when the shipper later shows what actually moved, notwithstanding the carrier's so-called "right" to rely upon the shipper's description of the goods and the shipper's so-called "duty" to describe the goods properly.<sup>18</sup> Obviously the Commission has not followed general principles of contract law when it permits shippers to disavow the earlier bill of lading descriptions. This does not mean, however, that the Commission must reverse its policy because such principles exist.

A bill of lading is, indeed, a contract between shipper and carrier as well as other things, such as a receipt and sometimes evidence of title to the goods. *See, e.g., Bills of Lading - Incorporation of Freight Charges*, 3 U.S.M.C. 111, 114 (1949) and cases cited therein. However, a bill of lading is subject to relevant provisions of the Shipping Act, 1916, and the bill of lading does not take precedence over the tariff with which it must be filed and to which it must conform under section 18(b)(1) of the Act and the Commission's regulation (General Order 13, 46 C.F.R. 536.5(d)(8)). Furthermore, the bill of lading is merely a contract whereas the tariff has long been held to have the same standing of a statute, i.e., as having the force and effect of law. In short, it is not contract law which governs but rather tariff law.

In *Compagnie Generale Transatlantique v. American Tobacco Co.*, 31 F. 2d 663 (2d Cir. 1929), cert. denied 280 U.S. 555, the consignee sued to enforce an award of reparation granted by the United States Shipping

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<sup>18</sup> I have referred to these "rights" and "duties" in this fashion because usually the violation of a right or duty leads to some consequences adverse to the party violating the right or duty. However, in cases of this type, if a shipper does not comply with its "duty" to describe the goods properly on the bill of lading, the shipper recovers reparation anyway. Similarly, the carrier, in exercising its "right" to rely upon the bill of lading description, is later found to be a violator of section 18(b)(3).

Board (one of this Commission's predecessors) which had found that the carrier had violated sections 16 and 17 of the Shipping Act, injuring the consignee. The court found no merit to arguments that application of the Shipping Act was improper because it would disturb rights under a contract which the parties had executed in France. The court held that "a lawful statute in force at the time the contract was made is read into the contract and becomes part of it . . . [a]nd the power of Congress to regulate also extends to and embraces the right to control the contract power of the carrier, in so far as the public interest requires such limitation. It is often manifested in bills of lading and tariffs . . . . Parties are free to contract with the carrier, but are subject to the rule which prohibits discrimination . . . . Such a contract must be and is deemed to be modified to conform to the statute . . . ." 31 F. 2d at 666.

At the time of the decision in the *Compagnie Generale* case (1929), there was no section 18(b)(3) and no requirement that carriers operating in the foreign commerce of the United States file tariffs to which they must rigidly adhere. Since 1961, of course, such carriers must file their tariffs and adhere strictly to them. Unlike the bill of lading, furthermore, the tariffs are considered to have the same force and effect as a statute and no contract will be enforced which departs from the tariff. See, e.g., *Penna. R.R. Co. v. International Coal Co.*, 213 U.S. 184, 197 (1913); *Farr Co. v. Seatrain*, 20 F.M.C. 411, 414 (1978), and the cases cited therein. In *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 98 (1915), the Supreme Court emphasized the binding nature of tariffs and their supremacy over other contracts between shipper and carrier, stating:

When a tariff has become legally promulgated, it is binding upon both the carrier and any shipper taking advantage of it, and its terms (in essence) become, in such respects the only contract between the two allowed by law.

In a similar vein, the Court in *State of Israel v. Metropolitan Dade County, Florida*, stated:

As with taxes, we start with the proposition that morality, equity or the invidious reflex of each has no part in tariff application. A tariff required by the appropriate regulatory statute, (footnote citation omitted) like the law of the Medes and Persians which altereth not is more than a consensual contract. It has the force of law with the analogous dignity of a statute. (Citations omitted.) 431 F. 2d at 928.

See also *Kansas Southern Ry. v. Carl*, 227 U.S. 639, 653 (1913) and *Chicago & Alton R.R. Co. v. Kirby*, 225 U.S. 155, 165 (1912), holding that a common carrier and shipper cannot even contract for a special service or rate unless the carrier publishes the special service or rate in its tariff making it open to all equally; and see *S. L. Shepard & Co. v.*

*Aguilines, Inc.*, 39 F. Supp. 528, 531 (E. D. S. C. 1941) refusing to enforce a contract for special services absent tariff authority. (Note that at the time of this case, however, section 18(b)(3) was not enacted.) For more cases holding that the tariff has the force and effect of a statute and overrides contracts between parties, see *13 Corpus Juris Secundum*, Carriers § 302, at 700-702.

The short answer to the Conference's arguments, therefore, is that contract law has been supplanted by section 18(b)(3), an overriding regulatory statute. This tariff law and similar tariff laws, moreover, have long developed their own peculiar principles based upon strict congressional policies designed to prevent discrimination among shippers. Moreover, it has long been recognized that these peculiar tariff laws and policies take precedence over ordinary principles of contract law. As seen by the quotation, cited above, from the decision in *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. at 98, the tariff becomes in effect the supreme contract. Furthermore, whereas mistake, fraud, misrepresentation, or contrary intention of the parties may have some relevance under principles of contract law, they are irrelevant under tariff law. As the Commission stated in *Sun Co. v. Lykes Bros.*, 20 F.M.C. at 70 n. 8:

Neither mistake, inadvertence, contrary intention of the parties, hardship nor principles of equity permit deviation from the rates, rules and regulations in the carrier's filed tariff. (Case citations omitted.)

The Commission has several times<sup>19</sup> quoted the following language from *Louisville & Nashville R.R. v. Maxwell*, cited above, 237 U.S. at 97:

Under the Interstate Commerce Act [similar to section 18(b)(3)] the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted under any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

To cite a few examples of cases in which tariff law has superseded contract law, consider that a carrier may actually intentionally misrepresent rates to a shipper who relies upon the erroneous quotation in booking the shipment. Under contract law, the contract would prob-

<sup>19</sup> See *Farr Co. v. Seatrain Lines*, cited above, 20 F.M.C. at 417 n. 8; *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361, 365 (1965); *Ocean Freight Consultants, Inc. v. Bank Line Ltd.*, 9 F.M.C. 211, 214-215 (1966).

ably be voidable because of fraudulent inducement. But under tariff law, the carrier may recover the full amount of the tariff rate if the carrier performs the service. See the cases discussed in 88 American Law Reports 2d 1375, 1377, 1387-1388 (1963). Or the shipper may have booked the shipment with the carrier only because the carrier had promised to file a lower rate in its tariff prior to the time of shipment. If the carrier fails to file the lower rate and the higher rate remains in the tariff, the carrier can recover the full amount of freight under tariff law notwithstanding the shipper's defense that the carrier breached its agreement. See *Chicago, B & Q. R. Co. v. Ready Mixed Concrete Co.*, 487 F. 2d 1263 (8th Cir. 1973) in which this state of events actually occurred.<sup>20</sup> Or, to give a final example, even if the shipper fails to comply with some provision in the tariff itself, i.e., in contract law terms, it breaches the contract, such as when the shipper fails to insert the notation in the bill of lading that the cargo is proprietary or fails to provide a specific commodity description but rather provides a trade-name description in the bill of lading, as discussed earlier, the Commission does not bar the shipper's recovery of an overcharge regardless of any doctrine in contract law.

But the Conference has another string to its bow, namely, the case of *State of Israel v. Metropolitan Dade County, Florida*. In that case the Court permitted a Port to assess and retain a higher tariff dockage charge even when the shipowner showed after the fact that its vessel was in the status required to qualify for a lower rate. The Court found that because the shipowner had failed to provide written notice that its ship was in a non-loading status as required by the Port's tariff, the ship was required to pay full dockage rather than half dockage but that when the shipowner notified the Port of this fact, the ship was entitled to half dockage thereafter. The Court simply read the tariff provision as requiring advance notice of the vessel's status and applied the provision literally, finding that the shipowner's failure to comply with the notice requirement would result in assessment of the full dockage rate and that the shipowner could not gain retroactive relief merely by giving notice later. The Court relied upon the principle that a tariff has the force of law and that it was unreasonable to shift the burden of determining the status of the vessel on the Port when the shipowner had better knowledge. 431 F. 2d at 928-929.

The Conference argues that the shipper in the instant case, Sanrio, is trying to do what the shipowner in *State of Israel* tried to do, namely, seek a lower rate by showing the actual facts which would have

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<sup>20</sup> Of course, the only relief for the shipper is the special-docket provision of section 18(b)(3) of the Act by which a carrier may file an application seeking to refund or waive additional freight when the carrier forgot to file the tariff rate promised to the shipper. This is an exceptional provision in tariff law and gives the carrier the option of filing the application, not the shipper.

justified a lower rate after the event. If we assume that there is no difference in the law applicable to terminal tariffs filed under Commission regulation (General Order 15, 46 C.F.R. 533) rather than under a statute (section 18(b)(3) of the Act) which governs common carriers' tariffs,<sup>21</sup> there are still some factors that should be noted when dealing with the case.

First, the Court treated the issues in *State of Israel* as merely requiring a literal reading of the tariff without feeling the need for any expert assistance. 431 F. 2d at 928. The Court interpreted a provision in the tariff (Item 215) which required shipowners to give advance written applications to the Port regarding the status of its vessels as being a notice provision and treated that provision as an essential condition to the determination of the correct rate. The tariff provision itself did not specify that failure to comply with the provision would result in assessment of higher dockage. However, the Court believed that there was good reason to construe the provision as a binding condition determining the dockage rate. But, as discussed, the Commission in many cases does not construe tariff provisions regarding designation of proprietary cargo or use of nontrade names in cargo descriptions on bills of lading as being essential conditions. As the Commission stated in one of the many cases following this policy, *Durite Corporation Ltd. v. Sea-Land Service, Inc.*, 20 F.M.C. at 675:

The Commission has consistently held with respect to overcharge claims that what actually was shipped determines the proper rate and has permitted shippers, who had failed to comply with some tariff provision, to cure the defect by later introduced evidence.

This decision of the Commission was, as mentioned, affirmed by the Court of Appeals without opinion in *Sea-Land Service, Inc. v. Federal Maritime Commission*, 610 F. 2d 1000 (D.C. Cir. 1979). In its brief to the Court, the Commission had pointed out the many cases in which it had permitted shippers to recover overcharges notwithstanding the shippers' failure to comply with tariff provisions requiring various types of specification so long as the shippers could prove what actually moved. The Commission explained that it did not view the tariff provisions as unyielding conditions precedent but merely as something used for initial rating purposes. In other words, although the carrier may have had to rate the cargo under higher rate categories because of a particular tariff provision at the time of shipment, this initial rating was subject to change if the shipper later presented evidence showing the

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<sup>21</sup> The Court made no distinction between terminal tariffs and common-carrier tariffs although noting that the Port's tariff was filed under 46 C.F.R. 533. (431 F. 2d at 928 n. 6.) The Court discussed the Port's tariff, assuming that it was "required by the appropriate regulatory statute . . ." 431 F. 2d at 928.



actual commodity. (See Brief for Federal Maritime Commission, *Sea-Land Service, Inc. v. Federal Maritime Commission*, 610 F.2d 1000 (D.C. Cir. 1979) (No. 78-2271)).<sup>22</sup>

Second, it appears that the Commission had not intervened in *State of Israel*. Consequently the Court did not have the benefit of the Commission's views. This does not mean that the Court would necessarily have agreed with the Commission's policy of permitting complainants to show after the fact what actually moved or what was the true state of events notwithstanding tariff provisions. However, the Commission obviously does not treat these tariff cases as merely involving simple interpretations of tariff language but has established and followed a policy of which the Court was not aware.<sup>23</sup>

Third, since the Commission was not a party to *State of Israel*, that decision, while entitled to respect, is not binding on the Commission. If the Commission finds the reasoning in *State of Israel* persuasive and agrees that granting shippers recovery causes carriers to bear unreasonable burdens under present policy, the Commission can change its policy. However, present Commission law and policy do not seem to agree with the Court. Moreover, Chief Judge Brown, who wrote the opinion in *State of Israel*, and who had remarked that the case did not require the assistance of "a supposedly expert body" (431 F. 2d at 928), in a later opinion recommended that courts have the assistance of expert agencies in cases having industry-wide consequences and policy considerations and cited the inadequacy of trial courts' reliance on limited evidentiary records presented by private adversary parties when the courts attempted to make far-reaching decisions. See *Usery v. Tamiami Trail Tours, Inc.*, 531 F. 2d 224, 239-246 (5th Cir. 1976). Apropos of these later remarks of Judge Brown, in the instant case the Conference and Sanrio are making pointed comments about the role of outside rate consultants, whether they serve the public, whether shippers or forwarders who place inadequate descriptions of goods on bills of lading should be given relief or whether it is the Conference and carriers who have a duty to establish verification practices, etc. There is no evidence that the Court in *State of Israel* was aware of all of these issues nor how widespread the problem of overcharges has become in the shipping industry. The Commission, however, can consider all of these factors in fashioning policy in cases of this type.<sup>24</sup>

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<sup>22</sup> The Commission also explained to the Court that the carrier had not gone to any extra expense in handling the cargo because of the shipper's failure to follow the tariff rule requiring specification of proprietary cargo on the bill of lading. (Brief, pp. 8, 23 n. 26.)

<sup>23</sup> Of course, the present Commission policy was developed primarily by decisions issued after the date of *State of Israel* (1970). Apparently no one has cited that case to the Commission in these later decisions.

<sup>24</sup> Moreover, the Commission is in a better position to consider whether freight forwarders are contributing to the overcharge problem by carelessly describing goods on bills of lading and, if so, how

### THE CONFERENCE'S ARGUMENTS CONCERNING THE EVIDENCE SUBMITTED BY SANRIO

To some extent the Conference repeats the arguments made by Maersk that the evidence submitted by Sanrio is unreliable and insufficient because the invoices and packing lists were sent between affiliated companies and were not subject to "outside verification." The Conference makes clear that it is not opposing the admission into evidence of the Sanrio documents (i.e., packing lists, invoices, etc.) but it is arguing that they are not to be given much weight. The Conference also argues that the documents were not verified, that they are inconsistent and contradictory, may not be authentic, and that Sanrio has presented four different versions of its claims in the past, a fact, if true, the Conference believes to undermine Sanrio's case. The Conference also questions whether the poor descriptions on the bills of lading ("General Merchandise") were truly inadvertent. As I mentioned earlier, Sanrio contends that its evidence is reliable and authentic and asserts that it is absurd to argue that any shipper would deliberately misdescribe its goods with the result that the shipper would have to pay more freight. Sanrio also explains the alleged discrepancies in the earlier claims submitted and points to the invoices which it believes to show constitute the best evidence of what actually moved rather than the bill of lading descriptions which a forwarder may have filled out "for the sake of expediency." (Reply by Complainant to Conference, p. 3.)

I have discussed earlier in this decision the various types of evidence which the Commission has customarily accepted and relied upon in deciding cases of this type. I have also discussed the doctrine that holds that court rules of evidence are not followed by administrative agencies operating under the Administrative Procedure Act, 5 U.S.C. 556 (d). Sanrio has submitted exactly the type of evidence consistently utilized in cases of this type (e.g., packing lists, invoices, sales literature, actual samples) and even the Conference does not question their admissibility into evidence. As to the Conference's contention that the packing lists and invoices may not really relate to the shipments in question, I agree with Sanrio that the signature of Mr. Z. Takahashi, the contemporaneous dates on the documents, and the mutually corresponding reference numbers serve to authenticate the evidence. I note furthermore that even the Conference does not argue that Sanrio lacks integrity in submitting those documents. (Reply of Intervenor Conference, pp. 8-9.) Furthermore, there is additional evidence in the case, such as catalogs

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this practice can be curbed. Also the Commission can consider the Complainant's argument that the Conference should institute a verification of documents practice instead of relying upon bill of lading descriptions. However, the Commission once tried to impose a duty on carriers to verify documents but was rebuffed by a court. See *Ocean Freight Consultants v. Royal Netherlands Steamship Company*, 17 F.M.C. 143, 145 (1973).

and actual samples, which corroborate the packing lists and invoices. In the last analysis, it should be remembered that the essential question in this case, as in the three other cases pending before Settlement Officers, is to determine what products Sanrio Company Ltd. is actually manufacturing and shipping to the United States. That is, are they toys, stationery for children, or other things? The catalogs and samples as well as the invoices and packing lists provide answers and even if one believes that because the shipper and consignee are affiliated companies, their invoices are not to be trusted, one can turn to the catalogs and samples for corroboration.

The Conference also argues that Sanrio's evidence is contradictory. The Conference argues that the first version of what was shipped was presented by the bill of lading, the second version relating to claim "SA-81," by a document prepared by Traffic Associates on December 5, 1978; the third version was shown on the complaint filed with the Commission on April 11, 1979; and finally, a fourth version was shown by the Customs consumption entry. In each of these versions there are certain changes concerning the description of the shipment and the volume of alleged toys. Sanrio has explained these discrepancies, however, and I have discussed the status of bill of lading descriptions and consumption entries earlier in this decision.

The first description of the shipment involved in claim "SA-81" was that shown as "General Merchandise" on the bill of lading. But shippers are not bound to bill of lading descriptions as the cases so amply demonstrate since it is what can now be shown to have moved that counts in cases of this kind. The second document questioned by the Conference is the claim letter which Traffic Associates sent to respondent Maersk which showed fewer cubic meters of alleged toys than the third document cited, which is the complaint. But Sanrio replies that the original claim letter (Ex. A-2) dated December 5, 1978, asked Maersk to verify the claim but Maersk did not do so. Therefore, when the third document was filed (the complaint), Sanrio revised the earlier claim and resolved doubts in its favor. Sanrio also criticizes Maersk because the claim was not considered on its merits but was rejected under the so-called six-months' rule in the Conference tariff but for which this complaint might not have had to be filed.<sup>25</sup> (Reply by Complainant to Conference, p. 7.) The final document, the Customs consumption entry, does not show toys as a description although Sanrio

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<sup>25</sup> Maersk rejected the claim by letter dated January 5, 1979 (Ex. A-4) citing Conference Tariff Rule 59 which does not permit Conference carriers to consider claims for freight adjustments unless the claims are presented within six months of the date of shipment. The rule therefore left Sanrio with no choice but to file its complaint with the Commission. It is well settled that the so-called six months' rule and other time rules in tariffs cannot bar a shipper from seeking reparation for overcharges under section 22 of the Shipping Act, 1916. See, e.g., *Kraft Foods v. Moore-McCormack Lines, Inc.*, 19 F.M.C. 407 (1976); *Union Carbide Inter-America, Inc. v. Venezuelan Line*, 19 F.M.C. 97, 99 (1976).

claims most of its products shipped to be toys. However, Sanrio asserts that the consumption entry represents the opinion of the customhouse broker as to how the goods should be classified for customs purposes and is not necessarily the best evidence of what the goods were. The Commission, as I have discussed earlier in this opinion, agrees with Sanrio. See *Equality Plastics, Inc. et al.*, 17 F.M.C. at 227. In that case, as noted, the Commission found a battery-operated drink mixer to be ratable as a "toy" under the carrier's tariff although the consumption entry showed it as something else. To illustrate further the point that ocean carrier tariffs and the U.S. Customs Tariff Schedule of the United States may not correspond, Sanrio asserts that the Conference's tariff Item 6020 for "toys" includes a number of specific articles which would not be classified as "toys" in the TSUS.

I conclude, therefore, that the Conference is seeking to persuade the Commission to reverse its now well established policy that the shipper can recover reparation for overcharges on the basis of a preponderance of evidence showing what actually moved notwithstanding careless descriptions on bills of lading prepared by the shipper or forwarder or the shipper's failure to comply with tariff rules requiring particular designations. But in so doing, the Conference is relying almost entirely on rejected arguments or on theories of contract law which are held not applicable to tariffs. The Conference does, however, cite one court decision which seems contrary to the Commission's policy but that case, decided in 1970, preceded the bulk of Commission law on the subject, nor did the Commission participate in that case and another United States Court of Appeals (for the District of Columbia) does not appear to be disturbed by the Commission's policy. The Conference's arguments that Sanrio's evidence is not entitled to much weight, although admissible into the record, mainly repeats the arguments of Maersk. New arguments made by the Conference have been rebutted by Sanrio which has explained apparent discrepancies and inconsistencies which occurred over a period of time during which the claims were being prepared and filed.

#### ULTIMATE CONCLUSIONS

Complainant, Sanrio Company Ltd., a shipper in Japan which manufactures and exports a variety of small products designed mainly for children, shipped 42 different products to the United States via respondent Maersk Line in late 1977, which were described on three bills of lading mainly as "General Merchandise." A traffic consultant firm audited the freight records of these shipments for the importer and submitted claims to Maersk stating that the products in question were specific commodities entitled to specific commodity rates under Maersk's tariff, which Maersk had not given them. Maersk refused to consider the merits of these claims because of its tariff rule (and that of

the Conference to which Maersk belongs) barring consideration of the merits of claims submitted more than six months after date of shipment. Thereafter Sanrio filed its complaint with the Commission after correcting a jurisdictional problem relating to the fact that the complaint was originally filed in the name of the importer who had not paid the freight.

Sanrio has submitted evidence which it claims shows the true nature of the products for carrier tariff rating purposes. In 24 instances both Sanrio and Maersk agree on what tariff rate should apply, although Maersk does not concede that the evidence submitted is reliable and sufficient. In 15 other instances in which Sanrio claims that the products were ratable as toys, Maersk disagrees and shows the proper rate for 12, mainly stationery products, although not conceding the sufficiency of the evidence submitted by Sanrio. In three other instances Sanrio has shown what rate should apply for two of the products. The record thus shows the proper commodity rate for 38 of the 42 products shipped. There is a failure of proof and inconclusive evidence as to the remaining four products. Since this is a bellwether case, being the forerunner of at least seven more claims<sup>26</sup> in which Sanrio products are involved, conclusive findings on the 38 products are desirable and should help curtail future litigation, Sanrio being an active, continual shipper.

Since the record does not contain an exhibit calculating the total amount of overcharge and consequently, the amount of reparation to be awarded, Sanrio shall comply with the Commission's procedures under Rule 252 which are designed to deal with such situations, namely, by preparing a reparation statement based upon the findings in this decision, checking it with Maersk for accuracy, and then submitting it to the Commission, which should be able to issue an appropriate reparation order without further litigation, if the findings in this decision are adopted.

Both respondent Maersk and intervenor Trans-Pacific Freight Conference of Japan/Korea, whose tariff is involved, argue that Sanrio's claims should be denied for a variety of reasons, although Maersk suggests alternatively that partial reparation on 24 of the products may be acceptable. Maersk and the Conference argue that Sanrio has not borne its "heavy burden of proof" applicable in cases of this type, that its evidence is unreliable and insufficient, and that respondent relied upon Sanrio's representations on the bill of lading when first rating the products. The Conference amplifies the arguments of Maersk, urging that present Commission law and policy be reversed because of its

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<sup>26</sup> Since I began writing this decision. I notice officially that four more complaints have recently been filed by Sanrio, Inc., the importer, besides the three earlier complaints mentioned earlier in my decision.

belief that such policy encourages carelessness in preparing bills of lading, is unfair to carriers subject to belated claims, is contrary to principles of contract law, and fosters continual litigation frequently brought by outside rate consultants. Sanrio rebuts all of these arguments, defending and explaining its evidence, relying upon Commission decisions, and explaining the need for shippers to have the assistance of freight consultants if carriers do not verify shipping documents and rate shipments correctly at the time of shipment.

On the basis of well settled Commission precedent and policy, Sanrio must prevail in its arguments concerning applicable principles of law in overcharge cases. The Commission has countless times affirmed the principle that the shipper may recover overcharges if the shipper can show what actually moved on the basis of all the evidence, notwithstanding the shipper's failure to describe the goods on the bill of lading properly or the shipper's failure to comply with some tariff provision requiring particular types of descriptions or designations on bills of lading. Furthermore, although frequently stating that the shipper has a "heavy burden of proof" in cases of this type, the Commission has explained that this merely means that the shipper will have difficulty in obtaining evidence after the shipment. The Commission has clarified the matter further by stating that the shipper must show with reasonable certainty and definiteness the validity of its claim on the basis of a preponderance of the evidence.

In the present case Sanrio has presented evidence which has frequently and customarily been utilized by the Commission, such as invoices, packing lists, sales literature, and actual samples. Although Sanrio has not shown that its products in dispute are mainly toys, because the evidence reveals that they have practical uses, as Maersk shows, Sanrio and Maersk, either alone or together, have shown the correct nature and rate for 38 of the 42 products. The fact that some of the evidence may be self-serving on Sanrio's part, that the invoices and packing lists were sent between affiliated companies, that the Customs consumption entry has different descriptions, and that there are other criticisms of Sanrio's evidence does not alter the fact that on balance the basic documents, the catalogs, and actual samples show with reasonable certainty and definiteness the nature of the products shipped for carrier tariff rating purposes.

In the last analysis this is another of the many cases in which a shipper, with or without the help of outside rate consultants, has presented claims to a carrier for alleged overcharges months after the shipment and which the carrier's tariff requires to be rejected without consideration of the merits. Thereafter the shipper filed a formal complaint with the Commission and presented evidence showing that the bill of lading description on which the carrier relied at the time of shipment was inaccurate. Maersk and the Conference are urging me to

ignore an overwhelming body of Commission case law which has firmly established the policy of permitting shippers to show what actually moved notwithstanding erroneous bill of lading descriptions, alleging various adverse consequences flowing from this policy and asserting contrary principles of contract law. I could not adopt the Conference's arguments even if I believe them to have merit since a change in Commission policy is a matter for the Commission, not an administrative law judge.

Under prevailing Commission law and precedent, therefore, I have considered all of the evidence, determined what rates should have applied when the record enabled me to do so, and recommended that the proceeding be concluded under the procedures established by Commission Rule 252 governing determination of total amount of reparation to be awarded.

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

Washington, D.C.  
April 15, 1980

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 79-27

EASTERN FORWARDING INTERNATIONAL, INC.  
INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION  
POSSIBLE VIOLATIONS, SECTION 44, SHIPPING ACT, 1916

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## NOTICE

*September 8, 1980*

Notice is given that no exceptions have been filed to the July 31, 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

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DOCKET NO. 79-27

EASTERN FORWARDING INTERNATIONAL, INC.  
INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION  
POSSIBLE VIOLATIONS, SECTION 44, SHIPPING ACT, 1916

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Settlement of a proceeding seeking to determine whether respondent engaged in forwarding activities in violation of section 44(a) and 44(e), Shipping Act, 1916, approved. Respondent ordered to pay \$7,500 as a civil penalty pursuant to the terms of the settlement agreement.

*John H. Dougherty* for respondent.

*Paul J. Kaller and Joseph B. Slunt* as Hearing Counsel.

## INITIAL DECISION<sup>1</sup> OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

*Finalized September 8, 1980*

This proceeding was instituted by Order of Investigation and Hearing, served April 2, 1979, to determine whether Eastern Forwarding International, Inc., the respondent, had violated section 44 of the Shipping Act, 1916, 46 U.S.C. 841b, by engaging in forwarding activities without a license and receiving compensation therefor and whether its application for a license should be granted or denied. In particular, said Order required the determination of the following issues:

1. Whether Eastern Forwarding International, Inc., has violated section 44(a) and section 44(e), Shipping Act, 1916, by engaging in forwarding activities subsequent to revocation of its license on May 13, 1977, and by receiving payment of compensation from oceangoing common carriers in violation of section 44(e), Shipping Act, 1916, and section 510.24(e), Commission General Order 4.
2. Whether Eastern Forwarding International, Inc. continues to engage unlawful forwarding activities under the guise of "port agent" on behalf of non-vessel operating common carriers by water, and possibly others, in violation of section 44, Shipping Act, 1916.
3. Whether, in light of the evidence adduced pursuant to the foregoing issues, together with any other evidence adduced, Eastern

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<sup>1</sup> 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).

Forwarding International, Inc. and its corporate officers, possess the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, 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.

By letter dated October 23, 1979,<sup>2</sup> the respondent notified the Commission that it wished to withdraw its application and to enter into negotiations for settlement of any civil penalty claims arising from the activities at issue in the proceeding.<sup>3</sup>

The Commission responded to respondent's letter request on December 5, 1979, by issuing an Amended Order of Investigation providing for the assessment or settlement of civil penalties under section 32 of the Shipping Act, 46 U.S.C. 831. The amendment added a fourth issue to the proceeding, as follows:

4. Whether civil penalties should be assessed against Eastern Forwarding International, Inc., pursuant to 46 U.S.C. 831(e), for violations of Shipping Act, 1916, and if so, the amount of such penalties;

In addition, the Commission gave the parties until March 3, 1980, to conclude any settlement negotiations.

Upon the retirement of Judge Levy, the proceeding was assigned to me. On February 28, 1980, I was advised by Hearing Counsel that there was no likelihood that settlement negotiations would be concluded by March 3, 1980. By Notice of Hearing, served February 28, 1980, I ordered that this matter proceed to hearing on April 1, 1980. At the hearing the parties informed me that they had come to agreement on the terms of settlement but would require some additional time to reduce their understanding to writing. Under the circumstances I ordered that the settlement be submitted not later than April 25, 1980. That time was later enlarged to May 12, 1980.

On May 12, 1980, the parties filed, jointly, a Proposed Settlement of Civil Penalties<sup>4</sup> and a Stipulation to which were attached a Promissory Note Containing Agreement for Judgment executed by respondent and various other attachments, including a receipt issued in the name of the Commission for a certified check in the amount of \$1,071.42, representing payment of the first installment of monies due under the terms of

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<sup>2</sup> The Order of Investigation directed that the hearing be held not later than October 2, 1979. Accordingly, Administrative Law Judge Stanley M. Levy, the Judge to whom this proceeding was initially assigned, established a timetable to comply with that directive. However, the respondent's chief executive officer later became ill and the schedule was necessarily interrupted.

<sup>3</sup> The withdrawal of the application makes it unnecessary to decide issue Number 3.

<sup>4</sup> Should this decision become the decision of the Commission, see n. 1, *supra*, pursuant to 46 C.F.R. 505.3, the Proposed Settlement of Civil Penalties is attached as Appendix I and made a part of this decision.

the settlement agreement. Separately, the parties also filed a Memorandum of Respondent Eastern Forwarding International, Inc. in Connection With Proposed Settlement of Penalties and Hearing Counsel's Memorandum in Support of the Proposed Settlement Negotiated With Respondent.

### THE STIPULATED FACTS

The Stipulation contains the following recitation of the facts:<sup>5</sup>

1. Eastern Forwarding International, Inc. (Eastern) was licensed as an Independent Ocean Freight Forwarder, license No. 1353, on August 11, 1971. Eastern's license was revoked as of May 13, 1976, in accordance with section 44(c) of the Shipping Act, 1916, because of Eastern's inability, at that time, to deposit cash collateral required by the Surety on Eastern's freight forwarder bond. This resulted in the surety canceling the bond.

2. On two occasions in the summer of 1977, Commission Investigators from the New York District Office visited Eastern's place of business. The first occasion followed a report from a vessel operating common carrier to the Commission that Eastern was continuing to show its name and license number, 1353, in the forwarder identification box on vessel operating ocean carrier bills of lading prepared by Eastern. The second occasion followed Eastern's second application in May 1977, and was an investigation of Eastern's activities.

3. The FMC staff members ascertained that Eastern was continuing to send to ocean carriers a line copy of the bill of lading for non-Government movements of household goods. It would do so with a hand-stamped certification in the form prescribed by section 44(e) of the Shipping Act. This authorizes a common carrier to compensate a forwarder for soliciting the cargo covered by the bill of lading or for booking space for the cargo. This results in the carrier payment of the ocean freight compensation. Non-Government movements of household goods then constituted about 10 percent of Eastern's business, with military (Government) movements of household goods constituting the balance. No compensation is paid on Government movements of household goods. The Commission's staff members informed Jay Goldberg, Eastern's president, that Eastern could not collect compensation from ocean carriers. They ascertained that Eastern, while handling approximately 440 ocean freight shipments during the period from revocation of its forwarder license until July 8, 1977, collected some \$2,944 in ocean freight compensation from 23 ocean carriers on about 50 commercial shipments of household goods.

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<sup>5</sup> The Stipulated Facts which appear in that text are unedited except for bracketed inserts representing additions or deletions.

4. Goldberg discussed these practices with FMC staff members on the occasions of their two visits to Eastern's place of business and with the Chief of the Office of Freight Forwarders following each of these visits. Following the second visit, he stopped listing the former license number on ocean bills of lading upon learning that the Commission's staff considered that the use of the license number violated section 44 of the Act. Eastern refunded all these payments to the carriers, and had done so by Fall 1977. Some vessel operating ocean carriers continued to send payments of ocean freight compensation to Eastern on shipments handled by Eastern without the solicitation, billing or certification on the part of Eastern. Eastern has retained these compensation checks, uncashed, and has made all of them available to Hearing Counsel for inspection and copying.

5. Since discontinuing its collection of ocean freight compensation, Eastern has not increased its charges to its NVOCC [non vessel operating common carrier] principals. Those charges have remained unchanged from the levels at which they have stood since 1963.

6. By letter of February 15, 1978, the Commission's Managing Director advised Eastern that the Commission intended to deny Eastern's May, 1977 application. As Eastern did not request a hearing on the intent to deny the application, by letter dated April 18, 1978, Eastern's application was denied.

7. In dealing with ocean carriers Eastern has usually acted and identified itself as a port agent. The documentation Eastern sends to the ocean carrier on such a shipment customarily consists of a set containing the ocean carrier bill of lading, a letter of transmittal of the bill of lading addressed by Eastern to the ocean carrier, and, where necessary, an export declaration. Eastern's letter of transmittal has been in the same form since Eastern commenced operation. [Attachment and reference thereto omitted.]

8. The Military Traffic Management Command (MTMC) receives quotations from household goods carriers for household-goods movements in response to invitations for bids which MTMC issues semiannually. Such invitations take note of the existence and role of port agents, [Attachment and reference thereto omitted]. From time to time MTMC issues special instructions concerning actions to be taken by port agents, functions to be performed, or reports to be submitted by them. [Attachment and reference thereto omitted.]

9. The August 1979 issue of the magazine *Containerization International* (Vol. 13, No. 8) contains (pp. 54-55) an article entitled "Facts of life for US forwarders," which is a discussion of the business of ocean freight forwarding in the United States. [Attachment and further reference thereto omitted.]

10. By letter dated November 24, 1978, the FMC Managing Director notified Eastern that the FMC intended to deny Eastern's third applica-

tion unless Eastern asked for a hearing. [Attachment and reference thereto omitted.]

11. Before requesting a hearing, Goldberg asked for and received the letter attached hereto as [Appendix II].

12. Eastern asked for a hearing by letter dated January 10, 1979. Thereafter, on April 2, 1979, the Commission issued the Order of Investigation and Hearing in this proceeding.

13. Since the visits of the Commission staff members in 1977 and Goldberg's conversations then and subsequently with the Chief of the Office of Freight Forwarders, Eastern has described itself on bills of lading and other shipping documents relating to shipments it handles as port agent for its NVOCC principal whom it identified as the shipper and no longer collects compensation from ocean carriers (retaining, uncashed and, for this proceeding only, such brokerage checks as are still being sent to it by carriers).

14. As a port agent, Eastern performs the following services, although not all of them on every shipment or for every NVOCC principal:

- a. Books export shipments with the ocean carrier.
- b. Prepares ocean bills of lading.
- c. Sends the ocean bills of lading to the NVOCC principal and the overseas agent of the NVOCC.
- d. Advises the NVOCC's of the expected arrival time of shipments at the port of discharge.
- e. Prepares the export declarations on shipments bound for foreign destinations.
- f. Arranges for the packing of the ocean carrier container and the delivery of the container to the pier through an affiliated company.

15. Eastern does not maintain written agency agreements with its NVOCC clients. In one instance the NVOCC has provided Eastern with a manual of written instructions which sets forth the working details of the arrangement between the NVOCC and its port agents. [Attachment and reference thereto omitted.]

### THE SETTLEMENT

Briefly, the Settlement<sup>6</sup> requires the respondent to pay \$7,500 to the Commission<sup>7</sup> in consideration for the barring of any civil action or

<sup>6</sup> See n. 4, *supra*, and Appendix I.

<sup>7</sup> Under the terms of the promissory note, respondent shall make 7 equal payments of \$1,071.43. The last payment is due June 30, 1983. The note bears interest at the rate of twelve percent (12%) per year. The method of payment and the instruments executed meet the requirements of the applicable Commission Regulation appearing at 46 C.F.R. 505.7.

claim for recovery of civil penalties against the respondent arising from the alleged violations set forth in the Order of Investigation and Hearing and occurring during the period from May 13, 1976 through December 31, 1978. The Settlement expressly states that the "Agreement is not to be construed as an admission of guilt by Respondent, its officers, directors or employees to the alleged violation." The Settlement is, of course, conditional in that it is expressly made subject to the approval of the Commission.

### DISCUSSION AND CONCLUSION

Both Hearing Counsel and the respondent submit that the amount of \$7,500 is a fitting and appropriate settlement. Separately, each points out that the respondent made restitution of the \$2,944 which the respondent received from the ocean carrier; that the respondent has terminated the practices related to the use of its former freight forwarder license and collection of compensation from ocean carriers; and that the respondent has agreed to refrain from such practices and to observe the procedures specified by the Commission's staff in its port agent activities in the future.<sup>8</sup> Under the circumstances they concur that the settlement is likely to prove a sufficient deterrent in the future.

In addition, the respondent asserts that at the outset of its allegedly unlawful activities it labored under some misunderstanding of the law applicable to port agents of NVOCC principals in that it was not then aware that the Commission's staff considered such port agents to be "a related person" to its NVOCC principal for purposes of Section 510.22(c)<sup>9</sup> of the Commission's General Order 4," and, therefore ineligible to collect compensation "from oceangoing common carriers for forwarding services performed on behalf of NVOCC principles."<sup>10</sup>

In this connection, respondent contends that because there has as yet been no administrative or judicial testing of the Commission's staff's construction, there is some doubt about the outcome of any litigation

<sup>8</sup> See The Stipulated Facts, No. 9; Appendix II.

<sup>9</sup> Section 510.22(c) of the Commission's Freight Forwarder Regulations, 46 C.F.R. 510.22(c), provides as follows:

(c) A nonvessel operating common carrier by water or person related thereto, otherwise qualified, may be licensed as an independent ocean freight forwarder to dispatch export shipments moving on other than its through export bill of lading. Such carrier or person related thereto may collect compensation under section 44(e) when, and only when, the following certification is made on the "line copy" of the ocean carrier's bill of lading, in addition to all other certifications required by section 44 of the Shipping Act, 1916, and this part:

"The undersigned certifies that neither it, nor any related person, has issued a bill of lading covering ocean transportation or otherwise undertaken common carrier responsibility for the ocean transportation of the shipment covered by this bill of lading." Whenever a person acts in the capacity of a nonvessel operating common carrier by water as to any shipment he shall not be entitled to collect compensation under section 44(e) nor shall a common carrier by water pay such compensation to a non-vessel operating common carrier for such shipment.

<sup>10</sup> See Appendix II.

that might be undertaken.<sup>11</sup> It supports this argument by references to what it considers to be contrary positions taken by the Commission's staff in November and December 1978<sup>12</sup> and an article which appeared in a publication in August 1979 which it perceives to reflect its own prior understanding of permissible conduct under regulation. Nevertheless the respondent does not wish to pursue the litigation alternative because it cannot be assured of a favorable result and because of the expense involved in a lawsuit.

Most important respondent states that other than these activities, which were short lived, and which were terminated following the staff's visits in the summer of 1977,<sup>13</sup> it has had no history of violations of the Shipping Act. It stresses that the activities which are called into account in this proceeding do not involve fraud, deceit or other conduct involving moral turpitude. Indeed, respondent states that it cooperated with the Commission's staff and Hearing Counsel through all stages of this investigation.

Following enactment of Public Law 96-25<sup>14</sup> the Commission promulgated rules and regulations governing the compromise, assessment, settlement and collection of civil penalties,<sup>15</sup> indicating that the criteria for compromise, assessment or settlement included the standards set forth in 4 C.F.R. Parts 101-105.<sup>16</sup>

The standards enunciated in 4 C.F.R. Parts 101-105, particularly those appearing in Part 103, have long been a part of this agency's program in the mitigation of civil penalties prior to the passage of P.L. 96-25.<sup>17</sup> They continue to provide valuable assistance to the Commission as an aid in determining the amount of penalty in assessment proceedings and in determining whether to approve proposed settlements in assessment proceedings. *Angel Alfredo Romero--Independent Ocean Freight Forwarder Application and Foreign Freight Forwarders, Inc.--Possible Violations of Section 44, Shipping Act, 1916*, 22 F.M.C. 788 (1980). *H. K. International Forwarding, Inc. Independent Ocean Freight Forwarder License Application*, 22 F.M.C. 622 (1980).

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<sup>11</sup> Respondent candidly states that the doubt about the outcome is not shared by Hearing Counsel.

<sup>12</sup> The Stipulated Facts, paragraph Nos. 10 and 11.

<sup>13</sup> *Id.*, paragraph Nos. 2, 3, 4.

<sup>14</sup> 46 U.S.C. 831.

<sup>15</sup> General Order No. 30, 46 C.F.R. Part 505, entitled *Compromise, Assessment, Settlement and Collection of Civil Penalties Under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933* (Awarded).

<sup>16</sup> Federal Claims Collection Standards, issued jointly by the Comptroller General of the United States and the Attorney General of the United States under section 3 of the Federal Claims Collection Act of 1966, 31 U.S.C. 952.

<sup>17</sup> See enclosure to letter dated July 12, 1978, from the Commission's Deputy General Counsel, Edward G. Gruis, to the Chairman, Administrative Conference of the United States, Robert A. Anthony, at pp. 5, 8.

Those standards recognize the value of settling claims on the basis of litigative probabilities,<sup>18</sup> i.e.--the ability to prove a case for the full amount claimed either because of legal issues involved or a bona fide dispute as to facts. A pragmatic approach is warranted in utilizing this criteria.

Those standards also recognize that settlement may be based upon a determination that the agency's "enforcement policy in terms of deterrence and security compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon."<sup>19</sup> In this connection, the Comptroller General and Attorney General advise that "These accidental or technical violations may be dealt with less severely than willful and substantial violations."<sup>20</sup>

It should also be observed that those standards recognize that penalties may be settled "for one or for more than one of the reasons authorized in this part."<sup>21</sup>

On the record before me I am satisfied that the proposed settlement of penalties should be approved as it comports with established criteria.

Although the activities of the respondent might not be classified as merely a technical or accidental violation they certainly cannot be considered as deliberate attempts to defeat regulation. Moreover, there was no effort to conceal those activities or to defraud anyone. This is manifest from the fact that respondent cooperated with the staff and attorneys for the Commission and made full restitution. Compliance with regulation was obtained almost immediately after the matters were brought to the respondent's attention. There has been no resumption in the allegedly illegal activities. Under the circumstances it is manifest that the Commission's enforcement program will be served by the payment of the amount agreed upon pursuant to and in addition to the other terms and conditions of the settlement agreement.

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<sup>18</sup> 46 C.F.R. 103.3.

<sup>19</sup> 46 C.F.R. 103.5.

<sup>20</sup> *Id.*

<sup>21</sup> 46 C.F.R. 103.7.



Accordingly, it is ordered that the settlement agreement entitled "Proposed Settlement of Civil Penalties" be approved and, in accordance with the terms of that agreement, respondent is ordered to pay the sum of \$7,500 in settlement of civil penalty claims.

(S) SEYMOUR GLANZER  
*Administrative Law Judge*

Washington, D. C.  
July 31, 1980

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(Editor's Note: Appendices I and II are included in the official docket files for this proceeding.)

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-28

IN THE MATTER OF FURNISHING CONTAINER CHASSIS

## ORDER

*September 8, 1980*

The Maryland Port Administration and the Delaware River, Massachusetts, and Virginia Port Authorities have filed a Petition for Declaratory Order seeking a ruling from the Commission that "common carriers by water must tender cargo containers mounted on chassis for removal of the cargo from the pier to the ultimate consignee at an interior point." On May 13, 1980, the Commission served notice of the filing of this petition. Subsequently, sixteen replies were submitted on behalf of a large number of interested parties.\*

Section 502.68 of the Commission's Rules (46 C.F.R. 502.68) provides for the discretionary issuance of a declaratory order to terminate a controversy or remove uncertainty. Petitions seeking such relief must:

1. state clearly and concisely the controversy or uncertainty;
2. name the persons and cite the statutory authority involved;
3. include a complete statement of the facts and grounds prompting the petition;

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\* (1) ABC Containerline NV; (2) Gulf/Mediterranean Ports Conference; (3) Board of Trustees of the Galveston Wharves; (4) National Maritime Council; (5) Japan/Korea-Atlantic and Gulf Freight Conference, Japan-Puerto Rico & Virgin Islands Freight Conference, New York Freight Bureau, Philippines North America Conference, Straits/New York Conference, Thailand/Pacific Freight Conference, Thailand/U.S. Atlantic & Gulf Conference, TransPacific Freight Conference (Hong Kong), Trans-Pacific Freight Conference of Japan/Korea, Agreement No. 10107, and Agreement No. 10108; (6) Latin America/Pacific Coast Steamship Conference and North Europe - U.S. Pacific Coast Freight Conference; (7) Australia-Eastern U.S.A. Shipping Conference, the "8900" Lines Rate Agreement, 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. North Atlantic Spain Rate Agreement, U.S. South Atlantic/Spanish Portuguese Moroccan and Mediterranean Rate Agreement, and West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference; (8) Counsel of American-Flag Ship Operators; (9) Port of Houston Authority of Harris County, Texas; (10) Delta Steamship Lines, Inc.; (11) National Customs Brokers & Forwarders Association of America, Inc.; (12) American President Lines, Ltd.; (13) Steamship Operators Intermodal Committee; (14) West Gulf Maritime Association; (15) the Commission's Bureau of Hearing Counsel; and (16) North Atlantic United Kingdom Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic Continental Freight Conference, North Atlantic Baltic Freight Conference, Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference, Continental North Atlantic Westbound Freight Conference, North Atlantic Westbound Freight Association, South Atlantic North Europe Rate Agreement, Gulf-United Kingdom Conference, Gulf-European Freight Association, United Kingdom & U.S.A. Gulf Westbound Rate Agreement, Continental-U.S. Gulf Freight Association, and FMC Agreement 10140.

4. fully disclose petitioner's interest; and
5. be served upon all parties named therein.

Moreover, section 502.68(b) expressly limits the availability of declaratory rulings to situations where a Commission order would allow persons to act without peril upon their own view. Because the instant petition fails to satisfy several of these requirements it will be denied.

Petitioners have failed to clearly articulate the controversy which they wish the Commission to resolve. At best, the petition indicates some dissatisfaction with the Commission's decision in another proceeding, Docket No. 79-86, *Japan/Korea-Atlantic and Gulf Freight Conference Rules Pertaining to Chassis Availability and Demurrage Charges*, 22 F.M.C. 466 (1980). The Petitioners have also failed to adequately disclose their interests in any controversy which might exist. Most importantly, however, they have not provided a complete statement of the facts and grounds for relief. Without a detailed statement of the factual situation prompting the petition, the Commission cannot reasonably be expected to pass judgment on containerized carrier operations throughout the United States.

Finally, the petition fails to reveal how the requested relief would materially affect the conduct of the Petitioners themselves. It appears that only particular terminal operators and ocean common carriers would be directly affected by the Commission's resolution of the petition.

**THEREFORE, IT IS ORDERED,** That the Petition for Declaratory Order filed by Delaware River Port Authority, Maryland Port Administration, Massachusetts Port Authority, and Virginia Port Authority is hereby denied, without prejudice, and

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

By the Commission.

(S) FRANCIS C. HURNEY  
Secretary

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 69-57

AGREEMENT NO. T-2336 - NEW YORK SHIPPING  
ASSOCIATION COOPERATIVE WORKING ARRANGEMENT

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## ORDER REOPENING PROCEEDING FOR LIMITED PURPOSE OF SATISFYING CLAIM OF ZIM-AMERICAN ISRAELI SHIPPING CO., INC. AND DIRECTING NEW YORK SHIPPING ASSOCIATION TO SATISFY REMAINING CLAIMS OR TO SHOW CAUSE WHY SUCH CLAIMS SHOULD NOT BE SATISFIED

*September 9, 1980*

On July 30, 1980, the United States Court of Appeals for the District of Columbia Circuit issued an opinion in actions brought to review various aspects of our orders in this proceeding issued on April 3, 1978 and July 5, 1978. In *No. 78-1479 - New York Shipping Association, Inc. v. FMC & USA*, the Court affirmed our order directing New York Shipping Association, Inc. (NYSA) to satisfy all of the remaining claims for assessment adjustments which the Commission had found to have been viable and timely-filed. In *No. 78-1871 - Zim-American Israeli Shipping Co., Inc.*, the Court reversed the Commission's denial of Zim's claim on the grounds that a similarly situated claimant, Korea Shipping Corporation, had been granted an assessment adjustment.

The Commission had denied Zim's claim on the basis that it had been filed in an untimely fashion and had also been waived. The Court found that Zim's claim was still viable since Zim's negative response to a poll requesting its opinion as to whether it wished an assessment refund did not constitute a waiver of its claim because of the "unofficial" and "nonbinding" nature of the poll. It also found that the Commission's grant of an extension of time to Korea Shipping Corporation to file its claim when such extension was requested after the filing deadline, but failure to grant a similar extension to Zim, was arbitrary and capricious. The Court went on to say that the fact that Zim was treated in the same way as other late-filing claimants requesting an extension out of time ". . . suggests that Zim was not the only firm treated arbitrarily." (Slip opinion at 16).<sup>1</sup>

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<sup>1</sup> The Court was not persuaded by the Commission's argument that Korea Shipping was in a different position from all other late-filing claimants because it alone had sought assessment adjustments earlier by a positive response to the above discussed poll.

The consideration by the Commission of Korea Shipping's claim out of time appears in law to have constituted a waiver of the Commission-imposed limitation for the filing of claims and required the Commission to consider all claims which were filed during the additional filing period granted to Korea Shipping. See *Montship Lines, Limited v. FMB*, 111 U.S. App. D.C. 160, 164, 295 F.2d 147, 151 (1961). All of the late-filed claims were in fact filed during such additional period. Korea Shipping filed its claim on January 13, 1977, having been given until January 31, 1977 to file, and the last claim, that of Moore-McCormack Lines (Moore-McCormack), was filed on January 17, 1977. The only distinction which could be made among the various late-filing claimants is that some requested an extension of time to file and some did not.<sup>2</sup> Since, however, the requests for extension were themselves out of time, the distinction would indeed appear to be one without a difference.

NYSA, although served with notice of the extension for filing granted to Korea Shipping, never objected to that extension. Moreover, NYSA, while formerly contending that it was not liable for claims adjustments and that claims granted by the Commission were barred by waiver and estoppel, contentions which have been rejected by both the Commission and the Court of Appeals, has at all times recognized the need to insure that assessment adjustments are made in a fair and non-discriminatory manner. (See, e.g., NYSA's Objection to Claims, received December 9, 1976 at 9, NYSA's Petition for Reconsideration or Stay filed October 18, 1976 at 3, 10-11).

Zim and the other late-filing claimants have of course computed the amount which they feel is due them. One slight adjustment is necessary in these computations. As the Commission held in its orders of August 22, 1977 and April 3, 1978, the claims of all successful claimants must be reduced by the amount of the assessment adjustments due and granted to those in whose favor adjustments were made because of overassessments on automobile carriage since to the extent automobiles were overassessed, all other claimants were underassessed. All successful claimants have borne their share of the automobile assessment adjustments, and it is only fair that Zim and the other late-filing claims for

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<sup>2</sup> Another possible distinction, that based on a negative response to the informal poll, which would have applied to Moore-McCormack, has been removed by the Court's holding that a negative response to the poll did not constitute a waiver of an assessment adjustment claim.

which adjustments are to be made also bear their share.<sup>3</sup> There would thus seem to be no dispute as to the dollar amount of the claims.<sup>4</sup>

The late-filed claims previously denied by the Commission, computed in exactly the same manner as were those of all of the successful claimants in the earlier orders herein affirmed by the Court of Appeals, are as follows:

**Zim-American Israeli Shipping Co., Inc.**

\$5,004,344 (Puerto Rican carrier underpayment) less \$801,214 (total automobile credits) or \$4,203,130 multiplied by 1.75% (% of Zim's assessments vis-a-vis total tonnage assessment) = \$73,555

**Additional Late-Filed Claims**

Total Adjustments	\$5,004,344 (Puerto Rican carrier under payment) less \$801,214
Required if Claims	(total automobile credits) or \$4,203,130 multiplied by 6.94%
Granted: \$291,697	(% of claimaints' assessments vis-a-vis total tonnage assessment)

Adjustments for each individual late-filing claimant if claims granted:

North American Maritime Agencies (on behalf of Maritime Co. of the Philippines)	\$6,725 (0.16% of total tonnage)
Crossocean Shipping Company, Inc. (as general agents for Jugolinija, Rijeka)	\$53,380 (1.27% of total tonnage)
Crossocean Shipping Company, Inc. (as general agents for Muhammadi Steamship Co., Ltd., Karachi)	\$1,681 (0.04% of total tonnage)
Venezuelan Line	\$23,958 (0.57% of total tonnage)
J. H. Winchester & Co., Inc.	\$24,378 (0.58% of total tonnage)
Norton Lilly & Co. Inc., as agent for:	\$52,119 (1.24% of total tonnage)
Fassio Line	\$21,016 (0.50% of total tonnage)
The Shipping Corporation of India, Ltd.	\$13,450 (0.32% of total tonnage)
Norton Line	\$3,783 (0.09% of total tonnage)
American & Australian Line	\$5,464 (0.13% of total tonnage)
Ellerman & Bucknall Steamship Co., Ltd.	\$4,623 (0.11% of total tonnage)
Port Line	\$3,783 (0.09% of total tonnage)
Moore-McCormack Lines, Incorporated	\$129,456 (3.08% of total tonnage)

<sup>3</sup> The orders establishing the liability of claimants to bear their share of the automobile assessment adjustments were those of December 27, 1976, which granted NYSA's petition for reconsideration on the question of the effect automobile assessment adjustments should have on other claims (see especially page 10), the order of February 23, 1977, which held that claims should be reduced to take account of all non-automobile claimants' underpayments occasioned by the overassessment of automobiles (see especially pages 2, 4, 7 and 14), and the order of August 22, 1977, which determined the exact amount of the automobile assessment adjustments, and thus the amount by which all other claims would be reduced (see pages 2-3, 6-7). These orders were served on all claimants, have never been challenged, and the time for court review of them has long passed.

<sup>4</sup> NYSA itself admits that the "Commission now has available the basic information needed for an accurate computation of all of the additional claims." (Response of NYSA, October 24, 1977 at 6).

In accordance with the Court's direction that Zim be permitted to file its claim, and no reason appearing why the claim should not be satisfied, we shall direct that NYSA satisfy such claim in one of the three ways which we have recognized as proper herein in proceedings which have twice been upheld by the Court of Appeals, namely, cash refunds, credits against present and future assessments, or partial assessments.<sup>5</sup>

We perceive no reason why NYSA should not satisfy all of the late-filed claims in the amount set forth in the foregoing chart and in the manner we have directed for all other claims. Since, however, NYSA has not as yet had an opportunity specifically to address itself to the problem of apparent discrimination in making assessment adjustments for Zim but not other late-filing claimants in the light of the Court's July 30th order, we shall allow NYSA such opportunity. NYSA will thus be directed to satisfy the remaining late-filed claims or, in the alternative, to show cause as to why the remaining late-filed claims should not be satisfied. The claim of Zim must of course be satisfied promptly.<sup>6</sup>

**THEREFORE, IT IS ORDERED,** That this proceeding be reopened;

**IT IS FURTHER ORDERED,** That NYSA shall, within 30 days of the date of service of this order, satisfy the claim of Zim-American Israeli Shipping Co., Inc. in the amount of \$73,555 by means of cash payments or a system of credits or partial credits against present and future assessments as outlined herein and in our orders of April 3, 1978, December 27, 1976 and our report and order in 19 F.M.C. 248, and notify the Commission in writing that such claim has been satisfied and describe the method of satisfaction employed;

**IT IS FURTHER ORDERED,** That NYSA shall, within 30 days of the date of service of this order, satisfy the remaining late-filed claims by means of cash payments or a system of credits or partial credits against present and future assessments, or, in the alternative, show cause why, in light of the Court's holding regarding Zim, the other claimants should not be accorded the same treatment as Korea Shipping

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<sup>5</sup> As we have earlier explained, should a successful claimant cease to serve the port of New York, credits or partial credits will no longer be a satisfactory means of assessment adjustments, and cash refunds will be required to satisfy the remaining liability. See e.g., *Agreement No. T-2336*, 19 F.M.C. 248, 262-265 (1976), *affd. sub nom. New York Shipping Ass'n v. FMC*, 187 U.S. App. D.C. 282, 292, 571 F.2d 1231, 1241 (1978); Orders of December 27, 1976 at 5, 9-10, and April 3, 1978 at 21; and notice of July 5, 1978 at 3-4.

<sup>6</sup> Although we have utilized 60 days in the past as the time during which adjustments which we have ordered are to be made, 30 days seems more appropriate here. All problems relating to Zim's claim have been fully resolved, and that claim should be satisfied expeditiously. Thirty days also seems sufficient for the satisfaction of the additional late-filed claims in light of the small number of such claims and NYSA's experience in making the necessary adjustments in compliance with our other orders herein. Moreover, if NYSA chooses to show cause why the remaining late-filed claims should not be satisfied, in light of the narrow questions presented, 30 days should also be sufficient.

Company. If NYSA elects to show cause in lieu of satisfying all of the remaining claimants, it shall make proper service upon all persons whose claims it contests.

IT IS FURTHER ORDERED, That if NYSA submits arguments that some or all of the remaining claimants should not be satisfied, those claimants may file replies to NYSA within 15 days of the date of service of NYSA's submission.

By the Commission.

(S) FRANCIS C. HURNEY  
*Secretary*



# FEDERAL MARITIME COMMISSION

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DOCKET NO. 79-98

AIR/COMPAK INC. - INDEPENDENT OCEAN FREIGHT  
FORWARDER LICENSE APPLICATION

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## NOTICE

*September 10, 1980*

Notice is given that no exceptions have been filed to the August 5, 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

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DOCKET NO. 79-98

AIR/COMPAK INC.

## INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION

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Held:

1. The applicant, Air/Compak Inc., violated section 44(a), Shipping Act, 1916, by engaging in unlicensed freight forwarding activities in at least seven instances.
2. Where the applicant was notified not to engage in freight forwarding activities without a license by the Federal Maritime Commission, both orally and in writing, and where the applicant did engage in such activities after being so notified, a civil penalty of \$5,000 is warranted and will be assessed pursuant to 46 U.S.C. 831(e). The penalty gives adequate consideration to any mitigating circumstances involved on the one hand, and constitutes a sufficient deterrent to future like conduct on the other.

*Clarence Morse* for respondent.

*Joseph B. Slunt* and *Alan J. Jacobson* as Hearing Counsel.

### INITIAL DECISION<sup>1</sup> OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

*Finalized September 10, 1980*

This is a proceeding begun pursuant to sections 22 and 44 (46 U.S.C. 821 and 841(b), respectively) of the Shipping Act, 1916, and section 510.8 of the Commission's General Order 4 (46 C.F.R. 510.8). The issues to be determined are:

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

### BACKGROUND INFORMATION

This proceeding was begun by the Commission's Order of Investigation and Hearing, dated December 7, 1979. The Order noted that Air/Compak had apparently engaged in freight forwarding without a li-

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<sup>1</sup> 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).

cense and, in addition to the two issues set forth above, directed that the following issue related to the applicant's fitness be determined:

3. Whether Air/Compak 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.

The Order further provided for seriatim filings of memorandums of law, etc., from the parties,<sup>2</sup> and directed that any additional procedure adopted by the Administrative Law Judge:

shall include oral testimony and cross-examination in the discretion of the Presiding Officer only upon a showing that there are issues of fact which cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matters in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record.

Respondent filed a motion on February 21, 1980, to extend the time for its opening memorandum, which motion was granted. Then, by letter dated February 29, 1980, it notified the Commission that it was withdrawing its application for a freight forwarder's license, without prejudice, and filed a motion to dismiss the proceeding in part<sup>3</sup> as well as for an extension of time so that it might "negotiate with Hearing Counsel and/or to reach settlement or otherwise plead." The motion was granted as was a subsequent motion for an extension of time to submit the opening memorandum. Finally, after the parties failed to reach agreement on settlement, both filed opening memorandums of law accompanied by affidavits and other evidence and Hearing Counsel filed its reply. In addition, both parties have agreed that the case should stand submitted on the written filings without the taking of direct oral testimony and without cross-examination.

#### FINDINGS OF FACT

For purposes of this decision the following documents are accepted as evidence and identified as follows:

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<sup>2</sup> January 21, 1980 - Opening Filing of Hearing Counsel.  
February 22, 1980 - Opening Filing of Respondent.  
March 14, 1980 - Reply Filing of Hearing Counsel.

<sup>3</sup> The issue sought to be dismissed was the issue of fitness (Issue No. 3) set forth in the Commission's Order of Investigation, dated December 7, 1979.

Document	Exhibit No.
Affidavit of Robert James Klapouchy	1
Letter of Charles W. Clow dated 6/7/78	2
Affidavit of District Investigator Miguel G. Tello	3
Affidavit of District Investigator David. M. Johnson	4
Affidavit of Thomas N. Davis	5

1. Air/Compak is a corporation with its principal office in Melbourne, Florida. Mr. Thomas Davis is its president. (Exs. 1, 5.)

2. Thomas Davis' work history is as follows:

- 1961-1973 -Employed in family owned and operated business (trucking) as a driver of daily runs, as claims investigator and as a rate clerk. In 1968 became Dispatch Supervisor and Traffic Manager and in 1972, Director of Operations.
- 1973-1974 -Employed by Birdsall, Inc., agents for Tropical Shipping, Ltd. as Equipment Control Manager. In October of 1973 was given responsibility of Port Operations which entailed direct supervision of stevedoring and all port and marine related functions.
- 1974-1978 -Employed by Harris Corporation as Transportation Manager who was responsible for all domestic and international traffic by ocean, land and air. His duties included booking ocean freight space and supervising the procurement of accurate and proper bills of lading, shipper's export declarations and other pertinent shipping documents. While at Harris he performed many if not all of the various activities engaged in by freight forwarders.

3. On June 1, 1978, Robert James Klapouchy, of the FMC's Office of Freight Forwarders, discussed Air/Compak's application for an ocean freight forwarder license with Mr. Davis. Mr. Klapouchy informed Mr. Davis that Air/Compak was not permitted to engage in ocean freight forwarding without a license. (Ex. 1.)

4. On June 7, 1978, the FMC sent the following letter to Air/Compak over the signature of Charles L. Clow, Chief, Office of Freight Forwarders:

Receipt is acknowledged of your application for an independent ocean freight forwarder license. The application is being processed, and further information regarding it will be sent to you in the future. The application has been assigned number *B-183*. Correspondence concerning the application should refer to the application number and be submitted *in triplicate*.

Your attention is specifically directed to Section 44, Shipping Act, 1916, which prohibits any person from engaging in carrying on the business of forwarding unless such person holds a license issued by the Federal Maritime Commission to engage in such business. "Carrying on the business of forwarding" is

defined under Section 510.2 of the enclosed General Order 4 and Section 1, Shipping Act, 1916.

If you should engage in the business of forwarding before receiving your license, you will be subject to penalties provided by law and may prejudice the issuance of your license.

Any changes in facts contained in your application, including addresses, telephone numbers, additional corporate officers, etc., should immediately be reported to the Commission in *triplicate*. Delay in reporting such changes may delay the processing of your application.

(Ex. 2.)

5. On December 18, 1978, after asking Mr. Davis to have Air/Compak's records available for inspection, FMC District Investigator Miguel G. Tello interviewed Mr. Davis and reviewed Air/Compak's records at its Melbourne office. Mr. Davis supplied M. Tello with "the forwarding paperwork" performed in Melbourne and told Mr. Tello the bookkeeping records were maintained in the Houston, Texas, office. He stated it would have been inconvenient to bring those records to Melbourne. (Ex. 3.)

6. Mr. Tello found five instances where Air/Compak engaged in freight forwarding between August 4, 1978, and October 3, 1978, after being told it would violate the law if it did so. He prepared a schedule setting forth the violations which schedule has been made a part of the record. (Ex. 3, paras. 8, 9, Attachments A, B-1 through F-3.)

7. Air/Compak invoiced its ocean freight clients \$60 for "Bill of Lading," which charge was for preparing the bills of lading and handling the shipments which included contacting the ocean carrier, arranging for booking the shipments and preparing the export documentations. (Ex. 3 para. 11.)

8. At the December 18, 1978, meeting, Mr. Tello asked Mr. Davis if he had engaged in ocean freight forwarding. Mr. Davis stated he had on a limited number of occasions for clients for whom he also had performed air freight forwarding services. He also stated he had experience in handling ocean shipments to the relevant foreign destinations due to his prior employment. (Ex. 3, para. 5.)

9. Mr. Davis informed Mr. Tello that he had received a letter from the Commission, which enclosed a copy of the Commission's rules regarding ocean freight forwarding and stated he was familiar with the Commission's rules. He also stated that he did not know his activity was improper since he did not receive compensation from ocean carriers which receipt he thought would have been improper. (Ex. 3, paras. 6, 7.)

10. At the end of the December 18, 1980, meeting Mr. Tello informed Mr. Davis not to perform any more ocean freight forwarding

without a license and to turn such work over to a licensed freight forwarder (Ex. 3, para. 12.)

11. On January 30, 1979, Commission District Investigator David M. Johnson, reviewed Air/Compak's records at its Houston office. The records reflected two other instances of ocean freight forwarding engaged in after the Commission had advised Air/Compak not to engage in such activity without a license. One occurred on December 28, 1979, and the other on January 5, 1980. (Ex. 4, paras. 3, 4, 5, Attachments A-1 through A-3, B-1 through B-3 and E-1 through E-4.)

#### ULTIMATE FINDINGS OF FACT

12. Air/Compak, through its principal officer Thomas N. Davis carried on the business of ocean freight forwarding within the meaning of sections 1 and 44 of the Shipping Act, 1916, and 46 C.F.R. 510, et seq., without a license.

13. Air/Compak carried on the business of ocean freight forwarding after being notified by the Commission that it was illegal to do so without a license.

14. Under section 32(a) of the Shipping Act, 1916 (46 U.S.C. 831(a)), the Commission may assess a civil penalty not to exceed \$5,000 for each violation of section 44 of the Shipping Act.

#### DISCUSSION

*Issue No. 1* - Whether Air/Compak Inc., violated section 44(a), Shipping Act, 1916, by engaging in unlicensed forwarding activities.

Section 44(a), Shipping Act, 1916, provides:

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.

The record in this case clearly establishes that Air/Compak violated section 44(a) in at least seven different instances and it has been so found as fact. Indeed, the respondent does not contest such a finding and has admitted in its own proposed findings of fact that the violations occurred (Respondent's Opening Memorandum of Law and Affidavit of Facts, Proposed Findings of Fact, paras. 5, 6). Consequently, no further discussion of this issue is necessary to this decision.

*Issue No. 2* - Whether civil penalties should be assessed against Air/Compak Inc., pursuant to 46 U.S.C. 831(e), for violations of the Shipping Act, 1916, and, if so, the amount of such penalty which should be imposed taking into consideration factors in possible mitigation of such a penalty.

Section 32(a) of the Shipping Act, 1916, provides that:

. . . whoever violates . . . section 44 of the Act . . . shall be subject to a civil penalty not to exceed \$5,000 for each such violation.

Further, section 32(e) provides that:

. . . the Commission shall have authority to assess or compromise all civil penalties provided in this Act.

The real question to be decided here is the amount of the penalty to be assessed. On the one hand, the respondent urges a penalty not to exceed \$1,000. On the other, Hearing Counsel argues for a penalty of \$5,000. The respondent bases his argument on the assertions that neither Air/Compak nor Mr. Davis has engaged in any prior violations of law, that Mr. Davis did not believe he was "doing business" as an ocean freight forwarder, that he thought, as in the case of air forwarding, that he could forward ocean freight before a forwarding license was issued, that Mr. Davis was ignorant of the Commission's freight forwarder statute and the regulations applicable to ocean freight forwarders, that he did not intend to violate Commission rules and regulations, that he did not collect brokerage fees from the carriers, that "he recognizes he gave little attention to the FMC application," that he has already suffered damage because of delay and the fact that he had to withdraw his application.

Hearing Counsel notes that while the minimum penalty is \$5,000, the relative severity of the violations and the cooperation of the respondent did not warrant such a penalty and that \$5,000 is the "minimum realistic penalty." He suggests that the \$1,000 penalty espoused by the respondent neither recognizes the significance of the violations nor serves as a meaningful deterrent against future misconduct.

As to the case law cited by the parties, respondent cites several cases most of which were decided before the Commission had authority to assess civil penalties. He cites *E. L. Mobley Inc.*, Docket No. 77-26, Report and Partial Adoption of Initial Decision served March 12, 1979, for the general proposition that the sanctions imposed by the law and regulations must be in the public interest and not punitive in nature. He then cites a series of cases which are concerned with the granting or denial of a license rather than with the penalty to be assessed.<sup>4</sup> Respondent does cite *Concordia International Forwarding Corporation-Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916*, Docket No. 78-34, 21 F.M.C. 587 (1978), and *Angel Alfredo Romero--Independent Ocean Freight Forwarder Application and Foreign Freight Forwarders, Inc.--Possible Violations of Section*

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<sup>4</sup> *Independent Ocean Freight Forwarder License Application - Guy G. Sorrentino*, 15 F.M.C. 127 (1972); *Fabio A. Ruiz d/b/a Far Express Company*, 15 F.M.C. 242, 247 (1972); *Independent Ocean Freight Forwarder License Application--Key Air Freight, Inc.*, 14 F.M.C. 290 (1971); *Independent Ocean Freight Forwarder License Application, L.T.C. Air Cargo, Inc.*, 13 F.M.C. 267 (1970).

44, *Shipping Act, 1916*, Docket No. 79-29, 22 F.M.C. 788 (1980) which are concerned with the penalty provisions. He analogizes the facts in those cases with those involved here and notes that the severity and number of violations involved in those cases exceeds what is involved in this proceeding.

As to the cases involving licensing Hearing Counsel responds that "equally irrelevant to the pending question of assessment for violations are the Commission's actions cited by Respondent regarding the licensing or revocation of licenses of forwarders." Hearing Counsel then proceeds to distinguish *Concordia* from the instant case, pointing out that *Concordia* involved a *settlement* agreement between the parties and not an assessment. Likewise, he distinguishes *Romero* from this case, noting that in *Romero* the facts indicated that the respondent was unable to pay any more than the \$2,500 penalty assessed, while here there is no inability to pay.

After reviewing the entire record in this case, it is held that a penalty of \$5,000 is appropriate. While in mitigation one can agree with the respondent that the number of violations was not great, that the amounts received for services rendered were small and that Mr. Davis' moral character and business reputation are good, these facts do not outweigh what is clearly reflected in the record, namely, that even after he was told not to forward ocean freight without a license Mr. Davis did so. It is not enough to dismiss his actions by calling them technical violations, by pointing to a lack of willfulness or by asserting that he was ignorant of the law and regulations. Given Mr. Davis' background and experience and the fact that in July of 1978 he was told it would be wrong to forward ocean freight without a license and was referred to the law and regulations, one is hard pressed to look upon his latter actions as inadvertent or forgetful. Any reasonable man being so put on notice would have inquired of the Commission as to what he might or might not do, and Mr. Davis' failure to make such inquiry evidences, at the very least, the kind of negligence, the kind of brinkmanship and the kind of conscious inaction the penalty provision was meant to deter. While the severest of penalties is not warranted certainly some penalty having a deterrent effect is called for. The \$5,000 figure is appropriate.

In its brief the respondent properly notes that it is difficult to set a minimum settlement figure for all cases and cites the many factual variations present in the cases such as the presence or absence of willfulness, "lawful intent and state of mind, etc." and experience as a freight forwarder. He then proceeds to argue that a \$5,000 penalty here would be unreasonable in light of *Concordia* and *Romero, supra*, where there were many more violations and where the violations were willful. Respondent also makes a penalty per violation computation which he uses to demonstrate how severe the \$5,000 penalty would be here. We



agree with Hearing Counsel that *Concordia* and *Romero* should not be compared to this case and are distinguishable from it because *Concordia* was the result of a settlement and not a hearing on the merits as here and because, in *Romero*, the assessment was clearly predicated on an inability to pay which is not present in the instant case.

As to the factual variances in each case it is obvious and we would agree with the respondent that each case must stand on its own. However, that is not to say that given the embryonic posture of the Commission's assessment authority it cannot or should not proceed to establish certain criteria so as to achieve some predictable degree of uniformity. The holding in this case stands for the proposition that once Commission warnings not to engage in ocean freight forwarding have been clearly disseminated to a respondent so that a reasonable man would either understand them, or lacking such understanding, would undertake to inquire as to matters he does not understand, the subsequent act of engaging in freight forwarding without a license is not a "technical" violation and will not be excused because of alleged lack of willfulness, ignorance, lack of harm or other similar factors. Further, a civil penalty of at least \$5,000 is warranted in such cases, where there are no *material* distinguishing facts. Here, a decision assessing such a penalty gives adequate consideration to the mitigating circumstances involved in that it recognizes that the respondent's actions did not result in unjust enrichment or an inordinate number of violations, and at the same time recognizes the need for the Commission to assess a penalty which will deter illegal ocean freight forwarding in the future either by the respondent or others who may find themselves similarly situated, facing similar alternatives.

In light of the above facts and discussion, as well as the entire record, it is held that the respondent, Air/Compak Inc., violated section 44(a), Shipping Act, 1916, by engaging in unlicensed freight forwarding activities, and that civil penalties in the amount of \$5,000 are hereby assessed against Air/Compak Inc., pursuant to section 831(e) (46 U.S.C. 831(e)) of the Shipping Act, 1916.

(S) JOSEPH N. INGOLIA  
*Administrative Law Judge*

Washington, D. C.  
August 5, 1980

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-2**

**AVION FORWARDING, INC. - INDEPENDENT OCEAN  
FREIGHT FORWARDER LICENSE APPLICATION**

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**NOTICE**

*September 10, 1980*

Notice is given that no exceptions have been filed to the August 4, 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

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DOCKET NO. 80-2

AVION FORWARDING, INC.

## INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION

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Respondent found to have carried on the business of ocean freight forwarding without a license; also found that a civil penalty should be assessed against respondent, and that mitigating factors are insignificant and unimpressive; and that respondent is not fit to be licensed. Application denied.

*John L. Alfano and Roy A. Jacobs* for respondent.

*John Robert Ewers, Joseph B. Slunt and William D. Weiswasser* as Hearing Counsel.

### INITIAL DECISION <sup>1</sup> OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

*Finalized September 10, 1980*

Avion Forwarding, Inc. (Avion), the respondent, filed an application for a license as an independent ocean freight forwarder. During the course of the Federal Maritime Commission's investigation of Avion, it appeared that Avion had engaged in unlicensed forwarding activities although previously warned not to engage in such activities.

Avion was advised of the Commission's intent to deny its application for a license, and Avion requested a hearing. By order of investigation and hearing served January 11, 1980, this proceeding was instituted to determine: (1) whether Avion violated section 44(a) of the Shipping Act, 1916 (the Act), by engaging in unlicensed forwarding activities; (2) whether civil penalties should be assessed against Avion pursuant to section 32(e) of the Act, 46 U.S.C. 831(e), for violations of the Act and the Commission's General Order 4 (46 C.F.R. 510) and, if so, the amount of such penalty which should be imposed, taking into consideration factors in possible mitigation of such a penalty; and (3) whether Avion and its corporate officers possess the requisite fitness within the meaning of section 44(b) of the Act to be licensed as an independent ocean freight forwarder.

In accordance with the order of investigation Hearing Counsel filed their opening memorandum of law, their request for a penalty of \$25,000, and affidavits of facts; respondent subsequently filed its memo-

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<sup>1</sup> 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).

randum of law and affidavit of facts; and later Hearing Counsel filed their reply memorandum of law.

The order of investigation further provided within two weeks following the reply memorandum of Hearing Counsel, that the parties submit written statements identifying any unresolved issues of fact and specifying the type of procedure to resolve them, any such procedure to include oral testimony and cross-examination at the discretion of the Presiding Officer only upon a showing of necessity to develop an adequate record.

In response to the above directive, neither the respondent nor Hearing Counsel requested opportunity for oral testimony. But, Hearing Counsel on May 19, 1980, petitioned that the record be reopened to receive new evidence of continuing violations by the respondent, to which petition the respondent did not reply. For good cause, the said petition was granted, and the record was reopened to receive the affidavit and supporting documentation offered by Hearing Counsel. The parties then were given two weeks following the ruling reopening the record (ruling served June 11, 1980) to submit written statements identifying unresolved issues of fact and specifying the type of procedure suited to resolve them. No response was received from the respondent, and Hearing Counsel submitted that the record was sufficient, stating that as of June 17, 1980, they had submitted for the record evidence of at least 137 violations of section 44(a) of the Act. Hearing Counsel reiterated their earlier recommendations that respondent's license application be denied and that a civil penalty of \$25,000 be assessed.

The following findings of facts are based upon the written record submitted by the parties.

Respondent is a New York Corporation established in November 1978 for the purpose of serving shippers of freight in both air and surface modes of transportation. Its principal office is in Jamaica, New York. Respondent is approved as an air forwarder by the Civil Aeronautics Board and possesses a license from the International Air Transport Association. Respondent also handles consolidations and domestic shipments throughout the United States.

An affiliate of respondent, Lorme International, Inc., holds a custom house brokers license and arranges customs clearance for all types of cargo. Another affiliate, Avion Air & Sea Trucking, Inc., provides motor carrier support to respondent's other companies while conducting local cartage operations in the New York, New York, area.

Neither respondent, nor its two affiliates, are connected with, in control of, or associated with any shipper or consignee of shipments to or from foreign countries.

Respondent has operated at a small loss for the seven months ending January 31, 1980. Respondent attributes this loss to the provision by it

of certain services without compensation, and anticipates a profit when and if it receives a license as an independent ocean freight forwarder.

Over the year ending March 19, 1980, respondent admits that it has provided its customers ocean freight forwarding service, including examining instructions and documents received from shippers, ordering cargo to port, preparing or processing delivery orders and dock receipts, and preparing and processing ocean bills of lading.

Respondent has not received brokerage from ocean common carriers, and believed that as long as it did not receive such brokerage, that it could continue to furnish ocean freight forwarding services.

Respondent states that it had the impression that so long as a licensed forwarder was shown on the bill of lading, the law was being complied with.

Respondent further states that its conception of the term, "carrying on the business of forwarding" implies that compensation is being paid. Inasmuch as respondent was compensated by its shippers for its forwarding services, apparently respondent's definition of compensation is limited to brokerage from ocean common carriers.

Respondent states that even if it violated the Shipping Act technically, that it should not be penalized when it has not benefited (received brokerage from ocean common carriers); that it is willing to accept a license as an independent ocean freight forwarder on a limited term basis, providing for a review of its fitness prior to the expiration of the term; and that if at a later date it has demonstrated that it can comply with the Shipping Act that it should be granted a permanent license.

On January 10, 1979, Avion received a form letter from the Commission in Washington, D. C., transmitting the application form for license as a freight forwarder which had been requested by Avion. The form letter received by Avion explicitly refers to section 44 of the Act and to the requirement of a license to carry on the business of forwarding. The form letter further warned that forwarding without a license subjected an applicant to possible penalties and prejudice to the issuance of a license.

On March 5, 1979, Avion's president, Mr. Charles Lorme, was told by a transportation industry analyst employed by the Commission in Washington, D. C., in a telephone conversation that Avion was not permitted to conduct ocean freight forwarding work before being issued a license by the Commission. This analyst gives the same warning to all applicants for licenses as freight forwarders.

On March 9, 1979, the Office of Freight Forwarders of the Commission in Washington, D. C., sent Avion a letter, which the analyst had referred to in the March 5th telephone conversation with Avion. This letter, as shown by the postal receipt, was delivered to Avion on March 14, 1979. The letter acknowledged receipt of Avion's application and directed its attention to the fact that:

section 44 of the Shipping Act, 1916, prohibits any person from engaging in carrying on the business of forwarding unless such person holds a license issued by the Commission to engage in such business.

The letter also warned Avion that if it should engage in the business of forwarding before receiving a license, it would be subject to penalties and such activities might prejudice the issuance of its license.

On March 28, 1979, an investigator employed by the Commission at its Atlantic District Office in New York City, spoke by telephone with Avion's president, Charles Lorme, and Mr. Lorme then was warned not to forward any more ocean shipments.

On April 4, 1979, the District Investigator of the Commission referred to above met with Mr. Lorme, and with Rosemarie Bacchi, Vice President/Operations Manager of Avion, and with Angelo M. Durso, Secretary of Avion. On May 30, 1979, Ms. Bacchi acknowledged in a written statement, witnessed by District Investigator Wilfred P. Calkins, that:

On April 4, 1979, Atlantic District Investigator Wilfred P. Calkins advised us that we were not permitted to handle ocean freight forwarding without being licensed by the Federal Maritime Commission. (Calkins affidavit, paragraph 17, and Exhibit F.)

On May 30, 1979, the district investigator once more warned Mr. Lorme and Ms. Bacchi that forwarding without a license was a violation of section 44(a) of the Act, and that a significant fine would be assessed and that their application for a license would be prejudiced thereby.

On November 6, 1979, the Managing Director of the Commission wrote to the president of Avion that information had been brought to the attention of the Commission that Avion had engaged in ocean freight forwarding activity on at least 31 occasions in violation of section 44(a) of the Shipping Act, 1916, and further advising, in part, that the Act requires that no person shall engage in carrying on the business of forwarding unless such a person holds a license issued by the Commission to engage in such business.

Mr. Lorme states in his affidavit, "We then immediately sought the assistance of counsel because of the apparent seriousness of the situation *and our crucial need for a forwarder license* in order to offer our customers a complete service." (Emphasis supplied).

As seen, at least as of November 6, 1979, respondent's president acknowledged its crucial need for a forwarding license.

Charles Lorme, respondent's president, has worked 10 years as a manager of import and export air freight for an air forwarder which also held an independent ocean freight forwarder's license. Among

other employment, he worked as assistant manager, import department, for another combined ocean and air forwarder and customhouse broker.

Ms. Bacchi, respondent's vice president, worked three years for an air freight forwarder. She worked a year as air freight manager for a forwarder which also held an independent ocean freight forwarder's license.

Between January 10, 1979 (when Avion received its first warning, notifying it of the requirement of a license to carry on the business of ocean freight forwarding) and March 5, 1979 (when Avion got its second warning), Avion admitted having forwarded 14 ocean shipments.

Between March 6, 1979, and March 28, 1979, Avion admitted having forwarded seven ocean shipments.

Between March 28, 1979, and April 4, 1979, Avion admitted having forwarded six ocean shipments.

Between April 5, 1979, and May 30, 1979, Avion admitted having forwarded five ocean shipments. Avion during that period also forwarded at least 10 other ocean shipments. (Exhibit C-2.)

Since May 30, 1979, until some few days before the time of the affidavit of Mr. Calkins, dated February 20, 1980, attached to the opening memorandum of Hearing Counsel, Avion had forwarded at least 53 ocean shipments.

Since January 26, 1979, and prior to February 25, 1980, Avion forwarded a total of at least 95 ocean shipments, without holding a license from the Federal Maritime Commission.

When the record was reopened, the new evidence showed that Avion had forwarded 33 more ocean shipments, with bills of lading dated as early as February 15, 1980, and as late as April 18, 1980. (Appendices A and B to the Affidavit of Edwin Hartin, International Traffic Manager of Mallinckrodt, Inc., the respondent's major ocean client.) Of these 33 invoices, 20 were billed under the invoices of Home Pack Transport, Inc., and 13 were billed under the invoices of Avion. Avion had an agency agreement dated March 1, 1977, with Home Pack Transport, Inc., in the sale of international air freight transportation.

Avion has invoiced its shippers for a wide variety of services including an "ocean freight forwarding fee." Exhibit A shows that on the 31 shipments listed, Avion collected a forwarding fee of \$35 in 29 instances, and a forwarding fee of \$40 in 2 instances, or a total of \$1,095.

Generally the facts show that even after numerous warnings Avion continued to carry on the business of ocean freight forwarding without a license from the Commission.

#### DISCUSSION AND CONCLUSIONS

The respondent in general contends that its violations of the Shipping Act were technical in nature, not flagrant nor deceitful, whereas Hear-

ing Counsel contend that respondent's violations of the Act were knowing and flagrant, and in fact that the evidence shows that the respondent is unwilling to conform to the rules and regulations of the Commission.

The evidence clearly supports the view of Hearing Counsel. From time to time respondent has offered different explanations of its conduct.

Respondent asserted that the district investigator did bring to respondent's attention the second paragraph of the letter dated March 9, 1979, concerning the prohibition against carrying on the business of forwarding, but that he did not fully explain how broadly the Commission defines forwarding, and that respondent understood the paragraph merely to mean that it could not cut shipping documents under its own name.

On May 30, 1979, respondent's Vice President, Ms. Bacchi, acknowledged the district investigator's warning given on April 4, 1979, and stated that respondent had not accepted any more shipments from that day on. (Exhibit F.)

Charles Lorme, the president of respondent, stated that when respondent received the Managing Director's letter dated November 6, 1979, respondent was aware of the seriousness of the situation and of its crucial need for a forwarding license.

Yet, respondent continued to forward ocean shipments including 33 such shipments as late as February, March, and April 1980, including at least 13 where respondent billed the shipper under its own name for forwarding services.

It is concluded that the respondent knowingly and flagrantly violated the Shipping Act after repeated written, telephonic, and oral in person, warnings.

The respondent on brief argues that in the absence of brokerage payments by ocean common carriers, unlicensed forwarding does not violate the statute. In *Concordia International Forwarding Corporation--Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916* 21 F.M.C. 587, the Commission considered the same argument as now made by Avion and ruled against Concordia. The Commission pointed out that the plain meaning of section 44(a) of the Act is a flat proscription against dispatching shipments of others without a license.

On brief, respondent also contends that if Avion technically violated the statute by performing forwarding services without a license even though no brokerage was received from ocean common carriers, that such violations were not so severe or so flagrant as to warrant the assessment of civil penalties. Respondent's contention that it was uncertain as to the law, and that in good faith that respondent had adjusted its operations to meet the legal requirements, certainly does not hold



water. Maybe at the outset of its operations, respondent was uncertain, but after repeated warnings, and acknowledgments by its vice president and by its president that it could not forward ocean shipments and that a license was crucial, respondent could not have been uncertain of the law.

Respondent contends also that by not accepting brokerage from ocean common carriers, it has avoided the one evil against which the law sought to protect, and if this factor does not excuse the alleged violations of the Act, it certainly should mitigate in Avion's favor in determining whether civil penalties should be assessed. While Avion did not receive brokerage it did receive consideration in the form of money from its shippers for its unlicensed forwarding services. Respondent did benefit from the services it rendered.

Respondent points out that it did not obtain legal counsel until November, 1979. However, even afterwards, well into February, March, and April 1980, respondent continued to forward without a license.

Respondent also asserts that it does not seek condonation of its activities, but nevertheless that no regulatory purpose is served by denial of its application for an ocean freight forwarder's license, because respondent is otherwise fit, willing and able to carry on its business for which there is a public need, and that no one has been damaged by respondent's misconduct.

Respondent, as seen, suggests that it be given a limited term license, so that the Commission may monitor Avion's activities and obtain assurance that the Commission's regulations are being complied with. Needless to say, Avion's activities in 1980 have been monitored and it has continued to violate the law after repeated warnings and acknowledgments of the law. No further monitoring is justified by the circumstances herein.

It is concluded and found, that on numerous and continuing occasions the respondent Avion violated section 44(a) of the Act by carrying on the business of ocean freight forwarding without holding a license from the Federal Maritime Commission; that a civil penalty of \$25,000, as recommended by Hearing Counsel, should be assessed against Avion pursuant to section 32(3) of the Act, and that the factors in possible mitigation of such a penalty are insignificant and unimpressive in view of the continued and flagrant nature of the violation of the Act by Avion; and that Avion and its corporate officers, as shown by their past disregard of the Act, do not possess the requisite fitness within the meaning of section 44(b) of the Act to be licensed as an

independent ocean freight forwarder. The said application hereby is denied.

(S) CHARLES E. MORGAN  
*Administrative Law Judge*

Washington, D. C.  
August 4, 1980

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-41

THE PORT AUTHORITY OF  
NEW YORK AND NEW JERSEY

v.

THE WEST COAST OF ITALY  
SICILIAN AND ADRIATIC PORTS  
NORTH ATLANTIC RANGE CONFERENCE  
AND ITS INDIVIDUAL MEMBERS

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## NOTICE

*September 10, 1980*

Notice is given that no appeal has been taken to the August 6, 1980 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

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DOCKET NO. 80-41  
THE PORT AUTHORITY OF  
NEW YORK AND NEW JERSEY

v.

THE WEST COAST OF ITALY  
SICILIAN AND ADRIATIC PORTS  
NORTH ATLANTIC RANGE CONFERENCE  
AND ITS INDIVIDUAL MEMBERS

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## MOTION TO DISMISS COMPLAINT AND DISCONTINUE PROCEEDING GRANTED

*Finalized September 10, 1980*

On July 21, 1980, Respondents served and filed the instant motion that the complaint be dismissed and that this proceeding be discontinued as moot. In support of this motion, respondents attached a copy of their tariff filing by which the subject drayage charge tariff provision, Rule 20-9 of the Conference Tariff, has been cancelled effective September 1, 1980. Respondents say that cancellation of the subject tariff rule is exactly the relief sought in the complaint. Therefore, the proceeding is moot and should be discontinued.

On August 5, 1980, the Complainant served and filed the following Reply to Respondents' Motion to Dismiss: "Inasmuch as respondents, the West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference and the individual members of that conference, have cancelled the tariff item which is the subject of the Complaint, the Port Authority of New York and New Jersey has no objections to Respondents' Motion to Dismiss."

Upon consideration of the above, the Presiding Administrative Law Judge *finds* and *concludes* the motion should be granted.

Wherefore, it is *ordered*:

- (A) The motion is granted. The complaint is dismissed.
- (B) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS  
*Administrative Law Judge*

August 6, 1980

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 76-11

AGREEMENT NOS. 150 DR-7 AND 3103 DR-7

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## MOTION TO DISAPPROVE DENIED

*September 11, 1980*

The Commission has before it the "Motion to Disapprove Agreement No. 150 DR-7" filed July 25, 1980 by Seatrain Pacific Services, S.A., and the August 4, 1980 Reply of the Trans-Pacific Freight Conference of Japan/Korea (TPFC).

Seatrain contends that the amended version of Agreement No. 150 DR-7 does not meet the conditions specified in the Commission's December 31, 1979 Report and Order conditionally approving that Agreement.<sup>1</sup> Seatrain's position is based upon the fact that TPFC was ordered to modify its dual rate contract to:

. . . clearly allow shippers the choice of binding only their port-to-port shipments or only their joint through intermodal shipments to the Conference. 22 F.M.C. 378, 392.

This requirement arose out of the "two contracts rather than one contract" issue which was argued throughout this proceeding, and Seatrain interprets the Commission's language as mandating the use of separate documents to describe the intermodal and the port-to-port contract obligations of merchant signatories. TPFC, however, filed a single document with two different signature lines marked "Port-to-Port Trade" and "Joint Through Intermodal Trade," respectively. The other modifications in TPFC's contract, except for those in Article 2(a), were in the form prescribed by the December 31, 1979 Order.

The Commission finds merit in Seatrain's argument that the Agreement would be clearer and less confusing to shippers if the two contracts were physically as well as legally separated. The use of at least two different signature pages and the addition of clarifying language to Articles 1 and 2(a) would have reduced the possibility of confusion on the part of contract shippers. Nonetheless, the amended Agreement is sufficiently clear when read in conjunction with the Commission's Report and Order and the Conference should not be seriously faulted for concentrating its attention on the specific modifications set forth

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<sup>1</sup> The Commission ruled that Agreement No. DR-7 would be disapproved unless certain shipper protection amendments were submitted on or before February 29, 1980. An amended version was timely filed and approved, but the approval was subsequently vacated when the Commission discovered that TPFC had not served other parties to the proceeding (Order of July 14, 1980).

therein. The amended version of Agreement No. 150 DR-7 submitted on February 29, 1980 will be approved. Seatrain's objections to the TPFC amendments are in actuality a petition for reconsideration of the December 31, 1980 Report and Order and, as such, are inconsistent with section 502.261 of the Commission's Rules (46 C.F.R. 502.261).

TPFC will also be directed, however, to make modifications in Agreement No. 150 DR-7 which assure that *each* contract has a combined cover and signature page that plainly identifies it as either a "Port-to-Port" contract or a "Through Intermodal" contract.<sup>2</sup> Amendments to Articles 1 and 2(a) are also necessary to better describe the determinative effect of the two different cover/signature pages. Alternatively, the Conference may remove all references to its intermodal service from its present contract so as to create two completely separate six-page documents, but the Commission does not wish to require any greater duplication of material and effort than is reasonably necessary to notify shippers of their right to choose between the two TPFC contract services.<sup>3</sup>

The further amendments should be submitted within 60 days of the service date of this Order and captioned "Agreement No. 150 DR-7 (revised)." This Agreement need not be served on the parties to this proceeding. Instead, it will be published in the *Federal Register* and otherwise processed as a separate and distinct section 15 matter.<sup>4</sup> If the requested amendments are not filed within 60 days, an order will be entered disapproving Agreement No. 150 DR-7 pursuant to section 25 of the Shipping Act, 1916 (46 U.S.C. 824).

**THEREFORE, IT IS ORDERED,** That the "Motion to Disapprove" of Seatrain Pacific Services, S.A., is denied and Agreement No. 150 DR-7 is approved: and

**IT IS FURTHER ORDERED,** That this proceeding is terminated: and

**IT IS FURTHER ORDERED,** That, on or before the sixtieth (60th) day following service of this Order, the member lines of the Trans-Pacific Freight Conference of Japan/Korea shall cause to be delivered to the Commission's offices in Washington, D.C., a complete copy of the dual rate contract approved today captioned as "Agreement No. 150 DR-7 (Revised)," signed by all the proponent lines, and modified in the following respects:

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<sup>2</sup> *I.e.*, a shipper wishing to sign both contracts would be required to sign two separate pieces of paper, but not two separate six-page contracts.

<sup>3</sup> TPFC has several thousand contract signatories, many of which may wish to sign both the port-to-port and intermodal contracts.

<sup>4</sup> The legal and factual issues litigated before the Commission and now on review in the United States Court of Appeals in *Seatrain Pacific Services, S.A. v. Federal Maritime Commission*, D.C. Cir. No. 80-1248, would not be reexamined in the consideration of Agreement No. 150 DR-7 (revised), however.

1. Article 1 is amended to read, in pertinent part:

. . . in the trade from ports in Japan and Korea to United States Pacific Coast ports in California, Oregon, Washington, Hawaii and Alaska (hereafter "Port-to-Port Trade"); or the trade from ports or points in Japan and Korea to inland points in the United States via ports in California, Oregon, Washington, Hawaii and Alaska (hereafter called the Through Intermodal Trade); . . .

2. Article 2(a) is amended to read:

Except as otherwise provided in this Agreement, the Merchant shall ship or cause to be shipped all of its ocean shipments moving in the Port-to-Port Trade, the Through Intermodal Trade, or both, on Conference vessels -- depending upon which contract the Merchant has executed. A Merchant signing only the Port-to-Port Contract need only commit its Port-to-Port shipments to the Conference and a Merchant signing only the Through Intermodal Contract is obligated to commit only its Through Intermodal shipments to the Conference. A Merchant may, but is not required to, sign both the Port-to-Port and the Through Intermodal contracts, in which case both types of shipments would be reserved for Conference vessels.

3. Separate cover/signature pages are attached to the Agreement, one plainly designated as controlling TPFC's "Port-to-Port Trade" and the other as controlling its "Through Intermodal Trade," so that shippers desiring to commit themselves to both contracts are required to sign two separate pieces of paper.

By the Commission.\*

(S) FRANCIS C. HURNEY  
*Secretary*

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\*Commissioner Teige did not participate.

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 77-23**  
**AGREEMENT NO. 10294**

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**ORDER OF DISCONTINUANCE**

*September 17, 1980*

This proceeding was initiated by Order of Investigation and Hearing on June 9, 1977, to determine: (1) whether Agreement No. 10294 is a true and complete copy of the understandings or arrangements between the parties; (2) whether the parties entered into and implemented any agreement or agreements, understandings, and/or arrangements without prior Commission approval; and (3) whether Agreement No. 10294 should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. 814).

Agreement No. 10294 prohibits any signatory from paying consolidation allowances to off-pier non-vessel operating consolidators for their services in consolidating less than containerload cargoes, notwithstanding anything to the contrary in any tariff or other agreement. However, the Agreement permits the payment of any authorized consolidation allowance for consolidation which occurs on the pier, at a deepsea waterfront facility. By its terms, the Agreement applies to shipments from, to, or via all Atlantic and Gulf Coasts ports and is open to any common carrier by water. Moreover, upon approval, it would void or cancel any provisions in existing Commission approved agreements which conflict with it.

Agreement No. 10294 was initially executed by seven ocean carriers,<sup>1</sup> and was later signed by six other carriers.<sup>2</sup> Eight carriers subsequently withdrew from the Agreement, leaving only Sea-Land, USL, Seatrain, Dart and ACL as parties. The Order of Investigation also designated Boston Consolidation Service, Inc., the International Association of NVOCCs, the United States Department of Justice (DOJ), and twelve non-vessel operating common carriers as Protestants. However, because several Protestants withdrew, only DOJ, C.S. Greene and Company, Inc., Emery Ocean Freight, Yellow Freight International,

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<sup>1</sup> American Export Lines, Inc., Atlantic Container Line (ACL), Dart Containerline Co., Ltd., Hapag-Lloyd AG, Sea-Land Service, Inc., Seatrain International, S.A., and United States Lines, Inc. (USL).

<sup>2</sup> Zim American Israel Shipping Co., Inc., Japan Line, Ltd., Mistui O.S.K. Lines, Ltd., Nippon Yusen Kaisha, Kawasaki Kisen Kaisha, Ltd., and Yamashita-Shinnihon Steamship Co., Ltd.



Lyons Transport, Inc., and the Wilson Group remain as Protestants. The Commission's Bureau of Hearing Counsel also participated.

On December 13, 1979, Administrative Law Judge Norman D. Kline served an Initial Decision in which he concluded that Agreement No. 10294 should be disapproved. Exceptions to this decision were filed by three of the remaining Proponents.<sup>3</sup> Hearing Counsel, DOJ, and protestant NVO-consolidators filed replies to exceptions.

The Commission presently has before it Proponents' Motion to Discontinue Proceeding. This motion is based upon Proponents' withdrawal of Agreement No. 10294 on July 14, 1980, which allegedly renders this proceeding moot. Protestant NVO's have replied in opposition to this motion claiming that Proponents withdrawal of the Agreement is an attempt to avoid an adverse decision of the Commission. Protestants contend that it was apparent at the Commission's open meeting of July 9, 1980 that the Commission had unanimously decided to uphold the Initial Decision and disapprove the Agreement, even though the Commission postponed the adoption of its report and order until its next scheduled meeting.

#### DISCUSSION

A Commission decision is not final until the order effecting it is issued. Until that time, Commissioners' votes are always subject to change. Likewise, the Commission's report or order following a determination made at either an open or closed meeting can also be modified considerably prior to its ultimate publication.

In this particular case the only issue which is before the Commission is whether the Agreement should be approved, disapproved, or modified.<sup>4</sup> Since the Agreement was withdrawn by Proponents prior to the Commission's final decision, the Commission has nothing before it upon which it is required to act.

**THEREFORE, IT IS ORDERED,** That the "Motion to Discontinue Proceeding" filed by the parties to Agreement No. 10294 is granted; and

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

By the Commission.

(S) JOSEPH C. POLKING  
*Assistant Secretary*

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<sup>3</sup> Seatrain and ACL did not join in these exceptions.

<sup>4</sup> The other two issues raised by the Order of Investigation and Hearing have been disposed of and are not before the Commission on Exceptions.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-10

BORDEN WORLD TRADE, INC.

PETITION FOR DECLARATORY ORDER

A combination of tariff ambiguity, carrier complacency and circumstantial evidence of the correct cargo measurements is sufficient to establish misrating by ocean carrier in violation of section 18(b)(3).

*Jayson S. Rice*, for Borden World Trade, Inc.

*David W. Gunther*, for Lykes Bros. Steamship Co., Inc.

## REPORT AND ORDER

*September 23, 1980*

BY THE COMMISSION: (RICHARD J. DASCHBACH, *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES V. DAY, LESLIE KANUK, AND PETER N. TEIGE, *Commissioners*)

The Commission has before it the "Petition for Declaratory Order" of Borden World Trade, Inc., and responsive materials submitted by Lykes Bros. Steamship Co., Inc.<sup>1</sup> Borden seeks a ruling that Lykes Bros. would violate section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)) by collecting an amount for the transportation of certain food processing equipment from New Orleans to Balboa, Canal Zone which exceeded the charges specified in its published FMC tariff. Lykes Bros. denies the allegation.

### BACKGROUND INFORMATION

The shipment in question sailed on December 3, 1977. It was packed in three 40-foot containers, one 20-foot container, and two "Low Boy" storage devices, all of which were owned by Lykes. A freight rate of \$142.00 per weight ton was assessed in accordance with Atlantic & Gulf/Panama Canal Zone, Colon and Panama City Conference Tariff FMC No. 1.<sup>2</sup> The parties agree as to the nature of the commodity

<sup>1</sup> On May 16, 1980 the Commission ruled that Lykes Bros.' Tariff Rule No. 8 did not bar consideration of Borden's claim in a proceeding under section 22 of the Shipping Act, 1916. At that time, both Borden and Lykes Bros. were ordered to provide further information regarding the disputed shipment. Responses were received from these parties on June 16, and June 6, 1980, respectively. Lykes replied to Borden's Response on July 3, 1980.

<sup>2</sup> Lykes Bros. was and is a member of this steamship conference. Borden was a signatory to the Conference's dual rate contract at the time of shipment. The Conference's tariff FMC No. 1 was cancelled by Tariff FMC No. 3 effective May 1, 1979.

shipped and the basic \$142.00 rate. Their dispute relates only to additional charges claimed by Lykes for unused space in the four carrier-owned containers.<sup>3</sup> The shipping documents were prepared by Cobal International, Inc., an independent ocean freight forwarder selected by Borden, but the rating was performed by Lykes Bros. The bill of lading issued in New Orleans shows an entry for "Freight Prepaid" totaling \$19,899.14. Only part of this amount was paid at the time of shipment. Lykes did not measure the contents of the containers before or after shipment.

On June 5, 1978, Lykes billed Borden for a remaining balance of \$8,537.76 derived entirely from charges contained in Tariff Rule 24. The remaining balance includes \$8,191.63 under Rule 24(n)(2) based on the "unused portion" of the containers and a "container use charge" of \$346.13 under Rule 24(t) based on the total assessed tonnage. Unless Borden prevails in the present proceeding, Lykes would be expected to collect the unpaid balance of \$8,537.76.

The critical provisions of Lykes' tariff are subsections 24(n)(2) and (n)(3) which provide that containers rated on a weight basis will be charged as though they weigh out at 85% of the container's capacity, *unless* the container is 85% full by volume. Lykes assessed a rate based upon 188,105 pounds (85% of the containers' weight capacity) rather than the 72,730 pounds actually placed in the containers by Borden. However, if the containers were 85% full by volume, the minimum weight charge would not apply.

## POSITION OF THE PARTIES

### I. Borden

- A. Borden states that each of the four containers was filled to 85% of its capacity by volume and supports this contention with the following evidence:
- (1) An Export Shipping Order (also referred to as an Invoice Packing List) dated October 18, 1977 and showing cubic measurements totalling about 87% of container capacity for the contents of each container (Exhibit "E").
  - (2) A statement that Lykes based its June 5, 1978 invoice (Exhibit "B") on an earlier copy of the Export Shipping Order which showed about 79% utilization. This figure was reached only because Borden inadvertently omitted hundreds of small, flexible items such as filters, washers, scaffolding and piping. The Lykes invoice was immediately challenged by Borden.

<sup>3</sup> Tariff Rule 24 governed container use charges. No such minimum charges are alleged to be applicable to "Low Boy" devices.

- (3) A statement that Borden was guided in selecting the amount of container space required by Mr. Paul Brown, a Lykes cargo planning specialist who actually visited the loading site and recommended the use of four 40-foot containers in addition to the "Low Boys."
  - (4) The June 13, 1980 affidavit of James E. Thompson, the Arthur Morgan Co. employee who supervised the packing of the containers, stating that after three of the four 40-foot containers were packed, the fourth was returned to Lykes in exchange for a 20-foot container, and that all of these containers were filled to "full visual capacity," and that 15% of usable space did not remain. This explanation is verified by the affidavit of Borden's Director of Distribution, Jayson S. Rice, who was also present at loading.
  - (5) A statement that Borden first questioned the applicable rate while the containers were still in Lykes' possession, but that Lykes failed to measure or even visually inspect the cargo.
- B. Borden alternatively argues that Rule 24(n) is inapplicable to its shipments, because the first heading under that rule states that it governs arrangements for the "exclusive use of containers" (Exhibit "C," 3rd Revised Page 18) and the December 3, 1977 bill of lading (Exhibit "A") contains no exclusive use specification.

## II. Lykes Bros.

- A. Lykes contends that Borden twice supplied it with sets of measurement figures showing less than 85% utilization -- once at the date of shipment (50%) and again on March 22, 1978 (79%). The second version was in the form of a Borden Export Shipping Order dated October 18, 1977 (Exhibit "1") and bearing the statement that it was "certified true and correct." The third and final measurement figures were submitted on August 7, 1978 (Exhibit "2"). The third version was an identical copy of the second except for the volume figures and the signature of A. J. Amore, a person unidentified by position or function. There were no additional items listed on the Export Shipping Order which might explain the difference in volume and no such explanation has been provided by Borden or Cobal International, Inc.
- B. Lykes states that Borden did not bring the measurement problem to its attention until the cargo left its custody and failed to provide timely written notice of its disagreement with the assessed freight as required by Tariff Rule No. 8.
- C. Lykes further asserts that Rule 24(n) is not limited to exclusive container use. It describes the "exclusive use" phrase referred to by Borden as only a "subheading" pertaining to a previous

set of rates and not a "heading" affecting the entire section. Moreover, Rule 24(a) permits containers to be filled with the cargoes of more than one shipper only if all of the cargo is consigned to the same person, so that unless multiple cargoes were placed in the containers used by Borden before they reached Lykes Bros.' facilities in New Orleans, the carrier would have been unable to place additional cargo inside them at that time.<sup>4</sup> It would allegedly have been "legally and practically impossible" for Lykes Bros. to have put another shipper's cargo in "House-to-House" containers such as those involved in the Borden shipment.

### FINDINGS OF FACT

The shipment was of a complex and unusual nature. Special rate negotiations were conducted between Borden and the Conference and Lykes sent Mr. Paul Brown to Borden's plant in Milstadt, Illinois, to review the shipment and make loading recommendations. Mr. Brown was not present at a time when the cargo was in the containers, however. Upon Mr. Brown's recommendation, Borden requested and Lykes initially provided four 40-foot containers from its marshalling station in St. Louis. These were trucked by Borden's agent, the Arthur Morgan Co., to Borden's plant for packing.<sup>5</sup>

Borden never requested exclusive use of the containers and Lykes never advised Borden that it would be enjoying exclusive use or that the applicable rate was based on an exclusive use theory.

After loading three of the 40-foot containers, Borden exchanged the fourth for a 20-foot container. All four containers were loaded by the Arthur Morgan Co. and delivered to Lykes' terminal in New Orleans via the Illinois Central Gulf Railroad at Borden's expense. Upon arrival

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<sup>4</sup> Rule 24 bears a heading which reads as follows:

These rules and regulations govern the carriage of cargo in ocean Carrier's (hereinafter called the Carrier) containers which the shipper or consolidator or inland common carrier(s) subject to prior booking arrangement with the Carrier, may fill and ship the cargo therein pursuant to the following terms and conditions, and will apply, unless otherwise indicated, only when the container has been filled by shipper, consolidator or inland common carrier as agent for the shipper(s) at his expense off the premises of the Carrier. The Carrier, as defined herein, may not itself be, or act as consolidator.

The term of "shipper(s) or consignee(s)" referred to herein, include his/their agent(s) or authorized representative(s) acting on behalf of the shipper(s) at port of loading or on behalf of the consignee(s) at port of discharge, whichever the case may be.

All rules and regulations published elsewhere in this Tariff and not conflicting with these rules, will apply.

Rule 24(a) states that:

Cargo from one or more shippers at one loading port only to one consignee at one port of discharge only, unless otherwise provided, may be placed in one container. Containerized cargo will be delivered at port of discharge, either to Customs or to consignee, in accordance with Customs regulations and at Carrier's option.

<sup>5</sup> The Arthur Morgan Co. of St. Louis is an industrial contractor which performs professional hauling, rigging, assembly, disassembly and packing functions for its clients.

in Panama, the containers were delivered directly to agents of the consignee, taken to the plant site, unpacked and assembled.

Lykes initially charged Borden for the shipment on December 5, 1977. The rates shown on the bill of lading were based upon Lykes' determination at the point of loading that the containers did not weigh out at 85% of their capacity, but Lykes did not open the containers to determine whether they were 85% full by volume. It gathered the facts necessary for cargo rating simply by telephoning the ocean freight forwarder on December 3, 1977 and requesting the cubic measurements of each container. At that time, Cobal International quoted measurements which equalled about 50% of the containers' stowage capacity. Because Lykes did not receive payment for all the charges listed on the bill of lading at the time of shipment and had to make arrangements to extend Borden credit, Lykes had adequate notice of the need to verify the cargo's measurements before it relinquished possession of the container.<sup>6</sup>

Lykes subsequently agreed to remeasure the set up food processing equipment at the consignee's plant in Panama in the context of participating in a FMC adjudicatory proceeding with Borden. When Borden decided not to file a formal complaint, Lykes withdrew its offer because the remeasuring would be very difficult and because its Tariff Rule No. 8 prohibited voluntary refunds for mismeasurement after cargo has left the carrier's custody.

Certain "exclusive use" rates were deleted from Lykes' Tariff Rule 24(n) on January 28, 1975, but at the time of shipment that rule continued to bear the following heading:

Freight rates to be applied will be specified in this tariff, subject to the following conditions:

Exclusive use of containers 20' and over:<sup>7</sup>

Minimum charges for "exclusive use" containers appear only in subsection (7) of Rule 24(n). Rule 24(a) restricts the situations in which the cargo of more than one shipper can be tendered in a single container, but there are no Rule 24 rates for "nonexclusive" container use and no other tariff provisions governing nonexclusive use.

Tariff Rule 24 does not expressly state whether or when the ocean carrier may add cargo to shipper loaded containers, but Borden has not rebutted Lykes' assertion that carriers in the trade customarily refrain from placing additional cargo in containers moving in a House-to-

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<sup>6</sup> Lykes offers no explanation for its issuance of a "Freight Prepaid" bill of lading or why it waited over six months to send Borden an invoice for the balance due. Credit transactions of this nature are not provided for in Lykes' tariff. See 46 C.F.R. 536.5(d)(7) regarding tariff rules governing credit terms.

<sup>7</sup> The Conference's current tariff still bears this heading.

House configuration.<sup>8</sup> Carriers receiving less-than-trailerload cargo on a Pier-to-Pier basis will commonly combine several shippers' cargo in a single container, however.

#### DISCUSSION

Lykes Bros.' tariff is vague and incomplete regarding the rates and practices applicable to shipper use of carrier-owned containers. There are no provisions instructing shippers how to obtain a particular type of container use and Rule 24 as a whole does not indicate with reasonable clarity that *all* House-to-House shipments will be afforded exclusive container use and rated on an exclusive use basis. Lykes dismisses the misleading heading appearing under Rule 24(n) as an obvious typographical error, but it is difficult to understand why such an error was allowed to remain in place for over five years without correction. The Conference should take prompt action to clarify these aspects of its tariff.

Although the incomplete condition of Lykes Bros.' tariff alone might not persuade the Commission that the additional charges were improper, that fact plus Borden's evidence that the containers were 85% full warrants a finding that the lawful rate in this instance was \$8,537.76 less than the amount assessed by Lykes on December 3, 1977. The affidavit of the Arthur Morgan Co. supervisor, the recommendation of a Lykes employee that four 40-foot containers were necessary, and the fact that one of these large containers was subsequently exchanged for a 20-foot container all lend substantial credence to Borden's unilateral declaration that its initial paper work was incorrect because it inadvertently failed to measure the great number of small parts which were included in the shipment. The alternative explanation offered by Lykes implies that Borden deliberately falsified at least the final (August 7, 1978) version of its Export Statement in order to save some \$8,500 -- conduct which would subject it to civil penalties of up to \$5,000 under section 16 Initial Paragraph of the Shipping Act, 1916, as that statute then read. The sounder conclusion is that Borden twice made an honest mistake.

Finally, the Commission notes that Lykes made no independent effort to ascertain the volume of the cargo it carried, despite the fact that the Shipping Act places the duty for accurately rating cargo upon the ocean carrier and not the shipper. It is no defense to a misrating claim for a carrier to rely upon information provided by the shipper or a freight forwarder selected by the shipper. If Lykes had made contemporaneous cargo measurements of its own which totalled less than 85%, Borden's circumstantial evidence would probably not have prevailed.

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<sup>8</sup> *I.e.*, loaded and unloaded away from the ocean carriers' premises by agents of the shipper. Pier-to-Pier cargo is loaded at the carrier's facilities.

In this instance, however, the combination of tariff ambiguity, Lykes' issuance of a "Freight Prepaid" bill of lading when the freight was not paid in full, Lykes' failure to inspect the containers before rating them, and Lykes' insistence upon a written request before attempting to verify the rate applicable to cargo in its possession, provides a sufficient basis for the Commission to find that the four containers were loaded to at least 85% of their capacity by volume. Accordingly, it is concluded that collection of the "unused portion" charge and the challenged percentage of the "container use" charge stated on Lykes Bros.' bill of lading and subsequent invoice would violate section 18(b)(3) of the Shipping Act, 1916.

**THEREFORE, IT IS ORDERED,** That the "Petition for Declaratory Order" of Borden World Trade, Inc., is granted to the extent indicated above.

(S) JOSEPH C. POLKING  
*Assistant Secretary*



# FEDERAL MARITIME COMMISSION

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SPECIAL DOCKET NO. 724

APPLICATION OF SEA-LAND SERVICE, INC.  
FOR THE BENEFIT OF STAR-KIST FOODS, INC.

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## ORDER ADOPTING INITIAL DECISION

*September 24, 1980*

Pursuant to Rule 92(b) of the Commission's Rules (46 C.F.R. 502.92(b)), Sea-Land Service, Inc., filed an application for permission to waive collection of a portion of the freight charges due from Star-Kist Foods, Inc., for six shipments of frozen eggs from Houston, Texas to San Juan, Puerto Rico.

Sea-Land and Star-Kist had negotiated a reduced rate for the shipment of eggs. However, because of an alleged administrative error, the negotiated rate was not published in Sea-Land's tariff at the time of shipment. Sea-Land admitted that the freight charge billed, which was based upon the rate legally in effect at the time of shipment, was unjust and unreasonable in violation of section 18(a) of the Shipping Act, 1916. 46 U.S.C. 817(a). Sea-Land further contended that the negotiated rate was the just and reasonable one.

Administrative Law Judge William Beasley Harris issued an Initial Decision in which he denied the application to waive the uncollected freight charges. This decision was based upon his legal conclusion that, in the domestic offshore commerce, a waiver could only be granted upon a finding that the legally applicable rate was unreasonable and a finding that the rate actually charged was reasonable. Initial Decision at 7. The Presiding Officer ultimately concluded that Sea-Land had failed to prove either fact, and that the record would not permit such a determination.

Sea-Land has filed Exceptions to the Initial Decision, stating: (1) that its application met the "standards" of Rule 92(b), or (2) that its tariff publication error was the establishment of an "unjust practice" in violation of section 18(a), for which reparations should be awarded to Star-Kist.

### DISCUSSION

Rule 92(b) of the Commission's Rules (46 C.F.R. 502.92(b)) sets forth the procedures which must be followed by carriers in domestic offshore commerce seeking to refund or waive collection of a portion of freight charges. The remedy to which this special docket procedure applies arises under section 18(a) of the Shipping Act, 1916 (46 U.S.C. 817(a))

and section 4 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 845a). Although an application is procedurally "considered the equivalent of a complaint and answer admitting the facts complained of," the Commission is not bound by any such admission. The carrier must still establish the essential elements of the relief as set forth in the relevant statutes.

Sea-Land has also alleged that its tariff publication error results in the establishment of an "unjust practice" in violation of section 18(a) of the Shipping Act. This theory was not raised in Sea-Land's application; nor was it discussed in the Initial Decision. Sea-Land cannot now raise it for the first time in its Exceptions. In any event, this single incident between Sea-Land and Star-Kist cannot be said to have risen to the level of a "practice."

The primary issue before the Commission is whether Sea-Land has met its burden of establishing a violation of section 18(a). The Commission's position concerning waivers or refunds based upon errors or inadvertence in failing to file or incorrectly filing an intended rate has evolved considerably since 1961. Prior to 1965, the Commission freely granted such requests in both the foreign and domestic trades. However, in 1965, a divided Commission decided that special docket relief would not apply in foreign commerce because of the then existing language of section 18(b)(3). *Ludwig Mueller Co., Inc. v. Peralta Shipping Corp.*, 8 F.M.C. 361 (1965). The Commission noted that special docket relief applied only in domestic offshore commerce because, in those cases, it was empowered to direct the enforcement of a reasonable rate pursuant to section 18(a). *Ludwig Mueller, supra*. 8 F.M.C. at 366. In such cases, the Commission would approve refunds of "the difference between a rate that the carrier admits and the Commission finds to be unreasonable (and therefore unlawful), and a rate which the Commission adjudges to be reasonable." *Ludwig Mueller, supra*. The Commission subsequently stated that questions of equity or justice were irrelevant in special docket proceedings and that only the factual questions of reasonableness or unreasonableness of a rate were relevant. *The East Asiatic Co., Inc.*, 9 F.M.C. 169, 172 (1965).

In 1968, Congress amended section 18(b)(3), P.L. 90-298, 82 Stat. 111, to empower the Commission to authorize common carriers by water in the foreign commerce to make voluntary refunds to shippers and to waive collection of freight charges where there was a clerical error in a tariff or, through inadvertence, there had been a failure to file an intended rate. *See* 46 U.S.C. 817(b)(3).

The Commission continued, however, to take a narrow view of its powers to grant refunds and waivers in the domestic commerce. *See, e.g., Davies, Turner & Co. v. Atlantic Lines, Ltd.*, 13 F.M.C. 279 (1970); *Real Fresh, Inc. v. Matson Navigation Co.*, 16 S.R.R. 553 (1975). In fact, the Commission specifically stated that section 18(a), unlike section 18(b)(3), does not contemplate refunds and waivers for errors in tariff

filings. *Real Fresh*, 16 S.R.R. at 554. Moreover, in a case quite similar to the instant proceeding, the Commission held that a carrier's "admission," standing alone, is not sufficient to support a finding that the applicable rate was unreasonable for purposes of section 18(a). *Pan American Industries, Inc. v. Sea-Land Service, Inc.*, 21 F.M.C. 747 (1979).

Because Sea-Land has not affirmatively demonstrated that the rate in effect at the time of the shipments was unjust or unreasonable or that its negotiated rate with Star-Kist was reasonable, the Commission agrees with the Presiding Officer that Sea-Land's application must be denied. The Commission will, therefore, adopt the Initial Decision.

**THEREFORE, IT IS ORDERED,** That the Exceptions filed by Sea-Land Service, Inc., are hereby denied; and

**IT IS FURTHER ORDERED,** That the Initial Decision in this proceeding is adopted by the Commission; and

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

By the Commission.\*

(S) JOSEPH C. POLKING  
Secretary

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\*Commissioner Teige dissents.

# FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 724

APPLICATION OF SEA-LAND SERVICE, INC. FOR THE  
BENEFIT OF STAR-KIST FOODS, INC.

## DISSENTING OPINION

Dissenting Opinion of Commissioner Peter N. Teige

In affirming the Administrative Law Judge's denial of this Special Docket application, the majority perpetuates an inequity which has gradually developed in the Commission's Special Docket proceedings, whereby the benefits of these procedures are made readily available to shippers in foreign commerce, while they are effectively denied to shippers in domestic offshore commerce. Because I believe that there is no good reason in law or policy why this inequity should exist, I respectfully dissent.

As the majority itself states, prior to 1965 the Commission and its predecessors had no difficulty in granting Special Docket applications in the domestic trades. Applications in both domestic and foreign commerce were processed under former Commission Rule 6(b) of practice and procedure, which read in relevant part as follows:

(b) *Voluntary payment of reparation.* Carriers or other persons subject to the shipping acts may file applications for the voluntary payment of reparation or for permission to waive collection of undercharges, even though no complaint has been filed pursuant to rule 5(b). All such applications shall be made in accordance with the form prescribed in appendix II(5) herein, shall describe in detail the transaction out of which the claim for reparation arose, and shall be filed within the 2-year statutory period referred to in rule 5(c). . . . *Such applications will be considered the equivalent of a complaint and answer thereto admitting the facts complained of.* If allowed, an order for payment will be issued by the Board.

*Ludwig Mueller Co., Inc. v. Peralta Shipping Corp.*, 8  
F.M.C. 361, 362 (1965) [Emphasis supplied.]

However, as the majority notes, in 1965 the Commission held by a 3-2 vote in the *Ludwig Mueller* case, *supra*, that Special Docket relief did not apply in foreign commerce because of the then existing language in Section 18(b)(3) of the Shipping Act. Later that same year, by an identical 3-2 vote, the Commission held for the first time that, based on the language of Section 18(a) of the Shipping Act, 1916, and Section 4 of the Intercoastal Shipping Act, 1933, "the application of a rate other

than the one legally on file [because of] a misunderstanding or a misconception of the carrier does not provide sufficient basis upon which to rest the granting of relief in a [domestic commerce] special docket application." *The East Asiatic Company, Inc.*, 9 F.M.C. 169, 172 (1965). The majority went on to state that (*id.*):

. . . it is evident that our special docket technique requires that all considerations of intention, error, misunderstandings, and the like, be discounted as irrelevant. The question is not one of inequity or injustice but rather one of fact, namely the "reasonableness" or "unreasonableness" of the rates in question.<sup>1</sup>

Because the Commission had held in *Ludwig Mueller* that the Special Docket procedure was unavailable to shippers in foreign commerce, Congress amended Section 18(b)(3) of the Shipping Act in 1968, P.L. 90-298, to empower the Commission to authorize common carriers by water in foreign commerce to make voluntary refunds to shippers and to waive collection of freight charges where there was a clerical error in a tariff or, through inadvertence, there had been a failure to file an intended rate. Although the legislative history of P.L. 90-298 contains few references to the question of Special Docket relief in domestic commerce, it does indicate that Congress thought it was providing shippers in foreign commerce the same relief from tariff filing errors which it assumed was already enjoyed by shippers in domestic commerce. See H.R. Rep. No. 920, 90th Cong., 1st Sess. 2 (1967). Certainly, it is most unlikely that Congress intended to grant shippers in foreign commerce greater relief than shippers in domestic commerce. Nevertheless, the Commission's decisions since 1968 have followed *East Asiatic* and have generally denied Special Docket relief to shippers in domestic commerce on the ground that the carrier applicant had failed to prove that the rate it had mistakenly applied was "unreasonable." *Real Fresh, Inc. v. Matson Navigation Co.*, 19 F.M.C. 215 (1976); *Pan American Industries, Inc. v. Sea-Land Service, Inc.*, 21 F.M.C. 747 (1979).<sup>2</sup>

I believe that the decisions commencing with *East Asiatic* were wrong and should be overturned. The statutes permit the Commission to find that a rate charged by a carrier in domestic commerce is "unjust or unreasonable." 46 U.S.C. 817, 845a. I see no reason why, when a carrier and a shipper negotiate a rate which, through mistake or oversight, is never filed or is incorrectly filed, and the shipper, relying on

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<sup>1</sup> It should be noted that the opinion in *East Asiatic* gives no guidance to carriers or shippers as to what quality or quantity of evidence must be adduced in order to permit the Commission to find that a particular rate, applied to a particular shipment or group of shipments, was "unreasonable."

<sup>2</sup> The case law, however, is not as uniform as the majority opinion indicates. In two recent cases, refunds to shippers in domestic commerce have been authorized on the basis of errors in tariff filings. *Fleetwood Aluminum Products v. Sea-Land Service, Inc.*, 19 S.R.R. 96 (1979); *Williams, Clarke Co., Inc. v. Sea-Land Service, Inc.*, 20 F.M.C. 461 (1978). Both of these cases are unreviewed decisions of Administrative Law Judges which became decisions of the Commission pursuant to 46 C.F.R. 502.227.

the new rate, makes the shipment, the Commission cannot permit carriers to admit facts showing that, *under the special circumstances attendant in these cases*, the tariffed rate is "unjust and unreasonable" and the intended rate is "just and reasonable." These words are, in normal human usage, flexible terms of equity and fairness. Where they arise in isolated instances heavily charged with individual acts of inequity, and not in the context of ratemaking in the normal economic regulatory sense, the words should be given the broader, equitable meaning they have in everyday parlance.

This approach would also give real meaning to Commission Rule of Practice 92(b), 46 C.F.R. 502.92(b), which governs Special Docket applications in domestic commerce. Rule 92(b) has been in effect without change since 1968, when it was promulgated in a rulemaking instituted after the passage of P.L. 90-298. *See* 33 *Federal Register* 14412 (September 25, 1968). It makes no reference to any requirement that a carrier allege or prove that a rate is "unreasonable," but instead states, in language identical to the old rule 6(b) which governed all applications before the *Ludwig Mueller* decision, *supra*, that Special Docket applications by carriers in domestic commerce "will be considered the equivalent of a complaint and answer thereto admitting the facts complained of." Under the procedure I propose, a carrier would simply "admit" facts showing that its tariffed rate was "unjust and unreasonable" and ask the Commission for permission to apply instead the intended rate. The Commission would then verify the *bona fides* of the alleged transaction to be certain that the tariff requirements of the Shipping Act were properly observed by the carrier. By instead reaffirming the holding in *Pan American Industries, supra*, that a carrier's admission under these special circumstances is nevertheless not sufficient proof that the substituted rate is "just and reasonable" in the ratemaking sense, the majority renders Rule 92(b) meaningless.

Although the Commission has never corrected the failure of the *East Asiatic* opinion to state how the question of "reasonableness" should be addressed in a Special Docket case, and does not do so in this case, it must be assumed that the majority would require a showing similar to that necessary in general ratemaking investigations under Section 18(a) and Section 4, i.e., evidence showing that the tariffed rate resulted in an excessive rate of return on rate base, and that the application of the intended rate would render an appropriate rate of return. *See, e.g., Matson Navigation Company Proposed Rate Increases in the U.S. Pacific Coast/Hawaii Domestic Offshore Trade*, 21 F.M.C. 532, 987 (1978). Obviously, that is not feasible in these types of cases. However, if the term "just and reasonable" is interpreted more flexibly so that it has a less technical meaning in these Special Docket cases than in general rate

investigations, there would be no need for requiring such a formidable presentation.<sup>3</sup>

In the present case, Sea-Land has admitted that Star-Kist Foods was mistakenly charged a higher, tariffed rate for six shipments of frozen eggs, even though Sea-Land and Star-Kist had previously negotiated a lower rate for those shipments. In reliance on that agreement, Star-Kist made a substantial change in its economic position and completed the shipment with Sea-Land. Not to protect the shipper in these circumstances would be highly inequitable. These facts are more than sufficient for the Commission to find that the tariffed rate was "unjust and unreasonable," and that the intended rate was "just and reasonable" under Section 18(a) of the Shipping Act, 1916.<sup>4</sup>

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<sup>3</sup> In view of the narrow fact situations typically presented in Special Docket applications, I cannot conceive how adoption of this approach would damage the integrity of the Commission's general rate-making powers in domestic offshore commerce. Of course, if an application were filed which did present such a threat, the Commission could always reject the application on that basis. Ordinarily, the rate change involved in these cases does not possess the magnitude or economic significance that triggers a rate investigation by the Commission.

<sup>4</sup> If reparation were to be granted as proposed herein, the procedure customarily followed by the Commission in reparation cases to prevent discrimination against other shippers would, of course, have to be utilized.

# FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 724

## APPLICATION <sup>1</sup> OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF STAR-KIST FOODS, INC.

Charges of \$23,161.86 (which included \$5,106.23<sup>2</sup> for wharfage, arrimo, transfer and documentation) on six shipments of frozen eggs from Houston, Texas, to San Juan, Puerto Rico, were paid and borne as such by Star-Kist Foods. The carrier, Sea-Land admits the freight charge originally billed by it, based on its rate legally in effect at the time of shipment, was unjust and unreasonable and therefore unlawful in violation of section 18(a) of the Shipping Act, 1916. Sea-Land believes that the rate upon which this application is based is just and reasonable in all respects. Sea-Land seeks permission to waive collection of a \$1,885.51 portion of aggregate ocean charges of \$19,941.14 so that aggregate ocean charges total \$18,055.63, under ocean charges sought to be applied and the shipper freed of the obligation to pay.

Permission requested for the waiver must be and is denied. The applicant under section 18(a) of the Act has to prove that the rate charged was in fact unreasonable or that the rate sought to be applied is in fact reasonable, in the same manner as if the carrier were opposing the payment. This the applicant-carrier has failed to do.

### INITIAL DECISION<sup>3</sup> OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

*Adopted September 24, 1980*

This proceeding involves transportation in the so-called noncontiguous domestic trades of six shipments of frozen eggs from Houston, Texas, to San Juan, Puerto Rico.

This special docket application was received in the Commission on June 6, 1980. That is the filing date. Violation of section 18(a)<sup>4</sup> of the

<sup>1</sup> Filed as *Star-Kist Foods, Inc. v. Sea-Land Service, Inc.* by the latter.

<sup>2</sup> These additional charges are not in issue and they were paid in full by the shipper. See Exhibit No. 10 at 1, attached to application.

<sup>3</sup> 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).

<sup>4</sup> Section 18(a) of the Shipping Act, 1916, 46 U.S.C. 817(a), provides, *inter alia*:

That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications and tariffs . . . [and that] no such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the [Commission].

The section further provides that:

Whenever the [Commission] finds that any rate, fare, charge, classification, tariff, regulation or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff regulations, or practice.



Shipping Act, 1916, is admitted by the carrier-applicant. Sailing dates for the shipments are given (corroborated by applicable copies of Sea-Land's vessel portion bulletin - Exhibit No. 8) as June 18 and 24, 1978, July 7, 14 and 30, 1978, and August 11, 1978. The application filed within two years after the cause of action accrued as to each of the six shipments is timely as to all.

The tariff applicable is that of Sea-Land Service, Inc., Tariff No. 273, FMC-F No. 40, from United States Gulf Ports to Ports in Puerto Rico. Prior to January 15, 1978, the applicable rate on shipment of Eggs, frozen, was \$3.98 per 100 lbs., TL minimum 36,000 lbs. as published in Item 10080, Original Page 280, effective November 12, 1977. Effective January 15, 1978, the rates in Tariff 273 were increased by 10.4% as provided for by Supplement No. 1 (Exhibit No. 2 attached to application). The \$3.98 per 100 lbs. rate became \$4.39 per 100 lbs.

Star-Kist Foods was developing movements of frozen eggs from the port of Houston, Texas, to Puerto Rico to be used in the manufacture of pet food. In consideration of the value and load factor of the cargo, Star-Kist deemed the current rate of \$4.39 per 100 lbs. too high to effect such movements. As a result of negotiations between Star-Kist and Sea-Land, it was agreed to publish a rate of \$3.96 per 100 lbs., minimum weight 40,000 lbs., confirmed by letter dated March 22, 1978, showing tariff effective date of March 28, 1978 (Exhibit No. 3).

Publication of the new \$3.96 per 100 lbs., minimum weight 40,000 lbs., was made in Item 10080, 1st Revised Page 280, effective date March 28, 1978. The new rate was properly symbolized as a reduction, but failed to state the rate was not subject to Supplement No. 1 (Exhibit No. 2) as was the intent.

First Revised Page 280 was canceled by 2nd Revised Page 280, effective August 10, 1978. Item No. 10080, Eggs, frozen TL minimum 40,000 lbs., shows rate of \$4.37 per 100 lbs. to incorporate the 10.4% increase. A new Item No. 10115 Fish, Tuna, raw, frozen, whole, loose was added, with a rate of \$1,869.90 per trailer.

During the period from June 18 to August 11, 1978, a total of six truckload shipments of frozen eggs were made by Star-Kist from Houston, Texas, To Mayaguez, Puerto Rico, via the Port of San Juan. The shipments were rated at the applicable rate of \$4.37 per 100 lbs. (\$3.96 plus 10.4%). In addition to the ocean charge, assessorial charges for Wharfage (Rule 520), Arrimo (Rule 540), Transfer (Rule 310), and Documentation (Rule 440) were made. This resulted in substantially higher charges than would have been the case had Sea-Land published the rate that had been agreed upon.

When paying the freight charges, Star-Kist reduced the ocean freight to the basis of the \$3.96 agreed-to rate and complained about the incorrect rate which was being assessed. Upon investigating the complaint, Sea-Land's America's Pricing Department discovered that an

obvious administrative error had occurred in the preparation of the proposal for the reduced rate and in not checking the published page for correctness as required by Pricing Policy. The error was corrected with the issuance of 3rd Revised Page 280, effective August 17, 1978, Item No. 10080, Eggs, frozen TL minimum 40,000 lbs., rate \$3.96 per 100 lbs.

The applicant submitted the following statement of the ocean charges for each shipment showing the charge as originally billed; as paid by the complainant; and the amount to waive based on the agreed-to rate which has now been published and become effective. Presented in support are copies of bills of lading or freight bills, together with applicable pages to support the assessorial charges (copies omitted here).

Freight Bill No.	Ocean Charge Originally Billed	Ocean Charge Paid by Shipper <sup>a</sup>	Ocean Charge Sought to Be Applied <sup>b</sup>	Ocean Charge Sought to be Waived
961-842667 <sup>a</sup>	40,000 lbs. at \$4.37/cwt \$1,748.00	40,000 lbs. at \$3.96/cwt \$1,584.00	40,000 lbs. at \$3.96/cwt \$1,584.00	\$ 164.00
961-843974 <sup>b</sup>	40,330 lbs. at \$4.37/cwt \$1,762.42	40,330 lbs. at \$3.96/cwt \$1,597.07	40,330 lbs. at \$3.96/cwt \$1,597.07	165.35
961-845661 <sup>c</sup>	80,360 lbs. at \$4.37/cwt \$3,511.73	80,360 lbs. at \$3.96/cwt \$3,182.26	80,360 lbs. at \$3.96/cwt \$3,182.26	329.47
961-846607 <sup>d</sup>	44,430 lbs. at \$4.37/cwt \$1,941.59	44,430 lbs. at \$3.96/cwt \$1,759.43	44,430 lbs. at \$3.96/cwt \$1,759.43	182.16
961-848623 <sup>e</sup>	170,210 lbs. at \$4.37/cwt \$7,438.18	170,210 lbs. at \$3.96/cwt \$6,740.32	170,210 lbs. at \$3.96/cwt \$6,740.32	697.86
961-838884 <sup>f</sup>	80,620 lbs. at \$4.39/cwt \$3,539.22	80,620 lbs. at \$3.96/cwt \$3,192.55	80,620 lbs. at \$3.96/cwt \$3,192.55	346.67
Totals	\$19,941.14	\$18,055.63	\$18,055.63	\$1,885.51

#### Reference Marks

Cwt = per 100 lbs.

<sup>a</sup> Additional charges (not at issue) assessed in the amount of \$320.00 for wharfage, Arrimo, Transfer & Documentation - paid in full by shipper.

SEA-LAND SERVICE, INC. FOR THE BENEFIT OF STAR- 265  
KIST FOODS, INC.

<sup>b</sup> Additional charges (not at issue) assessed in the amount of \$1,840.55 for ocean freight on Cheese Pellets (Item 10040) plus wharfage, Arrimo & Transfer - paid in full by shipper.

<sup>c</sup> Additional charges (not at issue) assessed in the amount of \$631.79 for wharfage, Arrimo, Transfer & Documentation - paid in full by shipper.

<sup>d</sup> Additional charges (not at issue) assessed in the amount of \$354.22 for wharfage, Arrimo, Transfer & Documentation - paid in full by shipper.

<sup>e</sup> Additional charges (not at issue) assessed in the amount of \$1,325.87 for wharfage, Arrimo, Transfer & Documentation - paid in full by shipper.

<sup>f</sup> Error in rate in original billing - applicable rate was \$4.37/cwt. Additional charges (not at issue) assessed in the amount of \$633.80 for wharfage, Arrimo, Transfer & Documentation - paid in full by shipper.

<sup>g</sup> Payment based on rate agreed upon to be published.

<sup>h</sup> Based on EXHIBIT NO. 9.

In support of this application, only the following is submitted by the carrier-applicant:

Sea-Land's failure to properly publish the reduced rate of \$3.96 per hundred lbs., TL minimum of 40,000 lbs. resulted in an unintentional increase to the shipper which Sea-Land does not attempt to justify.

The undersigned carrier hereby admits that the freight charge originally billed, based on its rate legally in effect at the time of shipment was unjust and unreasonable and therefore, unlawful in violation of Section 18(a) of the Shipping Act, 1916.

It is Sea-Land's belief that the rate as published and in effect August 17, 1978, and upon which this application is based, is just and reasonable in all respects. Permission to waive collection of \$1,885.51, the amount in excess of that basis, is requested.

#### DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

During the period from June 18 to August 9, 1978, the applicable rate for the shipment of frozen eggs as to five shipments (those of June 18 and 24, July 7, 14 and 30) was \$3.96 per 100 lbs. minimum weight 40,000 lbs., as per Item 10080, 1st Revised Page 280, effective date March 28, 1978. The applicable rate for the sixth shipment (August 11, 1978) was \$4.37 per 100 lbs., as per Item 10080, 2nd Revised Page 280, effective August 10, 1978. Applicant admits its failure to properly publish the reduced rate of \$3.96 per 100 lbs., TL minimum of 40,000 lbs., resulted in an unintentional increase to the shipper.

Section 2 of the Intercoastal Shipping Act, 1933, prohibits a carrier by water in intercoastal commerce from charging a greater or less or different compensation from that contained in the tariff on file with the Commission.

To find here that the application of a rate other than the one legally on file was the result of a failure of Sea-Land to properly publish the negotiated reduced rate, resulting in an unintentional increase to the shipper, does not provide sufficient basis upon which to rest the granting of relief in this special docket application. See Special Docket No.

382, *The East Asiatic Co., Inc. - Application for Permission to Waive Collection of Undercharges*, 9 F.M.C. 169, 172 (1965).

The Commission said it is empowered to direct the enforcement of a reasonable rate under section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933, both of which relate solely to the Commission's jurisdiction over common carriers in the non-contiguous domestic trades. (*Ibid.*)

Section 18(a) has been set forth in the footnote above. The Intercoastal Act, section 4, authorizes the Commission whenever it finds a particular rate unjust or unreasonable to prescribe and order enforced a just and reasonable maximum or minimum rate.

According to the Commission (*Ibid.*), from the foregoing it is evident that our special docket technique requires that all considerations of intention, error, misunderstandings, and the like, be discounted as irrelevant. The question is not one of inequity or injustice, but rather one of fact, namely the "reasonableness" or "unreasonableness" of the rates in question.

In 1965 the Commission chose Special Docket No. 377, *Ludwig Mueller Co., Inc. v. Peralta Shipping Corporation, Agents of Torm Lines*, and Special Docket No. 378, *Lykes Bros. Steamship Co., Inc., Application to Refund Part Freight Charges Collected on Shipment Via SS "Nancy Lykes" From Le Havre, France, to Galveston, Texas*, 8 F.M.C. 361 (January 13, 1965), for careful review in an effort to spell out clearly Commission policy with respect to special docket proceedings. (*Ibid.*, at 362.) No. 377 involved transportation of paprika from New York to Algiers. No. 378 involved transportation of household thermometers from Le Havre to Galveston. The Commission, after a painstaking review, was of the opinion, with respect to special docket proceedings in our foreign commerce, that the dissent in the *Swedish American Line* case, Special Docket No. 371, 8 F.M.C. 142, 143 (1964), reached the correct result. The Commission adopted the position that strict adherence to filed tariffs is mandatory (p. 364). The Commission asked what is the function of our special docket procedure and when may it be used. (p. 366)

It is a procedure whereby there is approved a refund from a carrier to a shipper of the difference between a rate that the carrier admits and the Commission finds to be unreasonable (and therefore unlawful) and a rate which the Commission adjudges to be reasonable.

The Commission continued.

It becomes immediately apparent, therefore, that only in those cases where the Commission is empowered to direct the enforcement of a reasonable rate is our special docket technique applicable, i.e., those cases within the purview of section 18(a) of the Act and the provisions of Intercoastal Shipping Act,

1933. Such cases, of course, relate solely to the Commission's jurisdiction over common carriers in the so-called non-contiguous domestic trades.

On August 12, 1965, the Commission in Special Docket No. 396, *Sea-Land Service, Inc. - Application to Waive Undercharges*, 8 F.M.C. 641, stated, *inter alia* the purpose of the special docket proceeding "is designed to reduce, insofar as possible, the time and expense of the parties, the Commission and its staff." (p. 643.)

The applicant herein has disposed of which rate was unjust and unreasonable, as well as which rate was just and reasonable, merely by alleging same. The only proper way that authorization can be granted for deviation from the duly filed tariff and grant the waiver requested in the present application is to grant that waiver upon a finding that the tariff or legally applicable rate was unreasonable, and a concomitant finding that the rate actually charged is a reasonable rate. See *East Asiatic* case, *supra*. The rate charged was the rate on file. There is no showing that the rate charged was unreasonable and unjust. See Special Docket No. 422, *Davies, Turner & Co., as Agents for Robert S. Schlesinger, Owner v. Atlantic Lines, Ltd.*, Special Docket No. 422, 13 F.M.C. 279 (1970); *Real Fresh, Inc. v. Matson Navigation Company*, Special Docket No. 468, 19 F.M.C. 216 (1976); *Pan American Industries, Inc. v. Sea-Land Service, Inc.*, Special Docket No. 556, 21 F.M.C. 747 (1979). Compare *Williams, Clarke Company, Inc. v. Sea-Land Service, Inc.*, Special Docket No. 489, 20 F.M.C. 461 (1978); *Fleetwood Aluminum Products v. Sea-Land Service, Inc.*, Special Docket No. 609, 19 S.R.R. 96 (1979).

Upon consideration of the above and the record herein, the Presiding Administrative Law Judge *finds* and *concludes* that the applicant has failed to prove which rates are unreasonable and unjust or which are just and reasonable. Also that the record is not such as to which in the final analysis such determinations can be made. The application must be denied.

Wherefore, *it is ordered:*

- (A) The application is denied.
- (B) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS  
*Administrative Law Judge*

Washington, D.C.  
June 30, 1980

## FEDERAL MARITIME COMMISSION

DOCKET NO. 77-13

FIRST INTERNATIONAL DEVELOPMENT CORPORATION

v.

SHIP'S OVERSEAS SERVICE, INC.

### ORDER DENYING RECONSIDERATION

September 25, 1980

By Petition filed July 30, 1980, Ship's Overseas Service, Inc. (SOS), asks the Commission to reconsider its decision served July 17, 1980, in *First International Development Corporation v. Ship's Overseas Service, Inc.*, 20 S.R.R. 209 (1980), ordering SOS to pay reparation in the amount of \$53,484.71 to First International Development Corporation (FIDCO). SOS also asks for a stay of the Commission's order and for oral argument. There were no replies to the petition for reconsideration.

SOS maintains on reconsideration that the Commission failed to consider the arguments raised in SOS's brief of February 20, 1978,<sup>1</sup> especially the question of FIDCO's "standing." SOS contends that "FIDCO was reimbursed for the transportation by OASIS and is not the person who bore the freight." SOS maintains that the situation in this case is identical to the that in *Carton Print, Inc. v. Austasia Container Express S.S. Co.*, 20 F.M.C. 30 (1977), where the shipper was found to lack standing to claim reparation for overcharges the carrier had collected from the consignee.<sup>2</sup>

SOS's reliance on the holding in *Carton Print, Inc.*, *supra*, is misplaced. In that case the carrier collected directly from the consignee overcharges sought to be recovered by the shipper, whereas in this instance FIDCO paid the freight charges.<sup>3</sup> Applying the criteria estab-

<sup>1</sup> The brief was received at the Commission on February 21, 1978.

<sup>2</sup> The shipper in that case admitted that it had suffered no losses and that in filing the complaint it had acted as an "intermediary" for the consignee in Australia. Here, neither Gulf Consolidated International, Inc., which sold the pipe to FIDCO, nor SOS had any dealings with OASIS, the consignee.

<sup>3</sup> Clearly FIDCO could not be "reimbursed" had it not paid the charges in the first place. However, in its February 21, 1978 brief, SOS simultaneously argues that OASIS reimbursed FIDCO and thus bore the transportation charges and that no proof was offered as to what portion of the charges OASIS actually paid. In fact, SOS collected from FIDCO \$23,115.14 in freight charges at a time cargo space had not yet been booked and the balance from the sales price payable to FIDCO under an escrow agreement apparently arranged by Charles Ragan under which FIDCO also paid an additional \$6,378.75 in insurance costs.

lished by the Supreme Court,<sup>4</sup> the Commission concluded that FIDCO suffered cognizable injury when it paid freight charges found to be unlawful.<sup>5</sup> Thus, the question of FIDCO's standing to claim reparation under section 22 of the Shipping Act, 1916 was fully considered by the Commission.

In any event, under Rule 261 of the Commission's Rules of Practice and Procedure,<sup>6</sup> none of SOS's arguments presents a basis for reconsideration of the Commission's decision in this proceeding. The petition for reconsideration and stay will therefore be denied.

It is so ordered.

By the Commission.\*

(S) JOSEPH C. POLKING  
*Assistant Secretary*

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<sup>4</sup> *Adams v. Mills*, 286 U.S. 397, 407 (1932); *News Syndicate Co. v. N.Y. Central R. Co.*, 275 U.S. 179 (1927); *Louisville & Nashville R.R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 534 (1918); and *Lehigh Valley R. Co. v. Meeker*, 236 U.S. 415 (1915).

<sup>5</sup> *First International Development Corp. v. Ship's Overseas Services, Inc.*, 20 S.R.R., *supra*, at 213.

<sup>6</sup> Rule 261 provides that:

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. 46 C.F.R. 502.261.

\*Commissioner Leslie L. Kanuk dissents.

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-8**

**SCHENKERS INTERNATIONAL FORWARDERS, INC.**

**v.**

**SEA-LAND SERVICE, INC.**

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**NOTICE**

*September 25, 1980*

Notice is given that no exceptions have been filed to the August 12, 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) JOSEPH C. POLKING**  
*Assistant Secretary*



## FEDERAL MARITIME COMMISSION

DOCKET NO. 80-8

SCHENKERS INTERNATIONAL FORWARDERS, INC.

v.

SEA-LAND SERVICE, INC.

Complainant has failed to meet its burden of proving, under the circumstances herein, the violations of the Shipping Act, 1916, alleged. Complaint dismissed. Proceeding discontinued.

*Gerald H. Ullman* for Complainant.

*John M. Ridlon* for Respondent.

INITIAL DECISION<sup>1</sup> OF WILLIAM BEASLEY HARRIS,  
ADMINISTRATIVE LAW JUDGE

*Finalized September 25, 1980*

"The issue in this case," according to the complainant, "is whether the shipment of adhesive cement should have moved as refrigerated cargo at a rate of \$515.75 or as glue or adhesives at a rate of \$209.50." (May 30, 1980 Complainant Brief, at 5). "The identity or characteristics of the shipment, adhesive cement, is not in question, the sole issue being whether respondent was justified in moving the cargo under a controlled temperature rate. That issue does not evolve around the question of the actual character of the cargo, there being no dispute concerning same, but rather the application (or misapplication) of Tariff Rule 30 by Sea-Land." (June 20, 1980 Complainant's Reply Brief, at 9).

The respondent in its June 12, 1980 Answer (at 8) contends the "Complainant's entire evidentiary record with respect to section 18(b)(3) relates to the alleged instructions with respect to carriage rather than the actual character of the cargo transported and its requirements with respect to temperature control. Complainant in its memorandum simply concludes without evidentiary basis that 'there being no basis for Respondent's assessment of the higher rate, the shipment was mis-rated' . . . far from being 'no basis' for assessment of the rate charged, Respondent had no alternative under the circumstances of this proceeding..."

The applicable tariff herein is the North Atlantic Mediterranean Freight Conference Freight Tariff No. 12 - FMC-7, French Section

<sup>1</sup> 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: North Atlantic Ports of the United States on the Hampton Roads/ Eastport, Maine, range to Marseilles, including Caronte, Fos, Port De Bouc and Port St. Louis de Rhone, France, only.

The freight charges for transportation of the commodity the carrier charged pursuant to the applicable Tariff, page 241, Item No. 931.0002.109 Refrigerator Cargo/Cargo, N.O.S., Requiring Minimum/Maximum Controlled Temperature Stowage (NOT applicable to shipments in bulk in Deep Tanks) at \$515.75 W/M. The complaint alleges in Paragraph 3 that Sea-Land charged and Standard Transport of France paid \$14,475.30 based thereon—stating the rate as \$555.75 W/M. The respondent's reply admits as to the \$14,475.30 (there is no documentary proof submitted on any statement by Standard of its having paid), saying, "3. With respect to paragraph 3 of the complaint, except to the extent that the rate applicable is cited as \$555.75 W/M, admitted. It is averred, however, that at the date of shipment, as shown by the attached Exhibit 'A,' the applicable rate was, in fact, \$515.75 W/M." The complainant contends the correct charge was for glue or adhesives at \$209.50 (May 30, 1980 brief at 2, 8). (Respondent's June 12, 1980 Answer, Exhibit 13) pursuant to 11th Rev. page 166 of tariff effective January 4, 1979, Item No. 569.5901.210.

The complaint alleges the respondent has assessed ocean freight charges in violation of sections 16 First, 17, 18(b)(3) and 18(b)(5) of the Shipping Act, 1916. The complaint seeks, *inter alia*, an order for the respondent to cease and desist from the aforesaid violations and to pay to the complainant by way of reparation the sum of \$10,352 with interest.

The complainant in its May 30, 1980 Brief and Memorandum of Facts, as part of an introductory statement, states that, "this proceeding was initiated by the filing with the Commission of a complaint, dated December 31st, 1979, against Sea-Land Service, Inc., respondent, for reparations in the sum of \$10,352.97."

#### BACKGROUND

The complaint in this proceeding signed by the Vice-President of Schenkers International Forwarders, Inc., was sworn to and subscribed to before a notary public, State of New York, December 31, 1979. The complaint, with a covering letter dated January 31, 1980, was received in the Office of the Secretary of this Commission February 4, 1980. Under date of February 5, 1980, the Secretary sent the following letter:

Reference is made to your complaint filed on behalf of Schenkers International Forwarders, Inc. against Sea-Land Service, Inc.

Before your complaint can be processed, it will be necessary for you to furnish the assignment of the claim to Schenkers

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from Standard Transport of France. I will hold the complaint pending receipt of the assignment.

The complainant in a letter dated February 8, 1980 (received February 12, 1980) to the Secretary of the Commission wrote:

In reply to your February 5, 1980 letter concerning the complaint I filed in the above matter, I am enclosing herewith an Assignment of Claim<sup>2</sup> executed by Standard Transport of France.

The complaint in this proceeding was served February 20, 1980. Notice of the filing of the complaint served February 21, 1980, was published in the *Federal Register*, Vol. 45, No. 39, February 26, 1980, page 12489.

Respondent's reply to the complaint, dated March 11, 1980, was received in the Commission March 13, 1980.

A prehearing conference was held herein on March 25, 1980, pursuant to notice served March 14, 1980. The parties revealed they had begun discussions toward a possible settlement; the talks and investigations were to continue; the parties to submit a status report on or before Tuesday, May 6, 1980.

The status reports were filed indicating the parties were amenable to this proceeding being conducted under the Shortened Procedure pursuant to Rule 181 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.181. Use of the Shortened Procedure was approved and a procedural schedule presented by notice served May 15, 1980.

The transcript and exhibits, together with all papers and requests filed in this proceeding, constitute the exclusive record for decision. The requests of parties for findings of fact have been considered fully and carefully; such requests were granted, granted in substance or denied as indicated by the following findings of fact.

#### FACTS

Standard Transport of France, whose name does not appear on any transportation documents in this proceeding, is an ocean freight for-

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<sup>2</sup> "Assignment of Claim. Know all men that Standard Transport of France, with its principal place of business at 4, Rue de Castiglione, Paris, France in consideration of One (\$1.00) Dollar paid to it by Schenkers International Forwarders, Inc., with its principal place of business at One World Trade Center New York, N.Y. (herein called the "assignee") hereby assigns to the said assignee all of its right, title and interest in a claim against Sea-Land Service, Inc. of Iselin, New Jersey for overcharges arising under a Sea-Land Service, Inc. bill of lading dated April 1, 1979, with respect to a shipment of adhesive cement in container number 263403.

In witness whereof, we have hereunto set our hands and seal in the City of Paris, France on this 31st day of December 1979

Standard Transport of France  
by Francis Arne - Pres. Directeur General  
and by Jean Bazes - Directeur General

Notarized January 11, 1980"

warder, doing business at Paris, France. In the latter part of January 1979, Schenkers International Forwarders, Inc., a corporation engaged in ocean freight forwarding, with its principal place of business in New York, N.Y., under FMC No. 911, received instructions from Standard Transport of France to arrange for the exportation, in a refrigerated container, of one container of "ciment golle," an adhesive cement, for discharge at the port of Nice for ultimate delivery to the purchaser, Sa Rhone Aquitaine-Chemie.

On March 12, 1979, the assistant traffic manager of Schenkers International Forwarders, Inc., booked with Sea-Land Service, Inc., a common carrier by water in the foreign commerce of the United States, on a house to house<sup>3</sup> basis, carriage for approximately 30,000 lbs of adhesive paste, temperature control 40°, on behalf of Miracle Adhesive Sales Corporation of New Philadelphia, Ohio, USA, for export to Nice, France (Respondent's June 12, 1980 Answering Memo, Exh. 2).

On March 13, 1979, Sea-Land Service Refrigerated Container No. 263403 was dispatched to Miracle Adhesive Sales Corporation in New Philadelphia, Ohio, via the trucking company Motor Freight Express, Inc. (*Ibid.*, Exhs. 3-4).

Container No. 263403, under Sea-Land Service, Inc. B/L No. 749640 dated 3/31/79<sup>4</sup> was "said to contain 18 Palleys (792 Pails) Ciment Golle as per pro forma invoice<sup>5</sup> dated 17th January 1979; Gross Weight 41,983 lbs., measurement 1069 cu. ft., Temp. control maintain 40°." Stamped correction approved. The port of loading is Baltimore on the vessel *Sea-Land Market* for discharge at Nice. The shipper is Miracle Adhesive Sales Corp., Bellmore, New York. The forwarding agent--Schenkers International Forwarders, Inc., FMC 911, New York, N.Y.

The parties admit the invoice value of the shipment was \$8,710 (Complaint, p. 2, Para. 5, Answer thereto).

Upon receipt on March 19, 1979, of Container No. 263403 by Sea-Land Service, Seal No. 499 on that container was broken and the cargo inspected. The inspection showed a block stock type loading and wire bound crate type packaging of the cargo; that the container refrigera-

<sup>3</sup> Defined under Rule 30 of the applicable Tariff as "Container stuffed by shipper and at the shipper's expense."

<sup>4</sup> Respondent's June 12, 1980 Answering Memo, Exh. 6, plainly shows perforations No. 749640 for No. of B/L and 3/31/79 for date. On the copy of the B/L there is written the word "adhesive" and "Temperature Control--Maintain 40°." There is not correction stamp on this copy. "Stow under Deck" is inked out. Complainant's Schedule Rule F, attached to its June 20, 1980 Reply Brief, shows "Stow Under Deck"; it bears no date or correction. The Complainant's May 30, 1980 Brief and Memo, Schedule C shows B/L with written date 4-1-77, and Sea-Land correction; the "Stow Under Deck" was inked out. It is noted that Rule 30 C-1, 1st Rev. Page 40, effective November 19, 1976, of the applicable tariff, states, "Since it is necessary that Containers be stowed on or under deck at the Member Line's option, Bill of Lading specifically claused to provide under-deck storage will NOT be issued."

<sup>5</sup> No invoice was ever presented herein.

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tion unit was set at 40 degrees; the temperature was tested and read to be 45 degrees and the cargo was "pulped" or tested and found to be at 45 degree temperature. A new seal was affixed to the container bearing the number 956665948. (Respondent's Answer of June 12, 1980, Exh. 5.)

The Bill of Lading numbered 749640 and dated 3/31/79, furnished by the forwarder, Schenkers International Forwarders, Inc., FMC - 911 (Complainant's June 20, 1980 Reply Brief, Schedule F), and accompanying the cargo, contained standard stamped instructions, one of which was "stow below deck" but contained no instructions as to the temperature control required with respect to the cargo. Sea-Land Service, Inc., deleted the phrase "stow below deck" and added a handwritten notation: "Temperature Control--Maintain 40 degrees" (Respondent's June 12, 1980 Answer, Exh. 6).

From March 19, 1979, when received by Sea-Land Service, Inc., in Baltimore until April 1, 1979, the loaded container continued to be activated and a controlled temperature maintained. On April 1, 1979, the cargo at issue was moved by Respondent under the bill of lading and applicable tariff.

**DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS**

The complainant contends that "it is clear beyond argument that the cargo did not in fact require refrigeration." (May 30, 1980, Brief, p. 6). The respondent replies (Answer, p. 18) "For Complainant to attempt to allege and prove violations of 18(b)(3) by Respondent on the basis of a bare conclusion of fact without record support or legal precedent, is inadequate proof of its claim." Respondent contends the "Complainant bears the burden of proving this allegation." The Complainant in its June 20, 1980 Reply Brief argued (p. 9) the Respondent erred in regard to burden of proof under section 18(b)(3) of the Shipping Act. The Complainant asserts the two cases cited by the Respondent deal with alleged errors in weight, measurement or description, and that this case does not involve such matters.

The Presiding Administrative Law Judge cannot agree with the complainant that respondent erred in regard to the burden of proof being upon the Complainant. The two cases referred to above as cited by the Respondent are (1) *Johnson & Johnson International v. Venezuelan Lines*, Docket Nos 71-46 and 71-67, 16 F.M.C. 84 (1973), in which the Commission stated at p. 85, "The proper test we have required is for the claimant to sustain a 'heavy burden of proof.' *Ocean Freight Consultants, Inc. v. Itaipacific Lines*, Docket No. 71-81 served June 20, 1972 (15 F.M.C. 312)"; (2) *United States of America v. Farrell Lines, Inc.* Docket No. 71-4, 16 F.M.C. 41 (1972), in which Complainant U.S. of A. was denied reparation because it failed to adduce sufficient evidence to indicate with reasonable certainty how a shipment of plastic pipe

from Bayonne, New Jersey, to Freetown, Sierra Leone, should have been rated.

The Complainant argues (May 30, 1980 Brief at 6) that it is clear beyond argument that the cargo did not in fact require refrigeration and that it behooves respondent to justify a refrigerated rate when the cargo did not require the service. *Au contraire*, the complainant as the moving party bears the burden of proving what the commodity moved was. Complainant says the proper rate of \$209.50 should have been assessed for glue or adhesives. Item 599.5, pursuant to page 166 of the tariff. Then, as pointed out above, posed the issue in this case as whether the shipment of adhesive cement should have moved as refrigerated cargo at a rate of \$515.75 or as glue or adhesives at a rate of \$209.50.

Sea-Land Service, Inc., Bill of Lading 749640, submitted as Schedule C to Complainant's May 30, 1980 Brief, is dated April 1, 1979, shows Container No. 263403 - "1 container said to contain: 18 Palleys (792 Pails) ciment golle as per pro forma invoice dated 17th January, 1979." In writing (really printing) is "Temp. Control Maintain 40°."

A bill of lading is both a receipt and a contract.

In giving effect to provisions of bill of lading conditions and circumstances which evidence proves were known to parties and contemplated by them in making it are to be taken into consideration. *Isthmian S.S. Co. v. California Spray Chemical Corp.*, 300 F.2d 41 (1962). In the instant case there are conditions and circumstances. For example, the complainant (the freight forwarder of the cargo) on March 12, 1979, made the booking with the respondent to dispatch and who did dispatch a refrigerated container to the shipper. The refrigerated container was No. 263403. The respondent received from the shipper loaded refrigerated container No. 26403 on March 19, 1979. The refrigeration unit was set at 40 degrees. From March 19, 1979, when received by respondent in Baltimore, Md., until April 1, 1979, the loaded container continued to be activated and a controlled temperature maintained.

The assistant traffic manager of the ocean freight forwarder complainant in his affidavit sworn to May 1, 1980, states, *inter alia*, that about 3 or 4 days prior to the loading of the cargo he received a telephone call from a representative of the respondent<sup>6</sup> in Baltimore and that he (the assistant traffic manager) in response to the question as to what temperature the loaded refrigerated box should be maintained, said the container should be appropriately located in the vessel so that the adhesive cement not freeze.

The complaint alleges (para. 3) and the respondent in its answer admits "ciment golle" is an adhesive cement. The respondent by such

<sup>6</sup> Respondent in its June 12, 1980 Answer (at 7) said it has no record of any telephone call of the sort alluded to.

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admission, raised no question as to what commodity was shipped. Thus, there is no information in this record as to what classification by type<sup>7</sup> this adhesive is.

The parties not being concerned with classification of the adhesive that was shipped, attention is directed to the manner--whether refrigerated or not.

Contracts such as bills of lading are to be interpreted from language within the four corners of documents, and any ambiguous language is best resolved against the one who has prepared it. In the present instance the Bill of Lading apparently had stamped thereon "Stow Under Deck" (Schedule F of Complainant's June 20, 1980 Reply Brief). The "Stow Under Deck" was overridden by inking out (Schedule C, Complainant's May 30, 1980 Brief). Also there was a stamp Respondent Correction, there was lettered in "TEMP CONTROL MAINTAIN 40°."

Rule 30, 1st Rev. Page 40, effective November 19, 1976, of the applicable tariff, reads, "Since it is necessary that Containers be stowed on or under deck at the Member Line's option, Bill of Lading specifically claused to provide under-deck storage will NOT be issued." This Rule 30, would, it seems, justify an overriding stamp or inking out of the "Stow Under Deck." Overriding stamp on printed bill of lading is to be considered as superseding printed form if there is a conflict. *Singapore Nav. Co., S/A v. Mego Corp.*, 540 F. 2d 39 (1976).

The complainant is an ocean freight forwarder licensed by this Commission. By an unconfirmed phone call by him to the carrier, concerning commodity that has been in a refrigerated container as ordered by the freight forwarder since March 1979, the freight forwarder who knew or should have known of the carrier's tariff and Rule 30 as well as the contract aspects of a bill of lading, by parol direction with no writing, allegedly says to locate the container in the vessel so the adhesive cement not freeze, and despite the fact the commodity is in a refrigerated container, says no specific degree of temperature was required and that the container should not have been transported under refrigerated conditions.

With no instruction in writing save the bill of lading, the situation is presented of a licensed ocean freight carrier attempting to use "Stow Under Deck," without more, as a direction of what to do with a refrigerated container. If the ocean freight forwarder complainant did not want the commodity shipped in the refrigerated container, he should have specifically conveyed that direction, not by indirection, or suggestion. And, under the circumstances herein, the carrier could

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<sup>7</sup> The *Condensed Chemical Dictionary*, 8th Edition, Hawley 1971, p. 17, defines Adhesive--Any substance, inorganic or organic, natural or synthetic, that is capable of binding other substances together by surface attachment. Types under inorganic and organic are listed.

hardly have handled the refrigerated container other than it did. The complainant has not proved otherwise.

The Complainant's Schedule E attached to its May 30, 1980 Brief, Sea-Land Bill of Lading No. 956744158-6, dated January 6, 1979, according to complainant, shows a movement of identical cargo from the same supplier to the same consignee did not require refrigeration. The respondent disagrees, pointing out that the Container No. 20469 is a refrigerated container; that a move from Baltimore, Maryland, to Le Havre, France, would be one made pursuant to the terms and conditions of a different conference tariff than the tariff here at issue--that is, the North Atlantic French Atlantic Freight Conference Tariff No. (3), F.M.C. No. 4 applicable to carriage from U. S. North Atlantic Ports to French Atlantic ports in the Bordeaux-Dunkirk range. The complainant did not deny that a different conference was involved, in its reply complainant said its purpose in calling the January shipment to the attention of the Commission was to establish that it had moved at the commodity and not refrigerated rate.

Upon consideration of the above and the record herein, the Presiding Administrative Law Judge *finds* and *concludes* that the complainant has failed to meet the burden of proving, under the circumstances presented in this case, that the commodity was improperly charged or that the respondent has violated section 18(b)(3) of the Shipping Act, 1916. Also, the showing of the bill of lading from another conference than that concerned herein did not provide complainant any help in meeting its burden of proof.

Complainant argues that "Stow Under Deck" on the Bill of Lading was an explicit instruction and can be read to mean that the initial instruction of the complainant that the refrigeration was necessary was withdrawn; that at the very least, respondent had a duty to inquire; that for the respondent unilaterally to strike out the complainant freight forwarder's explicit instructions without checking was arbitrary and capricious action constituting an unreasonable practice under section 17(Reply Brief, p. 4). Using the complainant's words (Reply Brief, p. 3) no authority is cited to support this contention and it is without merit.

The complainant asserts it is not necessary to show an actual discrimination to support a finding of a violation of the second paragraph of section 17 (Reply Brief, p. 7). He cites *Rates, Hong Kong-United States Trade*, Docket No. 1083, 11 F.M.C. 168, 176 (1967). (Interestingly, in the complainant's submission of its May 30, 1980 Brief of 10 pages, in which not a single case is cited in support of any contentions, and the June 20, 1980 Reply Brief of 12 pages, the above is the only case cited by the complainant in this proceeding.) On the cited page, the Commission pointed to the second paragraph of section 17 and said, "This paragraph of the Act is directed at unjust or unreasonable regulations as well as improper practices." The complainant has not in this pro-



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ceeding proved any unjust or unreasonable regulation or improper practices.

The complainant has not proved the respondent violated section 16 First of the Act.

As to allegations of violations of section 18(b)(5) of the Act, the complainant argues that the freight assessed was almost twice the value of the merchandise. The complainant asserts the respondent a few months before had transported similar commodity at a lesser charge, but the complainant ignores that transportation was in a different conference and route. Nevertheless the complainant says such difference is detrimental to the commerce of the United States. And adds that respondent has engaged in an unreasonable practice in violation of section 17. (May 30, 1980 Brief, p. 9.) In its June 20, 1980 Reply Brief, the complainant says nothing about any 18(b)(5) violation.

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

(1) The claimant has failed to meet its burden of proving, under the circumstances presented in this case, violations of sections 16 First, 17, 18(b)(3) and 18(b)(5) by the respondent as alleged.

(2) Reparation should be denied.

(3) The complaint should be dismissed.

(4) This proceeding should be discontinued.

Wherefore, it is *ordered* that:

(A) Reparation is denied.

(B) The complaint be and hereby is dismissed.

(C) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS  
*Administrative Law Judge*

Washington, D. C.  
August 12, 1980

**FEDERAL MARITIME COMMISSION**

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**INFORMAL DOCKET NO. 699(1)****GLADISH & ASSOCIATES****v.****SEA-LAND SERVICE, INC.**

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**ORDER PARTIALLY ADOPTING DECISION  
OF SETTLEMENT OFFICER***September 25, 1980*

This proceeding is before the Commission upon its determination to review the decision of Settlement Officer Robert G. Drew, awarding reparation to Gladish & Associates for freight overcharges on three of fourteen shipments of toothbrushes from Keelung, Taiwan to Seattle, Washington.

The Commission concurs with the Settlement Officer's conclusion that, with respect to the three shipments, the carrier collected freight charges in excess of those provided in the applicable tariff, in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817). The Commission also agrees that with respect to the remaining shipments, Claimant has failed to meet its burden of proof, and that its request for reparations as to those shipments must be denied.\*

The record reflects, however, that Claimant was not the shipper, but rather served as customs broker/freight forwarder, and that it had paid the ocean freight. The Commission therefore directs Claimant to reimburse, within thirty days, the shippers of the three shipments in question the portion of any freight charges awarded as reparation which the shippers may have already paid to Claimant. In addition, any brokerage fees Claimant may have received from the carrier on these shipments must be adjusted to reflect the lower rates.

**THEREFORE, IT IS ORDERED, That the Decision of the Settlement Officer is adopted by the Commission to the extent indicated; and**

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\* Three weeks after issuance of the Settlement Officer's Initial Decision, Claimant submitted additional evidence, consisting of copies of two letters and a box of toothbrushes, in support of its claim. The Commission has accepted the evidence for consideration in its review of this proceeding. However, Claimant's submissions remain inadequate proof of its claim, and its burden still has not been met with regard to these shipments.

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.\*\*

(S) JOSEPH C. POLKING  
*Assistant Secretary*

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\*\* Chairman Richard J. Daschbach did not participate.

**Separate Opinion of Chairman Daschbach.**

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The settlement officer's decisions in informal dockets do not have precedential value, Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 699(1)

GLADISH & ASSOCIATES

v.

SEA-LAND SERVICE, INC.

DECISION OF ROBERT G. DREW, SETTLEMENT OFFICER<sup>1</sup>

*Partially Adopted September 25, 1980*

## Reparation Awarded in Part

The claimant, Gladish & Associates (Gladish) is a corporation located at 1319 Second Avenue, Seattle, Washington. It is engaged in the business of customs brokerage and ocean freight forwarding.

The claim involves fourteen (14) shipments of toothbrushes carried by Sea-Land Service, Inc. (Sea-Land) from Keelung, Taiwan to Seattle, Washington under the bills of lading indicated below. The shipments were assessed the rate for "Brushes, all kinds, excluding plastic" as designated under Item 390 of Sea-Land Tariff No. 245-A, FMC No. 138. The shipments moved on a freight collect basis, and the freight charges were paid by Gladish as evidenced by copies of cancelled checks submitted by Gladish at the request of this Settlement Officer.

The shipments involved in this claim are identified as follows:

B/L No.	Vessel & Voyage	Rate As- sessed	Rate Claimed	Amount of Claim
1. 970110536	S/L Exchange 61E	\$79	\$61	\$ 367.56
2. 970119940	S/L Finance 51E	79	61	118.08
3. 970114714	S/L Finance 50E	79	61	233.10
4. 970117577	S/L Commerce 59E	79	61	120.24
5. 970125691	S/L Finance 52E	84	65	561.12
6. 970129735	S/L Commerce 61E	84	65	252.13
7. 970133652	S/L Finance 53E	84	65	103.74
8. 970135545	S/L Exchange 65E	84	65	121.98
9. 970133049	S/L Trade 62E	84	65	116.09
10. 970146049	S/L Finance 55E	84	65	101.72
11. 970112043	S/L Mclean 96E	79	61	95.94
12. 970112598	S/L Mclean 96E	79	61	114.12
13. 970129771	S/L Commerce 61E	84	65	131.67

<sup>1</sup> 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.

## FEDERAL MARITIME COMMISSION

B/L No.	Vessel & Voyage	Rate As- sessed	Rate Claimed	Amount of Claim
14. 970153583	S/L Finance 36E	89	65	148.08
Total amount claimed				\$2,585.57

With the exception of No. 14 above, each of the rates assessed was the Overland Common Point (OCP) rate for "Brushes, all kinds, excluding plastic" under Item 390 of Sea-Land's Tariff No. 245-A, FMC No. 138. Shipment No. 14 above was assessed the Local rate under Item 390 of the same Sea-Land tariff. Item 390 of the tariff excludes plastic brushes for which it directs the reader to Item 2100. Item 2100 is described as "Plastic Goods and Manufactures N.O.S. including Plastic Inflatable Furniture and Plastic Dresser Sets (Containing comb, brush and mirror)."

Gladish claims that "To the best of our knowledge these toothbrushes are PLASTIC..." and that the lower Item 2100 O.C.P. rate should apply. Accordingly, reparation in the amount of \$2,585.57 is claimed.

When Gladish filed this claim with Sea-Land, Sea-Land refused to honor the claim under Item 305 of Sea-Land Tariff No. 245-A, FMC No. 138 which prohibits acceptance of a claim beyond six months of the date of shipment. However, the claim herein under consideration was filed within the time limit specified by statute<sup>2</sup>, and it has been established by the Commission that the so-called "six month" rule may not act as a bar to recovery of an otherwise legitimate overcharge claim in such cases.

The shipment identified as No. 1 above is described on the bill of lading as "polypropylene" toothbrushes and the shipment identified as No. 7 above is described as "styrene" toothbrushes. The remaining twelve (12) shipments were described on the bills of lading as "toothbrushes" without indicating the material of manufacture. Accordingly, the Settlement Officer requested Gladish to submit, in the form of packing lists, commercial invoices, or other such documentation, evidence that the toothbrushes were in fact plastic.

In reply to the Settlement Officer's request Gladish submitted commercial invoices covering each of the fourteen (14) shipments. These commercial invoices describe the toothbrushes exactly as on the respective bills of lading. Only the shipments identified as Nos. 1 and 7 above are confirmed by the commercial invoices to be of polypropylene and styrene manufacture. The commercial invoices do not indicate the material of manufacture with respect to the remaining twelve shipments.

<sup>2</sup> 46 C.F.R. 502.302. The earliest shipment involved here was carried aboard a vessel which sailed on January 9, 1978 and the claim was filed on June 14, 1979.

The United States Department of Commerce, Bureau of the Census, Schedule B classification publication, 1978 edition, includes under the term "plastics," polypropylene<sup>3</sup> and styrene.<sup>4</sup> Accordingly, I find that the shipments identified as Nos. 1 and 7 above were toothbrushes of plastic manufacture and should have been rated under Item No. 2100 of Sea-Land's Tariff No. 245-A, FMC No. 138. However, I also find that with respect to the other twelve (12) shipments Gladish has not met the burden of proving that those shipments were toothbrushes of plastic manufacture, and, therefore the rates assessed by Sea-Land were correct.

As previously indicated the shipment identified as No. 14 above was assessed the "Local" rate under Item 390 of Sea-Land's Tariff No. 245-A, FMC No. 138. Since this shipment was destined for Nashville, Tennessee, it should have been rated at the O.C.P. tariff rate of \$84 per cubic metre pursuant to Item 390 of Sea-Land's Tariff No. 245-A, FMC No. 138, rather than the Local rate of \$89. Therefore, the overcharge is calculated as follows:

Ocean freight assessed:		
6.17 cubic metres/\$89 per cubic metre		\$549.13
Correct ocean freight:		
6.17 cubic metres/84 per cubic metre		<u>518.28</u>
	Overcharge	\$ 30.85

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 tariff. In addition, since this claim was filed within the time specified by statute (see Footnote 2) the so-called "six month" rule of Sea-Land's tariff cannot act as a bar to these overcharge claims. Accordingly, based on the foregoing discussion and findings, Gladish is awarded reparation on the shipments identified as Nos. 1 and 7 above in the amounts of \$367.56 and \$103.74 respectively, and in the amount of \$30.85 for the shipment identified as No. 14 above. The total amount of reparations is \$502.15. In addition, twelve (12) percent interest per annum is awarded, to be calculated from the date that the ocean freight was paid. The claim with respect to the remaining eleven (11) shipments is denied.

(S) ROBERT G. DREW  
*Settlement Officer*

June 26, 1980

<sup>3</sup> The Condensed Chemical Dictionary, Eighth Edition (1971), defines polypropylene as a synthetic crystalline thermoplastic polymer.

<sup>4</sup> The Condensed Chemical Dictionary, Eighth Edition (1971), defines styrene as a thermoplastic synthetic resin.

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-26**

**JUTE CARPET BACKING COUNCIL, INC., AND ITS MEMBERS**

**v.**

**CALCUTTA, EAST COAST OF INDIA AND  
BANGLADESH/U.S.A. CONFERENCE AND ITS MEMBERS**

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**NOTICE**

*October 2, 1980*

Notice is given that no appeal has been taken to the August 26, 1980 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**

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**DOCKET NO. 80-26****JUTE CARPET BACKING COUNCIL, INC., AND ITS MEMBERS****v.****CALCUTTA, EAST COAST OF INDIA AND  
BANGLADESH/U.S.A. CONFERENCE AND ITS MEMBERS**

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**MOTION FOR LEAVE TO WITHDRAW COMPLAINT  
GRANTED; COMPLAINT DISMISSED***Finalized October 2, 1980*

The Jute Carpet Backing Council, Inc. and its members, complainants in this proceeding, have filed a motion requesting leave to withdraw their complaint. Complainants explain that they have decided not to proceed against respondent Calcutta, East Coast of India and Bangladesh/U.S.A. Conference at this time. In reply to the motion, respondent Conference filed their "consent" to the withdrawal of the complaint.

This case began with the filing of the complaint in which the Council and its members, importers of jute carpet backing materials, alleged that the Conference had increased its rates on these commodities by means of a general rate increase of 17 percent on April 10, 1980, and had allegedly also increased bunker surcharges. The Council alleged that these increases caused the rates on their commodity to be so unreasonably high as to be detrimental to the commerce of the United States, in violation of section 18(b)(5) of the Shipping Act, 1916, and asked the Commission to find these rates to be unlawful, issue a cease and desist order, and order an indeterminate amount of financial reparation. The Conference admitted certain rate increases but denied the central allegation of violation of section 18(b)(5) of the Act.

Had this case proceeded into litigation it would most likely have entailed considerable expense with uncertain results. Cases litigated under section 18(b)(5) have traditionally involved the development of lengthy evidentiary records with results often not supporting the positions of complainants or protesting shippers. See, e.g., *Investigation of Ocean Rate Structures*, 12 F.M.C. 34 (1968); *Iron and Steel Rates, Export-Import*, 9 F.M.C. 180 (1965); *Outbound Rates Affecting Export High-Pressure Boilers*, 9 F.M.C. 441 (1966); *Pacific Westbound Conference--Investigation of Rates, Rules and Practices of Wastepaper*, 19 SRR 19 (1979). Moreover, it is well established that the Commission cannot

grant an award of reparation retroactively under section 18(b)(5). See *Westinghouse Electric Corp. v. Sea-Land Service, Inc.*, 19 SRR 1056 (1979), and the cases cited therein. Termination of the case at this time would undoubtedly result in considerable savings to all parties concerned regarding costs of litigation. Furthermore, even though complainants have determined not to pursue the question of lawfulness of respondent's present rates on the commodity which they import under the standards of section 18(b)(5), withdrawal of the complaint, even if construed to constitute a dismissal of the complaint, does not bar complainants from filing a complaint addressed to future rate increases, if they believe that relief is required. Finally, there are no exceptional circumstances which would preclude application of the general rule that complainants have the right to choose not to engage in litigation if they believe it to be in their best interests to withdraw.

Accordingly, the motion for leave to withdraw the complaint is granted. The complaint is dismissed and the proceeding discontinued subject to Commission review under Rule 227(b), 46 C.F.R. 502.227(b).

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

August 26, 1980

# FEDERAL MARITIME COMMISSION

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## TITLE 46 - SHIPPING

### CHAPTER IV - FEDERAL MARITIME COMMISSION

#### SUBCHAPTER B - REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[GENERAL ORDER 24; AMDT. 1; DOCKET NO. 80-32]

#### PART 522 - FILING OF AGREEMENTS BETWEEN COMMON CARRIERS OF FREIGHT BY WATER IN THE FOREIGN COMMERCE OF THE UNITED STATES

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*October 2, 1980*

**ACTION:** Final Rule

**SUMMARY:** The Federal Maritime Commission exempts agreements solely involving terminal facilities located in foreign countries from the filing and approval requirements of section 15 of the Shipping Act, 1916.

**DATE:** Effective October 8, 1980

#### **SUPPLEMENTAL INFORMATION:**

By notice filed in the *Federal Register* on May 27, 1980, the Federal Maritime Commission solicited comments on a proposed rulemaking to exempt pursuant to section 35 of the Shipping Act, 1916 (46 U.S.C. 833a) leases or arrangements solely involving terminal facilities located in foreign countries from the filing and approval requirements of section 15 of the Act (46 U.S.C. 814).

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 requirements 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.

In the main, comments expressed the view that leases or arrangements solely involving terminal facilities located in foreign countries are not within the Commission's jurisdiction under the Shipping Act.

The Commission has occasionally approved agreements involving terminal facilities located abroad. These agreements, between two vessel operating common carriers, as defined in section 1 of the Shipping Act, provided for joint use of a terminal in a foreign port which necessarily involved a degree of rationalization of sailings and coordination of schedules which could affect service and frequency at U.S. ports. The Commission considered these agreements to be within its

jurisdiction. Therefore, it can be said that some agreements involving terminal property at a foreign port are subject to section 15. On the other hand, the Commission is not unmindful that international law principles of comity and sovereignty, the fact that these foreign terminal operators have no direct contact with the United States, and the frequent lack of practical means to carry out any regulations, militate against the positive assertion of jurisdiction in many of these cases. However, to separate those agreements which have such remote contacts with any area of regulatory concern as to compel a determination that no jurisdiction exists, from those within the jurisdiction of the Commission, is difficult in the abstract and unnecessary for the purpose of this order. The Commission is of the opinion that it should exempt the entire class of these agreements rather than attempt to draw an abstract jurisdictional line between them.

Since terminals located in foreign countries have no significant contact with the commerce of the United States, exemption of agreements which solely involve such terminals will not impair effective regulation by the Commission, be unjustly discriminatory, or be detrimental to commerce. Therefore, the Commission will exempt these agreements, to the extent of our jurisdiction, from the filing and approval requirements of section 15.

NOW, THEREFORE, pursuant to sections 15, 35, and 43 of the Shipping Act, 1916 (46 U.S.C. 814, 833a, and 841a) and section 4 of the Administrative Procedure Act (5 U.S.C. 553) IT IS ORDERED, That, effective upon publication in the *Federal Register*, Title 46 C.F.R. Part 522 is hereby amended by the addition of a new section 522.8 as follows:

**Section 522.8 - Exemption of Agreements Between Common Carriers by Water in Foreign Commerce Solely Involving Terminal Facilities.**

Authority: Sections 15, 35, 43, Shipping Act, 1916 (46 U.S.C. 814, 833a, 841a); Section 4, Administrative Procedure Act (5 U.S.C. 553).

(a) *Exemption* - To the extent the Commission has jurisdiction, agreements solely involving foreign terminal facilities are exempted from the filing and approval requirements of section 15 of the Shipping Act, 1916.

(b) *Compliance with the Filing and Approval Requirements of Section 15* - Notwithstanding paragraph (a) of this section, persons who desire Commission approval of agreements solely involving foreign terminal facilities may file such agreements

with the Commission for section 15 consideration in accordance with ordinary filing procedures.

By the Commission.

(S) JOSEPH C. POLKING  
*Assistant Secretary*

## FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-6

SPECIFIC COMMODITY RATES OF FAR EASTERN  
SHIPPING COMPANY IN THE PHILIPPINES/U.S.

PACIFIC COAST TRADE AND U.S. GULF/AUSTRALIA TRADE

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Controlled carrier's rates for "Buri and Rattan Furniture from Cebu" and "Beer, mineral water, etc." found to be unjust and unreasonable and are, therefore, disapproved.

*Steven B. Chameides and John F. Dorsey* for Far Eastern Shipping Company.

*Polly Haight Frawley, Alan J. Jacobson, and Paul J. Kaller* for Bureau of Hearing Counsel.

### REPORT AND ORDER

*October 3, 1980*

BY THE COMMISSION: (RICHARD J. DASCHBACH, *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES V. DAY, *Commissioner*. COMMISSIONER LESLIE L. KANUK CONCURS IN THE RESULT. COMMISSIONER PETER N. TEIGE DID NOT PARTICIPATE).

By Order served January 31, 1980, the Commission: (1) directed the Far Eastern Shipping Company (FESCO)<sup>1</sup> to show cause why six of its rates on three commodities in the Philippines/U.S. trade and one F.A.K. (freight all kinds) rate in the U.S. Atlantic and Gulf/Australia and New Zealand trade<sup>2</sup> should not be disapproved; and (2) suspended those rates for 180 days pursuant to section 18(c)(4) of the Shipping Act, 1916 (46 U.S.C. 817(c)(4)) pending the Commission's determination of their justness and reasonableness. The Philippines North America Conference (PNAC) intervened but later withdrew from the proceeding.

This proceeding was assigned to Administrative Law Judge Charles E. Morgan for the expedited development of an evidentiary record. On May 30, 1980, the Presiding Officer certified to the Commission a record which consisted of 10 exhibits. In addition, all exhibits which were introduced in Docket No. 70-104, *Specific Commodity Rates of Far Eastern Shipping Company in the Philippines/U.S. Pacific Coast Trade*,

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<sup>1</sup> FESCO is a "controlled carrier" subject to regulation under the Ocean Shipping Act of 1978, P.L. 95-483, 92 Stat. 1607, which amended sections 1 and 18 of the Shipping Act, 1916 (46 U.S.C. 801, 817). FESCO is directly or indirectly owned and controlled by the government of the U.S.S.R. under whose flag its vessels operate.

<sup>2</sup> See Attachment A.

were incorporated by reference. FESCO and the Commission's Bureau of Hearing Counsel filed simultaneous opening and reply briefs. FESCO also filed a request for oral argument, which was denied by the Commission.

### POSITIONS OF THE PARTIES

FESCO first claims that its rates are the same as or similar to the rates of other carriers in the same trades. In doing so, it relies upon other carriers' rates in existence on the date of the Commission's Order initiating this proceeding and also on more current rates. In addition, a portion of its rate comparison is based upon Military Sealift Command rates of other carriers. FESCO also contends that its slower and less frequent service from the Philippines requires it to maintain lower rates than two major carriers in the trade - American President Lines and Sea-Land Service, Inc. Lastly, FESCO argues that some of its rates are required to assure the movement of particular cargo - buri furniture.

Hearing Counsel initially asserts that FESCO's total charges on all four subject commodities are lower than the total charges assessed by its competitors. However, because four of the seven rates under consideration have not resulted in trade disruption (injury to other carriers from the capture of an unduly large portion of the market), Hearing Counsel finds them justified. Hearing Counsel further contends that the other three rates - "Buri and Rattan Furniture from Cebu" (Local and OCP) and "Beer, mineral water, etc." (Local) - have disrupted the market for their carriage and have not, therefore, been justified. Finally, Hearing Counsel does not agree that FESCO's rates on buri and rattan furniture have been shown to be required to assure the movement of this commodity.

### DISCUSSION

Once a rate is questioned by the Commission under the Ocean Shipping Act of 1978, the burden is on the controlled carrier to demonstrate that the rate is just and reasonable. *See* 46 U.S.C. 817(c)(1). For the purposes of determining whether rates of a controlled carrier are just and reasonable, the Commission is permitted to take into account "appropriate factors," four of which are set forth in section 18(c)(2).<sup>3</sup> In

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<sup>3</sup> Section 18(c)(2) states in part:

. . . 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 the 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

this particular proceeding, FESCO has addressed only the second and third of these factors. Upon thoroughly reviewing the entire record and the arguments of the parties, the Commission finds that the rates on two of the four commodities at issue are unjust and unreasonable and they will, therefore, be disapproved.<sup>4</sup>

*Footwear (OCP and Local), Beer (Local), and F.A.K. Rates*

FESCO's total charges on all four commodities are lower than those of other carriers in the same trades.<sup>5</sup> See Attachments B through E. However, FESCO did not move any beer or footwear under its OCP rates in 1979 (Exhibit 8); nor has it carried any F.A.K. cargo from Houston to Australia (Exhibit 6).<sup>6</sup> Moreover, FESCO's local carriage of rubber sandals — approximately 527 revenue tons in 1979 (Exhibit 6) — represents a minuscule portion of this market. See Attachment F. It does not appear, therefore, that any of FESCO's rates for these commodities have disrupted these trades or harmed other carriers. Accordingly, these rates will not be disapproved.

*Buri and Rattan Furniture from Cebu*<sup>7</sup>

FESCO's total charges for buri and rattan furniture are about 17 percent less than PNAC's and range as high as almost 32 percent less than that of Seatrain Pacific Services, S.A., a major independent carrier in the trade. However, FESCO's charges for this commodity are within 4.25 percent of the charges assessed by Evergreen Line for local carriage. See Attachment B. This limited similarity between FESCO and

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(iv) the rates . . . are required to maintain acceptable continuity, level, or quality of common carrier service to or from affected ports.

<sup>4</sup> In reaching this conclusion, the Commission: (1) considered only rate comparisons which employed rates in effect at the initiation of this proceeding; (2) considered any applicable charges relating to the subject rates which would affect the total transportation charge to a shipper; and (3) gave little weight to comparisons which used rates available only to the military.

<sup>5</sup> FESCO has offered a study which purportedly proves that its slower and less frequent service justifies lower rates. This theory is based upon the assumption that slower service results in increased inventory and insurance costs to shippers. However, the levels of insurance and inventory costs as they pertain to these particular commodities during the time in question have not been established. Moreover, the transit times employed in FESCO's study are subject to dispute. It appears that FESCO offered a more frequent service from Cebu (3 times a month) than alleged in its study (bi-weekly) (Exhibit 9). In any event, even if the differences due to transit time costs are accepted, they do not justify the disparity of rates between FESCO and its competitors.

<sup>6</sup> This F.A.K. rate was FESCO's first such published rate between Houston and Australia. Because it was suspended prior to its effective date, there is no history of carriage under it. Attachment E indicates that Karlander Kangaroo Line is the only other carrier with a like rate, but that Karlander's total charge is significantly higher than FESCO's. The record does not reveal whether Karlander actually carries any cargo pursuant to its rate.

<sup>7</sup> The local and OCP rates for buri and rattan furniture from Cebu are merely two of several rates published by FESCO under the general commodity description of "furniture." Much of the data which has been introduced in this proceeding does not distinguish among these various rates. However, this data remains relevant because: (1) 86 percent of FESCO's carriage from the Philippines originates at Cebu (Exhibit 3, at 6), and (2) the rates on furniture from Cebu obviously contribute substantially to FESCO's overall market penetration for the carriage of furniture.



Evergreen is not controlling, however, because of the differences in their service characteristics. Unlike FESCO, Evergreen does not serve the Philippines by direct service, but rather employs feeder vessels (Exhibit 7, at 6). In any event, it is the effect of FESCO's rates on its market share and the share of the other carriers which is particularly relevant.

Furniture is one of the seven major-moving commodities in the Philippines/United States Pacific Coast trade and comprises 77 percent of PNAC's cargo (Exhibit 7, at 13). Since 1977, PNAC has seen a gradual decline in its carriage of this commodity during a period when furniture exports in general from the Philippines were increasing (Exhibit 10, at 4; Exhibit 14, at 4 and 5, Docket No. 79-104). In 1979 (the only year for which FESCO provided data) FESCO carried 50,847 revenue tons of furniture compared to 64,847 revenue tons for the entire 17 member conference. *See* Attachment F. This amounted to more than 44 percent of the total market for the carriage of furniture (Exhibit 10, at 5). During the last quarter of 1979, FESCO outcarried PNAC (Exhibit 10, at 5). No other independent carrier appears to have carried any appreciable amount of this commodity.<sup>8</sup>

The affidavits offered by FESCO (Exhibits 3 and 4) do not justify FESCO's apparently low rates on furniture as being necessary to assure its movement. Two Philippine shippers generally assert that, because of the nature of the commodities they ship, FESCO's low rates have been an important factor in their businesses. However, these two affiants make no claim to speak for the entire export furniture industry; nor do they unequivocally state that FESCO's particular rates in question are necessary to assure the movement of all such cargo from the Philippines. Even though FESCO has captured a significant portion of the market for the carriage of this commodity, the Conference continues to carry substantial amounts. Accordingly, these rates do not appear to be *necessary* to assure the movement of buri and rattan furniture from Cebu.

*Beer, mineral water, etc.*

Beer is also one of the seven major-moving commodities from the Philippines (Exhibit 7, at 13), and FESCO's total charges for this commodity are at least 18 percent less than the Conference and almost 33 percent less than Seatrain. *See* Attachment C. What data is available indicates that FESCO carried 6,554 revenue tons of beer locally in 1979, while at the same time, the Conference carried only 4,583 revenue tons, both locally and OCP. *See* Attachment F. FESCO thus outcarried the Conference by 43 percent. While there is no data for

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<sup>8</sup> Census data for 1978 indicates that independents other than FESCO carried only 1.54 percent of all the furniture. (Exhibit 7, at 17).

FESCO's carriage of beer other than for 1979, the record does reveal that PNAC's carriage has decreased significantly from 1978 to 1979 - 14,857 revenue tons to 4,583 revenue tons. See Attachment F. Again, as with furniture, other independents have not played an important role in the carriage of this commodity, transporting only 2.7 percent of all beer, mineral water, etc. in 1978. (Exhibit 7, at 17).

The Commission finds, therefore, that FESCO has significantly penetrated the market for the carriage of furniture and beer from the Philippines, due in large part to the past and present disparity between FESCO's rates and those of its competitors. The Commission further concludes that the rates under consideration have not been adequately justified by FESCO and, because they are unjust and unreasonable, they will be disapproved.

**THEREFORE, IT IS ORDERED,** That the rates of Far Eastern Shipping Company for "Buri and Rattan Furniture from Cebu" (Local and OCP) and "Beer, mineral water, etc." (Local), as listed in Attachment A, are hereby disapproved as unjust and unreasonable; and

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

By the Commission.

(S) JOSEPH C. POLKING  
*Assistant Secretary*

## ATTACHMENT A

*Far Eastern Shipping Company*

## A. FROM: Ports in the Philippines

TO: U.S. Pacific ports and Overland Common Points

DESCRIPTION	TAR- IFF ITEM	RATE SUSPENDED	EFFEC- TIVE DATE
Furniture made of . . .			
From Cebu only			
Special rate			
Buri and Rattan Furniture only	480	Local 41.00M	2-3-80
	480	OCP 36.25M	2-3-80
Beer, mineral water, soft drinks, and			
spirits in cases, cartons or pallets	100	Local 41.50M	2-8-80
	100	OCP 38.50M	2-8-80
Footwear, viz:			
Rubber Sandals, Flat Soles with thongs			
	470	Local 43.00M	2-8-80
	470	OCP 41.50M	2-8-80

## B. FROM: U.S. Atlantic and Gulf

TO: Australia and New Zealand

Freight, All Kinds, in containers			
Special Rate from Houston only	2800	2600PT 20	2-1-80

**ATTACHMENT B**  
**BURI AND RATTAN FURNITURE**

CARRIER	RATE	CEBU BUNKER SUR- CHARGE	ARBI- TRARY CHARGE	TOTAL CHARGE	PERCENT BY WHICH FESCO'S TOTAL CHARGE IS LOWER THAN COMPETI- TOR'S TOTAL CHARGE
FESCO	LOC 41.00M	4.00		45.00	
	OCP 36.25M	4.00		40.25	
<sup>1</sup> PNAC	BURI				
	LOC 45.00M	9.50		54.50	17.43
	OCP 39.00M	9.50		48.50	17.01
	RATTAN				
	LOC 51.25M	9.50		60.75	25.92
	OCP 46.75M	9.50		56.25	28.44
<sup>1</sup> SEA- TRAIN	BURI				
	LOC 41.00M	8.00	9.50	58.50	23.07
	OCP 35.00M	8.00	9.50	52.50	23.33
	RATTAN				
	LOC 46.00M	8.00	9.50	63.50	29.13
	OCP 42.00M	8.00	9.50	59.50	32.35
<sup>2</sup> EVER- GREEN	LOC 39.00M	8.00		47.00	4.25

<sup>1</sup> Exhibit 7.

<sup>2</sup> Exhibit 2.

## ATTACHMENT C

BEER, MINERAL WATER, ETC.<sup>1</sup>

CARRIER	RATE	BUNKER SURCHARGE	TOTAL CHARGE	PERCENT BY WHICH FESCO'S TOTAL CHARGE IS LOWER THAN COMPETITOR'S TOTAL CHARGE
FESCO	LOC 41.50M	4.00	45.50	
	OCP 38.50M	4.00	42.50	
<sup>1</sup> PNAC	LOC 46.00M	9.50	55.50	18.02
	OCP 43.00M	9.50	52.50	19.05
<sup>1</sup> SEA- TRAIN	LOC 59.75M	8.00	67.75	32.84

<sup>1</sup> Exhibit 7. FESCO has compared its local measurement rate for beer to Seatrain's local per container rate for beer. Exhibit 2. However, since Seatrain also offers a local measurement rate for this commodity, FESCO's comparison is of considerably less value than a measurement rate to measurement rate comparison.

**ATTACHMENT D**  
**FOOTWEAR, VIZ: RUBBER SANDALS,**  
**FLAT SOLES WITH THONGS**

CARRIER	RATE	BUNKER SURCHARGE	TOTAL CHARGE	PERCENT BY WHICH FESCO'S TOTAL CHARGE IS LOWER THAN COMPETITOR'S TOTAL CHARGE	
FESCO	LOC 43.00M	4.00	47.00		
	OCP 41.50M	4.00	45.50		
<sup>1</sup> PNAC	LOC 48.00M	9.50	57.50	18.26	
	OCP 46.00M	9.50	55.50	18.02	
<sup>1</sup> SEA- TRAIN	LOC 50.00M	8.00	58.00	18.96	
	OCP 47.00M	8.00	55.00	17.27	
<sup>2</sup> ZIM	LOC 54.50M	9.50	64.00	26.56	
	OCP 51.50M	9.50	61.00	25.41	

1 Exhibit 7.

2 Exhibit 2.

ATTACHMENT E  
 FREIGHT, ALL KINDS

CARRIER	RATE	BUNKER SUR-CHARGE	CURRENCY ADJUSTMENT FACTOR	TOTAL CHARGE	PERCENT BY WHICH FESCO'S TOTAL CHARGE IS LOWER THAN COMPETITOR'S TOTAL CHARGE
FESCO	2,600 P/C 20			2600.00	
<sup>1</sup> KAR-LANDER	3,150 P/C 20	441.00	94.50	3685.50	29.45

1 Exhibit 7.

**ATTACHMENT F**  
**CARGO MOVEMENTS (REVENUE TONS) IN THE**  
**PHILIPPINES - U.S. PACIFIC COAST TRADE**

	COMMODITY	FESCO <sup>1</sup>	PNAC <sup>2</sup>	SEA-LAND <sup>3</sup>
1979	Furniture	50,847 (1994 TEU's x 25.5 cbm stow)	64,486	6,288
	Beer	6554 (257 TEU's x 25.5 cbm stow)	4,583	
	Footwear	1581 (62 TEU's x 25.5 cbm stow)	24,985	
1978	Furniture		66,782	7,530
	Beer		14,857	
	Footwear		36,697	
1977	Furniture		66,939	12,183
	Beer		12,186	
	Footwear		4,762	

1 Exhibit 8 provides data in TEU's. Stowage factors are available from Exhibit 2, at 3. Beer and footwear data reflect local movements only because no OCP movements occurred.

2 Exhibit 10, at 4.

3 Exhibit 7, at 16.



**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-53**

**U.S. GULF/NORTH EUROPE DISCUSSION  
AGREEMENT NO. 10178-1**

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**DISCONTINUANCE OF PROCEEDING**

*October 21, 1980*

Respondents have filed a motion to discontinue proceedings in this matter. The motion demonstrates that proponents no longer wish to pursue the agreement in question. Inasmuch as the proponents have withdrawn the agreement in question and the only issue ordered to be heard was the approvability thereof under section 15, the motion to discontinue should be granted. It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY  
*Secretary*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 69-57

AGREEMENT NO. T-2336

NEW YORK SHIPPING ASSOCIATION  
COOPERATIVE WORKING ARRANGEMENT

## NOTICE CONCERNING SATISFACTION OF REMAINING VALID CLAIMS AND DISCONTINUANCE OF PROCEEDING

*October 23, 1980*

On September 9, 1980, we issued an order in this proceeding directing New York Shipping Association, Inc. (NYSA) to satisfy, within 30 days of service of such order, the outstanding claim for assessment adjustments of Zim-American Israeli Shipping Co., Inc. (Zim) as well as the other still remaining valid claims, or to show cause why such other claims should not be satisfied.

On October 9, 1980, we received notification from NYSA that the outstanding claims of Zim and the other claimants which we had determined were still owed assessment adjustments had been satisfied in the amounts set forth in our September 9th order by the extension of full credits against assessments for cargoes handled at the Port of New York on or after October 9, 1980, one of the methods of satisfaction which we had prescribed in that order. NYSA asks, accordingly, that we now confirm its complete satisfaction of the claims, release and discharge it from any further liability with respect thereto, and close this proceeding.

We have only one observation to make with respect to the manner in which NYSA has chosen to satisfy the claims. As we have frequently explained, should a successful claimant cease to serve the Port of New York, credits will no longer be a satisfactory means of assessment adjustments, and cash refunds will be required to satisfy the remaining liability. See *Agreement No. T-2336*, 19 F.M.C. 248, 262-265 (1976), *affd. sub nom. New York Shipping Ass'n. v. F.M.C.*, 187 U.S. App. D.C. 282, 292, 571 F.2d 1231, 1241 (1978); Orders of December 27, 1976, pages 5, 9-10, and April 3, 1978, page 21; notice of July 5, 1978, pages 3-4; and order of September 9, 1980, page 6. We are thus unable to hold definitively at the present time that credits will continue to be a proper and sufficient method of satisfying the claims. At the present time, however, we find NYSA in full compliance with our September 9th order directing complete satisfaction of the remaining valid claims. Should the method of satisfaction here recognized as proper at the

NEW YORK SHIPPING ASSOCIATION COOPERATIVE 305  
**WORKING ARRANGEMENT**

present time become *improper*, because a claimant ceases operations at the Port, NYSA is directed to satisfy the remaining portions of its liability to such claimant by a cash refund.

**THEREFORE, IT IS ORDERED**, That this proceeding be, and it hereby is, discontinued.

By the Commission.

(S) FRANCIS C. HURNEY  
*Secretary*

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 79-82  
PIER SERVICES, INC.

v.

PORTSIDE REFRIGERATED TERMINALS

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## ORDER ADOPTING INITIAL DECISION

*October 23, 1980*

This proceeding is before the Commission upon Exceptions filed by Portside Refrigerated Terminals, Inc., to the Initial Decision of Administrative Law Judge Joseph N. Ingolia. Replies to Exceptions have been filed by Pier Services, Inc. and the Commission's Bureau of Hearing Counsel, an intervenor.

The proceeding was initiated as a result of a complaint filed by Pier against Portside (Respondent) alleging that: (1) a \$.10 "per carton" inspection charge assessed by Respondent is unlawful under sections 16 and 17 of the Shipping Act, 1916 (46 U.S.C. 815 and 816) and contrary to the tariff filing provisions of the Commission's Rules (General Order 15, 46 C.F.R. Part 533); and (2) a partnership agreement entered into between Respondent and Louis and Vincent D'Annello to form Robideau Portside is in violation of section 15 of the Shipping Act, 1916 (46 U.S.C. 814) because it was not filed with the Commission and is otherwise unjustly discriminatory and unfair.

The Presiding Officer found that Portside was an "other person" within the meaning of section 1 of the Shipping Act and that it had violated sections 16 and 17 as well as the tariff filing provisions of Part 533. He found that Portside violated section 16 by assessing a "per carton" charge against Pier that was not assessed against Pier's competitor and that the assessed charge was an unreasonable practice within the meaning of section 17. The Presiding Officer further found that Portside violated Part 533 and section 17 by failing to file a proper tariff with the Commission and by charging rates other than as specified in its tariff on file with the Commission. Finally, the Presiding Officer determined that there was insufficient record evidence to support a finding that the agreements in issue are subject to section 15 of the Shipping Act. No party took exception to the section 15 aspects of the Initial Decision.

EXCEPTIONS AND REPLIES

Generally, Portside argues that it is a warehouse and as such is exempt from the Commission's terminal tariff filing requirements. Accordingly, Portside submits that the Presiding Officer erred in finding that it violated section 17 and Part 533 for failing to file a terminal tariff. Moreover, because the services performed for Pier are allegedly incidental to Portside's warehouse activities, Portside argues that the Commission lacks jurisdiction over the rates charged for such incidental services as temporary removal from storage.

Portside further contends that in any event it performed services for Pier for which it should be compensated and that its charge is neither unreasonable nor unduly preferential. Finally, Portside submits that its arrangement with the Robideau/Portside partnership justifies assessing a different type of charge to the partnership than to Pier.

Complainant and Hearing Counsel support the Presiding Officer's Initial Decision. They argue that Portside's warehouse services are included within the scope of sections 1, 16, and 17 of the Act because these services are provided in connection with a common carrier by water. Moreover, these parties submit that the exemption for tariff filings provided in Part 533 does not apply to Portside because there is no evidence in this proceeding that the services in issue are performed for *water carriers* pursuant to *storage agreements* covered by issued warehouse receipts. On the contrary, Hearing Counsel point out that Portside's President has admitted that it does not have any contracts with oceangoing carriers.

Complainant and Hearing Counsel argue that Portside's practice of assessing a \$.10 per carton charge is an unreasonable practice within the meaning of section 17 because it is applied to all cartons whether they are actually inspected or skipped; and because the charge is not applied to the Robideau/Portside partnership. Finally, because this charge is not assessed against the Robideau/Portside partnership, Hearing Counsel and Pier submit that the Presiding Officer also properly found a section 16 violation.

DISCUSSION

Portside's Exceptions and the record in this proceeding present the Commission with no reason for disturbing the findings and conclusions of the Presiding Officer's Initial Decision. Indeed, Portside's Exceptions generally constitute nothing more than a restatement of arguments presented to and properly considered and disposed of by the Presiding Officer. The record presented clearly supports the Presiding Officer's findings that Portside is an "other person" within the meaning of section 1 of the Act and that Portside violated Part 533 and section 17 by failing to file proper tariffs with the Commission and by charging rates in excess of those rates which were currently on file with the

Commission. Moreover, the record supports the Presiding Officer's findings that the charges assessed against Pier were unlawful and that the assessment gave the Robideau/Portside partnership an unreasonable preference and advantage which resulted in an unreasonable prejudice or disadvantage to Pier within the meaning of section 16.

**THEREFORE, IT IS ORDERED,** That the Exceptions of Portside Refrigerated Terminals, Inc., are denied and the Initial Decision served in this proceeding on June 19, 1980 is adopted as the decision of the Commission and made a part hereof; and

**IT IS FURTHER ORDERED,** That, in accordance with the provisions of the Commission's General Order 15, 46 C.F.R. 533, Portside Refrigerated Terminals, Inc., file a tariff with this Commission within 30 days of the date of this Order showing its *current* rates, charges, rules, and regulations; and

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

By the Commission.

(S) FRANCIS C. HURNEY  
*Secretary*

## FEDERAL MARITIME COMMISSION

NO. 79-82

PIER SERVICES, INC.

v.

PORTSIDE REFRIGERATED TERMINALS, INC.

### HELD:

- (1) Section 22, Shipping Act, 1916. A complaint filed under section 22 does not require a showing of direct or indirect injury or require a claim for reparations as a condition to its filing, and therefore the complainant has standing in this proceeding even though it has not made a claim for reparations.
- (2) Sections 1, 16 and 17, Shipping Act, 1916. Where the respondent carries on the business of operating a refrigerated warehouse as well as providing services incident to such business in the Port of Philadelphia, it is an "other person" within the meaning of sections 1, 16 and 17 of the Shipping Act and is subject to the jurisdiction of the Commission.
- (3) Section 17, Shipping Act, 1916. Where the respondent undertakes to provide services making imported frozen meat available to the importer or those acting on his behalf, for inspection required by the U. S. Department of Agriculture; and where after the inspection the meat is returned to the respondent's warehouse to be delivered to the inland carrier or consignee so that it may enter the commerce of the United States, the services are related to or connected with the receiving, handling, storing and delivery of property within the meaning of section 17.
- (4) Section 17, Shipping Act, 1916 (General Order 15). Where the respondent initially failed to file its rates in a tariff for services performed as a terminal operator; and where it did file rates in a tariff after being requested to do so by the Commission but subsequently failed to file increases in those rates, and finally; where the respondent adopted a "package" rate which it failed to file in a tariff with the Commission, the respondent violated section 17 and General Order 15. The respondent also violated section 17 and General Order 15 by assessing a \$.10 per carton charge against the complainant, which charge was not filed in any tariff with the Commission and was an unjust and unreasonable practice related to or connected with the handling, storing and delivering of property.
- (5) Section 16, Shipping Act, 1916. Where the respondent assessed a \$.10 per carton charge against the complainant; where such charge was uncorrelated to the cost of the services rendered; where the facts of record indicate the charge gave an undue and unreasonable advantage to a partnership favored by the respondent and subjected a competing party to undue and unreasonable prejudice or disadvantage; the \$.10 per carton charge violated section 16.
- (6) Section 15, Shipping Act, 1916. Where various agreements were entered into by several entities regarding the lease and sub-lease of property in the Port of Philadelphia; where the respondent was sub-lessee of a refrigerated warehouse in the Port; where a partnership agreement was executed regarding the providing of meat inspection service on behalf of importers of frozen meat; and where the facts of record were insufficient to allow a determination as to the nature and effect of each of the agreements, such agreements need not be filed under section 15. However, the record does warrant further investigation and inquiry by the Commission or its staff

to further develop the facts and surrounding circumstances, should the Commission deem such action feasible.

*Theodore W. Flowers, Michael H. Malin, and Ronald J. Restrepo* for complainant, Pier Services, Inc.

*Israel Packel* for respondent, Portside Refrigerated Terminals, Inc.

*John Robert Ewers, Aaron W. Reese, and Deana E. Rose* for intervenor Hearing Counsel.

INITIAL DECISION OF JOSEPH N. INGOLIA,  
ADMINISTRATIVE LAW JUDGE<sup>1</sup>

*Adopted October 23, 1980*

PRELIMINARY MATTERS

On August 6, 1979, the complainant, Pier Services, Inc. (Pier), filed a complaint against respondent, Portside Refrigerated Terminals, Inc. (Portside), under section 22 of the Shipping Act, 1916, as amended, and in accordance with the Rules of Practice and Procedure of the Federal Maritime Commission (Commission).<sup>2</sup> In its complaint Pier alleges that:

IV.

- A. That by reason of the facts stated in the foregoing paragraphs, Complainant has been subjected to liability to Respondent for charges for alleged services at the rate of \$.10 per carton which charges were when exacted and still are:
- (1) unjust and unreasonable in violation of 46 U.S.C. §816;<sup>3</sup>
  - (2) illegal and improper under 46 U.S.C. §816 because of Portside's failure to file with the FMC such modification to its tariff as required by 46 C.F.R. §§533.3, 533.4, 533.6(b) and (d), (6); and
  - (3) unjustly discriminatory against Complainant in violation of 46 U.S.C. §815. <sup>4</sup>
- B. By reason of the facts stated in Paragraph K above, the lower rehandling charge given by Respondent to importers who use the services of Robideau-Portside Services is unjustly prejudicial and discriminatory in violation of 46 U.S.C. §816.
- C. Portside has contravened 46 U.S.C. §816 and the regulations promulgated pursuant thereto, 46 C.F.R. §533.1 *et seq.*, by assessing charges greater than those set forth in its most recent tariff, FMC Tariff No. 2.

<sup>1</sup> 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).

<sup>2</sup> Rule 62, Rules of Practice and Procedure; 46 C.F.R. 502.62.

<sup>3</sup> Section 17, Shipping Act, 1916.

<sup>4</sup> Section 16, Shipping Act, 1916.



- D. The partnership agreement between Respondent and Louis and Vincent D'Annello (Robideau Portside Services) is unjustly discriminatory and unfair as between competing meat inspection services and is in violation of 46 U.S.C. §814<sup>5</sup> because it was not filed with the FMC. (Footnotes supplied.)

The complainant asks that the Commission order the respondent to cease and desist from violations of the Shipping Act, that it apply in the future only such charges as the Commission determines are lawful and that the respondent be required to submit to the Commission all "agreements or understandings for the exclusive use or rental of Portside's facility at the Packer Avenue Marine Terminal."

On August 16, 1979, the respondent filed a Motion to Dismiss alleging, in essence, that the Commission lacks jurisdiction and that the complaint fails to set forth a cause of action. The motion was denied by Order dated September 24, 1979. Also, Hearing Counsel filed a Motion to Intervene on September 7, 1979, which motion was later granted.

In its reply of October 11, 1979, the respondent asks that the proceeding be dismissed and denies any violation of the Shipping Act on its part. It specifically denies that (1) its activities with respect to Pier are subject to the Shipping Act, (2) it is required to file any agreement it has entered into with others under section 15 of the Shipping Act, (3) it is required to file tariffs relating to meat inspection services, although it admits that Portside is an "other person" within the meaning of section 1 of the Shipping Act, 1916, (4) its \$.10 per carton charge is illegal or predatory or contravenes its tariff.

Concurrent with this proceeding the complainant filed a complaint against the respondent in the United States District Court for the Eastern District of Pennsylvania,<sup>6</sup> seeking an injunction against the collection of the \$.10 per carton charge, pending the outcome of this proceeding. On agreement of both parties the District Court enjoined the collection of the \$.10 per carton charge subject to the posting of a bond by the complainant during the period the injunction is extant.

On November 16, 1979, the parties filed a stipulation of facts (SF), together with various exhibits, some of which have been included in the Findings of Fact section of this decision. Subsequently, hearing was held in Philadelphia, Pennsylvania, and original and reply briefs were submitted. At the hearing the parties submitted certain stipulated documents<sup>7</sup> which have also been incorporated into the Findings of Fact section of this decision, where necessary.

<sup>5</sup> Section 15, Shipping Act, 1916.

<sup>6</sup> *Pier Services, Inc. v. Portside Refrigerated Terminals, Inc.*, C.A. 79-2394.

<sup>7</sup> Exhibit, C-10.

## FINDINGS OF FACT

1. Pier Services, Inc. (Pier), is a Pennsylvania corporation, with its principal place of business at 126 Federal Street, Philadelphia, Pa. 19147. Pier provides meat inspection services in the ports of Philadelphia, New York and San Francisco, on behalf of importers of containerized frozen meat products in order for those importers to comply with the federal inspection requirements of 21 U.S.C. 620. Regulations of the United States Department of Agriculture (USDA), require the importer to provide facilities and labor to assist the Meat Inspection Division (MID) of the USDA in its inspection of imported frozen meat products. Importers do not usually have such facilities and normally have a company such as Pier provide them as well as the necessary labor, or a company associated with a warehouse or a warehouse itself. (SF. 1; Tr. 27)

2. Portside Refrigerated Terminals, Inc. (Portside), is a Pennsylvania corporation with its principal place of business at Delaware and Packer Avenues, Philadelphia, Pa. 19148. It carries on the business of operating a refrigerated warehouse as well as providing services incident to that business. (SF. 2; Tr. 126, 127)

3. Portside operates the terminal refrigerated warehouse facility at the Packer Avenue Marine Terminal under an arrangement with Pennsylvania Refrigerated Terminals, Inc. (PRT), a Pennsylvania corporation, whose officers, directors and shareholder ownership is identical to that of Portside. No memorandum of the arrangement has ever been filed with the Commission. PRT is the sublessee of the refrigerated warehouse facility under a sublease agreement with Lavino, which in turn is the lessee under a lease agreement with the City of Philadelphia. Neither the lease agreement nor the sublease agreement has ever been filed with the Commission. (SF. 6)

4. The sublease between Lavino and PRT was executed on July 29, 1965. In pertinent part it provides:

1. From and after the commencement of the term hereof, Sublessor hereby leases to Sublessee, and Sublessee hereby leases from Sublessor, the exclusive use of all that certain space marked in red on the site plan marked Exhibit "A" attached hereto and made part hereof; together with the refrigerated warehouse building and appurtenant improvements to be constructed in such space in accordance with subparagraph 3(a) and 3(b) of the Lease (hereinafter referred to as "premises" or "demised premises"), to be used for the storing and warehousing of goods, wares and merchandise requiring refrigeration, primarily incoming and outgoing; together with the use in common with Sublessor, its employees, agents, customers, guests and invitees of the roadways and railway sidings indicated as "common use facilities" as shown on Exhibit "A", by Sublessee, its employees, agents, customers, guests

and invitees, provided that such use in common shall in no way obligate Sublessee to repair and maintain such roadways and railroad sidings, or to contribute to the cost of any such repair or maintenance.

The demised premises shall be a part of the Packer Avenue Marine Terminal to be erected concurrently herewith by Landlord and/or the General State Authority of the Commonwealth of Pennsylvania (hereinafter referred to as "Marine Terminal"), which Marine Terminal shall be laid out and comprise the area designated therefor in Exhibit "A", and shall include, but is not limited to, the buildings and other structures, parking areas, sidewalks, roadways, railroad sidings, tracks, lighting and sanitary deposit systems indicated therefor in Exhibit "A".

\* \* \*

11. Sublessee shall observe and comply with any and all requirements of the constituted public authorities and with all Federal, State or local statutes, ordinances, regulations and standards applicable to Sublessee or its use of the demised premises including, but not limited to, rules and regulations promulgated from time to time by Landlord's Port Division and other authorities having jurisdiction over any phase of operation in and about the terminal; *provided, however*, that Landlord shall be obligated to comply with such requirements where they relate to matters involving structural integrity in the building in the demised premises, as required by the LEASE.

12. Neither Sublessor nor Sublessee (except as to its obligations to pay rent or maintain insurance under all the provisions of this Sublease) shall be deemed to be in violation of this Sublease if it is prevented from performing any of its obligations hereunder for any reason beyond its control, including without limiting the generality thereof, acts of God or the public enemy, the elements, flood, fire, explosion, any law, order or regulation of the Federal or State Government or any agency thereof, strikes, lockouts or other work stoppages or failure or delay of performance by suppliers or contractors.

\* \* \*

14. Sublessee agrees to permit any railroad tracks upon the demised premises to be operated on the Belt Line principle, i.e., all railroads shall have the privilege to deliver and receive cars to and from the premises.

15. Sublessee agrees to be bound by all of the obligations and conditions imposed upon Landlord by the terms of the Lease between Landlord and the Department of Property and Supplies of the Commonwealth of Pennsylvania relating to their joint participation in the Marine Terminal to the extent

such obligations and conditions affect Sublessee and pertain to the premises demised hereunder, except for such obligations or conditions which concern or affect the rent payable hereunder or provisions with regard to maintenance.

\* \* \*

35. This agreement is conditioned upon the passage of an authorizing ordinance to be enacted by the Council of the City of Philadelphia and approved by the Mayor within three (3) months of the date of the LEASE.

(Exhibit C-10, page 1)<sup>8</sup>

5. Imported frozen meat cannot enter the free flow of United States commerce until it receives United States' government approval. (21 U.S.C. §620; SF. 1, Tr. 71, 124-126)

6. Pier has been in the business of providing meat inspection services since 1971. In October of 1975 Pier entered into a partnership agreement with Portside Services, Inc. (PSI), a corporation whose ownership is essentially the same as that of Portside, wherein each retained a 50 percent ownership. In pertinent part the agreement is as follows:

2. The purpose of Pier Services will be to engage in the inspection services of perishable foodstuffs or other perishables that may be required by the U.S. Government or any agency thereof, prior to their entry into the commerce of the United States through the ports of Philadelphia, Pennsylvania or Camden, New Jersey. Such items shall include but shall not be limited to, fresh frozen meats, frozen cooked meats and canned meats. All such services which might be performed by either of the parties hereto in the Philadelphia or Camden area shall be performed by Pier Services and not by them individually or in conjunction with others.

\* \* \*

4. The principal operations of Pier Services will be located in the U.S. Department of Agriculture Inspection Room located in the facilities of Portside, Packer Avenue, Philadelphia, Pennsylvania. As may be needed by the partnership, the similar type of facility owned by Pier, located at 126 Federal Street, Philadelphia, Pennsylvania, will be available to Pier Services. No rent as such will be charged Pier Services for the use of such facilities.

5. The day to day operations of Pier Services will be under the supervision of Ray Tippett ("Tippett"). He shall be paid a salary by Pier Services of approximately \$420.00 per week, in addition to fringe benefits consisting of Blue Cross and Blue Shield medical insurance. Pier Services will also employ a

<sup>8</sup> In using page numbers to Ex. C-10, disregard the first 3 pages of the exhibit.

secretary, who will be paid approximately \$150.00 per week, in addition to applicable fringe benefits. Pier Services, Inc. will pay Tippett and the secretary weekly and the partnership will reimburse Pier Services, Inc. the gross amount of such payroll including the employer's share of payroll taxes. In addition to those expenses, Pier Services will be responsible for and will pay the direct expenses incurred in its operations, including without limitation, salary of a foreman, other direct labor, all applicable fringe benefits and payroll taxes, motor vehicle rentals, insurance, light, heat and power, supplies, linens and daily maintenance of facilities.

\* \* \*

7. In the event of a termination of this partnership, all liabilities of the partnership shall be paid and the remaining assets shall be distributed to the partners equally after adjusting the capital accounts so that each partner's capital account will be equal. At the time of such termination, the use of the name "Pier Services" will revert to Pier, and the facilities and equipment located in the premises of Portside at Packer Avenue shall no longer be available for use by Pier or any of its related operations. Such facilities and related equipment shall at that time be returned to Portside in the same condition as when their use began by Pier Services, normal wear and tear excepted. At that time, the facilities of Pier at 124 Federal Street shall no longer be available to Portside.

(SF., Appendix)

7. On April 17, 1979, PSI entered into a partnership agreement with Louis and Vincent D'Annello to form Robideau Portside Services of Philadelphia (Robideau-Portside). The term of the agreement is four years and the agreement is presently operative. In essence, the agreement is the same as the earlier agreement PSI had with Pier, and on its execution Robideau-Portside became a competitor of Pier. (SF. 12; Ex. C-10, pages 35-39)

8. Portside is the only refrigerated warehouse facility within the Packer Avenue Marine Terminal area in the Port of Philadelphia and is located 275 feet from the dock. Its facility is the nearest refrigerated warehouse facility to a dock in the Port of Philadelphia. (SF. 3, 4; Ex. C-9)

9. Ships carrying containerized frozen meat products into the Port of Philadelphia dock at the Packer Avenue Marine Terminal because, among other reasons, containers can be unloaded into Portside's facility at less expense, by means of forklift trucks. Other refrigerated warehouses or other distribution points are at such distance as to require ordinary trucking. (SF. 5)

10. Containerized frozen meat unloaded at the Packer Avenue Marine Terminal originates from Australia and New Zealand. (SF. 18; Tr. 48, 72, 91)

11. At least 85 percent of the frozen meat unloaded at the Port of Philadelphia is discharged at the Packer Avenue Marine Terminal. (Tr. 33-34, 314)

12. Portside assumes custody of the frozen meat as a warehouseman in the name of the owner of the cargo or whoever is storing it and retains custody until the frozen meat is released to the consignee or inland carrier. The meats are conveyed to Philadelphia by common carrier by water. (Tr. 48, 49, 72, 337-339)

13. When an importer selects Pier to provide the necessary inspection services for meats at Portside's warehouse, Portside, after due notice makes arrangements and does the work necessary to move the meat out of its regular storage and to move selected cartons to trucks in front of its premises. Pier then picks them up and transports them to 126 Federal Street for inspection by the MID inspector. The MID inspector selects approximately 15 to 18 cartons per container; each container holds 600 cartons. The cartons selected for inspection are then defrosted and inspected at Pier's establishment. Thereafter, Pier transports them back to the front of Portside's premises and Portside moves them back into storage. Before the inspection process is completed, the cartons not selected for inspection are stamped by Pier at Portside's facility on the assumption that the samples will pass inspection. The stamps are removed if the samples are rejected. (SF. 9; Tr. 69-71, 227-229)

14. Whether Pier or Robideau-Portside is used in the meat inspection process by the importer, Portside removes the cartons selected as samples from storage and places them on a different pallet by forklift. (SF. 10, Tr. 69-71, 228)

15. Portside's removal of the samples to the loading dock for inspection and their return to the warehouse is included in the "MID Sample Selection," charge described as "(a)ssessment by Terminal Operator for cost of ILA Labor involved in assisting in selection of frozen meat samples by the Meat Inspection division of the United States Department of Agriculture, covering containerized product only \* \* \*." The charge appears in Portside Tariff No. 1, at \$.11 per carton, in Tariff No. 2, at \$.12 per carton and in Portside's October 1, 1978, "Explanation of Charges" at \$.13 per carton. (Ex. C-10, pages 47, 59 and 63; FF 20, 23, 24; Tr. 196, 197)

16. In 1979 the USDA instituted the "skip system," whereby the MID inspector does not inspect any cartons of frozen meat coming from a packing house with an historically low rejection rate. "Skipped cartons" are not taken to a meat inspection facility, but are stamped with an identifying number. The "skip system" is employed for ap-

proximately two-thirds of all cartons of frozen meat entering the Port of Philadelphia. By letter dated February 27, 1979, Portside notified its customers that cartons which were "skip" inspected would be subject to a \$.07 per carton charge rather than the \$.13 per carton charge applicable to "random sampling" inspections. (SF. 11; Ex. C-10, page 46)

17. On May 17, 1973, the Commission sent a letter to Portside stating:

Dear Mr. Skelly:

We have received inquiries concerning the scope of Portside Refrigerated Terminals' operations at Philadelphia and specifically, the handling of frozen meats discharged from water carriers and placed in Portside's facility for storage.

It is our understanding that Portside assesses a charge to the importer for the movement of frozen meat from dockside to Portside's adjacent facility; that 72 hours free time is allowed on meat; that after expiration of free time storage charges are assessed; and that a charge is assessed against the importer for the pulling of samples for inspection by U.S.D.A. inspectors. In view of these services, there is some question as to whether Portside is performing marine warehousing services subject to the jurisdiction of the Federal Maritime Commission.

For your information we are enclosing a copy of the Commission's General Order 15, which pertains to the filing of tariffs by terminal operators. We suggest that you review the information in General Order 15 to determine whether a tariff should be filed with the Commission setting forth the rates, rules and regulations pertaining to the handling of frozen meat by Portside.

We would appreciate your comments regarding Portside's operations including your views regarding the filing of a terminal tariff.

(Ex. C-13)

18. On June 5, 1973, Portside sent a letter to the Commission stating in pertinent part:

In answer to your letter of May 17, 1973, the rate information requested by Pier Services has been supplied to them. We would also like to point out that Portside Refrigerated Terminals operates as a warehouse issuing warehouse receipts. Therefore, Chapter IV Federal Maritime Commission, Part 533 does not apply to our operation.

Your attention to this matter is greatly appreciated.

VERY TRULY YOURS,  
PORTSIDE REFRIGERATED TERMINALS, INC.  
GERALD T. SKELLY  
*Vice President*

(Ex. C-10, page 75)

19. On August 9, 1973, the Commission transmitted a letter to Portside stating in pertinent part:

Dear Mr. Skelly:

This refers to your letter of June 5, 1973, regarding Portside Refrigerated Terminals operations at Philadelphia.

It is our informal opinion that Portside Refrigerated Terminals, Inc. is an "other person" subject to the Shipping Act, 1916, inasmuch as it is carrying on the business of "forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water" and therefore subject to the jurisdiction and regulation of the Federal Maritime Commission. (Emphasis added.) In view of the foregoing, it is requested that you furnish the information previously requested in our letter of May 17, 1973, regarding Portside's operations as they relate to the receiving or delivering of cargoes moving by water carrier in the foreign commerce of the United States. We are particularly concerned with your operations as they relate to services performed for, or in conjunction with, Pier Services, Inc.

With respect to the tariff filing requirements of this Commission, and the exemptions contained in General Order 15 for warehouses issuing warehouse receipts, we would appreciate more detail regarding the issuance of such receipts. For example, to what extent are you regulated at the present time? Please also furnish a sample copy of the receipts issued.

Upon receipt of this information we will advise you further as to the need to file a terminal tariff.

(Ex. C-10, page 74)

20. On September 25, 1973, the Commission again contacted Portside as follows:

Dear Mr. Skelly:

This refers to our correspondence of August 9, 1973 (copy enclosed) advising you of our informal opinion with respect to Portside Refrigerated Terminals' subjectivity to the jurisdiction of this Commission. We also requested additional information to determine whether a tariff should be filed.

As of this date, we have received no response to our letter and we would appreciate your attention to this matter.

(Ex. C-10, page 73)

21. On July 3, 1974, the Commission advised Portside in pertinent part:

Dear Mr. Skelly:

Since your letter of December 3, 1973, we have reviewed the information which you sent us, as well as additional informa-



tion received from Lavino Shipping Company concerning the operations conducted by Portside.

After reviewing this information, it is our informal position, as previously stated in our letter of August 9, 1973, that Portside Refrigerated Terminals, Inc. is an "other person" subject to the Shipping Act, 1916. As we have already pointed out, section 1 of the Act defines an "other person" as "any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." (Emphasis added).

The above conclusion concerning Portside was reached for the following reasons:

1. Portside services cargo transported by common carriers by water,
2. Portside's facility is physically adjacent to a marine terminal area, and
3. Portside performs storage, warehousing and related services.

In addition, Lavino Shipping Company, upon our request, provided us with information which indicates that:

1. The number of comparable freezer facilities in the area is limited, thus the number of alternatives open to the shipper is correspondingly limited,
2. Lavino prefers to move all frozen meat through Portside and as such it operates under the premise that shippers prefer this treatment, and
3. If the cargo were delivered ex-dock, Lavino itself would pick the samples for the M.I.D. Inspection and effect delivery to the trucker for the ultimate receiver.

A copy of Lavino's letter dated March 18, 1974, is enclosed. It appears that while Portside is performing services for the importer, such services are not always performed at the direction of the importer. In other words, Portside provides certain services, including warehousing, on cargoes moving through the Port without direct authorization by the consignee. This is the type of service generally provided by a marine terminal operator. Under such circumstances, the ability of the individual shipper to dictate the manner in which this frozen meat is handled through the Packer Avenue facility appears limited. For your information, we are enclosing a copy of General Order 15 which requires the filing of tariffs by terminal operators. Your particular attention is directed to 533.6(b) which includes a cold storage plant in the definition of a "port terminal facility."

In view of the foregoing, it is requested that you send us a copy of the rates which you assess for your services, as well

as any comments you may have with regard to our conclusions.

(Ex. C-10, page 69)

22. Effective October 1, 1974, Portside filed its Tariff No. 1 (F.M.C. No. 1) as follows:

**PORTSIDE REFRIGERATED TERMINALS, INC.**

**EXPLANATION OF CHARGES, EFFECTIVE OCTOBER 1, 1974**

**ITEM #1-EXPEDITING \$13.25 PER SHIPMENT** An expediting charge shall be assessed to the consignor for each shipment delivered or released from his account. The charge shall include the preparation of an inland bill of lading, scheduling of carriers for straight time appointment pick-up and returning of the signed inland bill of lading to the consignor. The charge will be applicable whether the consignor should supply an inland bill of lading, or not, whether the product is released to a carrier under a prepaid, freight collect basis or to an ex-dock customer. A charge of \$10.00 per shipment shall apply on any distribution change which requires reprocessing of delivery ticket/inland bill of lading in addition to initial expediting charge.

**ITEM #2-PARTIAL OR TAILGATE LOADING** Partial or Tailgate Loading is the service of transporting cargo from the freezer facilities to a truck tailgate. In this instance, the actual truck loading is performed by the carrier's agent. A charge of \$.25 CWT will be assessed the shipper for this service.

**ITEM #3-FULL TRUCK LOADING** Full Loading is the service of transporting cargo from the freezer facilities into a truck. In this instance, the actual truck loading is performed by labor supplied by the terminal facility. A charge of \$.56 cwt will be assessed the shipper for this service.

**ITEM #4-RAILCAR LOADING** Railcar Loading is the service of transporting cargo from the freezer facilities into a railcar. The railcar loading is performed by the terminal acting as agent for the rail carrier. A charge of \$11.11 PER TON shall be billed directly to the railroad carrier for this service.

**ITEM #5-MID SAMPLE \$.11 PER CARTON** Assessment for cost of labor involved in assisting in the selection of frozen meat samples by the Meat Inspection Division of the United States Department of Agriculture.

**ITEM #6-HANDLING\*** Handling is the service of physically moving cargo into public warehouse facilities. Rates for this service will be made available upon request.

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\*These items are not subject to the filing requirements of General Order No. 15. This exemption is granted by virtue of the fact that these types of services are performed in conjunction with a bona fide public warehouse operation and pursuant to storage agreements covered by issued warehouse receipts.

*ITEM #7-STORAGE\** Storage is the service of providing public warehouse facilities for the storing of cargo after the expiration of free time. Rates for this service will be made available upon request.

*ITEM #8-WEIGHING* The service of recording cargo weights will be performed at a rate of \$.08 PER CARTON.

*ITEM #9-BILL OF LADING* The service of processing a BILL OF LADING so that cargo may be released OUT OF STORAGE will be performed at a rate of \$6.25.

*ITEM #10-DELIVERY CHARGE* The service of retrieving cargo OUT OF STORAGE will be performed at a rate of \$1.25.

*ITEM #11-FREE TIME* Free Time is the specified period during which perishable cargo may occupy space assigned to it on the terminal facilities free of terminal storage charges subsequent to the discharge of such cargo off the vessel.

A Free Time period of 72 hours shall be allowed on all frozen cargo moving across the terminal facilities.

(Ex. C-10, pages, 58-61)

23. On November 28, 1975, the Commission again contacted Portside by letter. It states:

Dear Mr. Skelly:

Enclosed is a copy of a self-explanatory letter received from the Delaware River Port Authority. The staff has not received changes to Portside's Tariff No. 1 currently on file except for Supplement 1A. Supplement 1A as you know, states that: "All charges are based on straight time labor rates. When such services are required during overtime periods and on Saturdays, Sundays, and holidays contained in ILA labor agreements for Port of Philadelphia, prior arrangements must be made and the difference in labor costs between straight time and overtime will be charged to those responsible for authorizing such overtime." For your information, we received Supplement 1A on April 14, 1975.

You are reminded that if the rates, rules or regulations in Portside's tariff have or are currently undergoing further changes, such revisions should be promptly submitted in accordance with General Order 15.

It is requested that you review Portside's tariff and if necessary, take immediate steps to see that any further adjustments in the originally submitted tariff are reflected by appropriate filings to this Office.

(Ex. C-10, pages 65-66)

24. Portside replied on December 5, 1975, as follows:

In reference to your letter of November 28, 1975, I should like to apologize for your not receiving your copy of our FMC Tariff #2.

I have contacted my personnel and we are under the opinion that we had mailed one to you.

Enclosed please find a new copy of Tariff #2 and please forgive the delay.

I have also, at this time, contacted people at the Port Authority and have brought them up to date.

VERY TRULY YOURS,  
PORTSIDE REFRIGERATED TERMINALS, INC.

GERALD T. SKELLY  
*Vice President and General Manager*

(Ex. C-10, page 67)

25. Effective October 1, 1975, Portside filed its Tariff No. 2 (F.M.C. No. 2), as follows:

**PORTSIDE REFRIGERATED TERMINALS, INC.**

**EXPLANATION OF CHARGES, EFFECTIVE OCTOBER 1, 1975**

**ITEM #1-EXPEDITING \$14.00 PER SHIPMENT** An expediting charge shall be assessed to the consignor for each shipment delivered or released from his account. The charge shall include the preparation of an inland bill of lading, scheduling of carriers for straight time appointment pick-up and returning of the signed inland bill of lading to the consignor. The charge will be applicable whether the consignor should supply an inland bill of lading, or not, whether the product is released to a carrier under a prepaid, freight collect basis or to an ex-dock customer. A charge of \$10.00 per shipment shall apply on any distribution change which requires reprocessing of delivery ticket/inland bill of lading in addition to initial expediting charge.

**ITEM #2-PARTIAL OR TAILGATE LOADING** Partial or Tailgate Loading is the service of transporting cargo from the freezer facilities to a truck tailgate. In this instance, the actual truck loading is performed by the carrier's agent. A charge of \$.28 cwt will be assessed the shipper for this service.

**ITEM #3-FULL TRUCK LOADING** Full loading is the service of transporting cargo from the freezer facilities into a truck. In this instance, the actual truck loading is performed by labor supplied by the terminal facility. A charge of \$.63 cwt will be assessed the shipper for this service.

**ITEM #4-RAILCAR LOADING** Railcar Loading is the service of transporting cargo from the freezer facilities into a railcar. The railcar loading is performed by the terminal acting as agent for the rail carrier. A charge of \$12.23 PER TON shall be billed directly to the railroad carrier for this service.

**ITEM #5-MID SAMPLE \$.12 PER CARTON** Assessment for cost of labor involved in assisting in the selection of frozen meat samples by the Meat Inspection Division of the United States Department of Agriculture.

**ITEM #6\*-HANDLING** Handling is the service of physically moving cargo into public warehouse facilities. Rates for this service will be made available upon request.

**ITEM #7\*-STORAGE** Storage is the service of providing public warehouse facilities for the storing of cargo after the expiration of free time. Rates for this service will be made available upon request.

**ITEM #8-WEIGHING** The service of recording cargo weights will be performed at a rate of \$.09 PER CARTON.

**ITEM #9-BILL OF LADING** The service of processing a BILL OF LADING so that cargo may be released OUT OF STORAGE will be performed at a rate of \$6.25.

**ITEM #10-DELIVERY CHARGE** The service of retrieving cargo OUT OF STORAGE will be performed at the rate of \$1.25.

**ITEM #11-FREE TIME** Free Time is the specified period during which perishable cargo may occupy space assigned to it on the terminal facilities free of terminal storage charges subsequent to the discharge of such cargo off the vessel.

A Free Time period of 72 hours shall be allowed on all frozen cargo moving across the terminal facilities.

(Ex. C-10, pages 62-64)

26. Effective October 1, 1978, Portside issued an "Explanation of Charges Effective October 1, 1978," as follows:

**HANDLING \$.24 CWT** Handling covers transportation of all frozen meat moving through our facility, from our delivery platform to freezer protection with seventy-two hours free time beginning the following day after completion of the vessel discharge on break-bulk vessels. Free time begins the following day after stripping on container vessels. The charge will be billed directly and only to the Importer of Record and will not be rebilled or handled in any other manner.

**EXPEDITING \$16.00 PER SHIPMENT** An expediting charge shall be assessed to the consignor for each shipment/container delivered or released from his account. The charge shall include the preparation of an inland bill of lading, scheduling carriers for straight time appointment pick-up and returning of the signed inland bill of lading to the consignor. The charge will be applicable whether the product is released

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\*These items are not subject to the filing requirements of General Order No. 15. This exemption is granted by virtue of the fact that these types of services are performed in conjunction with a bona fide public warehouse operation and pursuant to storage agreements covered by issued warehouse receipts.

to a carrier under a prepaid, freight collect basis, or to an ex-dock customer. A charge of \$10.00 per shipment shall apply on any distribution change which requires reprocessing of delivery ticket/inland bill of lading in addition to initial expediting charge.

**LOADING (PARTIAL WORK ORDER) \$.43 CWT** Partial Work Order consists of transporting product from our freezer to the truck tailgate with loading by carrier's agent. Charges to be assessed to consignor or carrier as requested.

**LOADING (FULL WORK ORDER) \$.84 CWT** Full Work Order consists of transporting product from our freezer into truck with loading by labor supplied by our facility. Charges to be assessed to consignor or carrier as requested.

**M.I.D. SAMPLE SELECTION \$.13 PER CARTON** Assessment by Terminal Operator for cost of I.L.A. Labor involved in assisting in the selection of frozen meat samples by the Meat Inspection Division of the United States Department of Agriculture, covering containerized product only. Charge will be billed directly and only to the Importer of Record and will not be rebilled or handled in any other manner.

**REHANDLING \$.84 CWT** To be assessed if "documents" are not available upon discharge of the vessel/container, as any product placed under freezer protection without necessary M.I.D. documents will require, upon receipt of such documents, rehandling from freezer to platform in order Meat Inspection Division may select samples for "Random Sampling/Defrost Inspection." Rehandling also to be assessed for any requested operation which necessitates actual rehandling of product. The charge for rehandling product due to unavailable documents will be billed directly to the Importer of Record and will not be billed, rebilled or handled in any other manner.

**OVERTIME LOADING \$76.00 PER HOUR** Will apply in addition to normal partial or full work order rates per cwt assessed to the consignor at his request only. The charge will not be billed, rebilled or handled in any other manner.

	30 DAYS	15,000# & OVER	5/14,999#	UNDER 5,000#
Handling:		\$.84 cwt	\$.89 cwt	\$1.00 cwt
Storage:		*\$.53 cwt	*\$.68 cwt	*\$.71 cwt

	10 DAYS			
Handling:		\$.17 cwt	\$.22 cwt	\$.33 cwt
Storage:		*\$.27 cwt*	*\$.34 cwt	*\$.36 cwt
Handling:		\$.60 cwt	\$.65 cwt	\$.76 cwt
Storage:		*\$.27 cwt <sup>b</sup>	\$.34 cwt	*\$.36 cwt
Handling:		\$.84 cwt	\$.89 cwt	\$1.00 cwt
Storage:		*\$.27 cwt <sup>c</sup>	*\$.34 cwt	*\$.36 cwt

\*PLUS 12% POWER SURCHARGE ON STORAGE.

<sup>a</sup>Less Vessel Handling & Loading.

<sup>b</sup>Less Vessel Handling and Includes Loading.

<sup>c</sup>Includes Vessel Handling & Loading.

**IN-BOND STORAGE** An additional 10% charge on handling and storage will apply to cover cost for documentation and United States Custom Inspector per hour "entry" and "withdrawal" charges.

**NOTE:** In the event product remains in warehouse after initial "10 DAY" storage period, an additional "30 DAY" storage period will automatically accrue.

MINIMUM	\$15.00	DELIVERY	\$1.25 EA.
CHARGE:		CHARGE:	
TAKING	\$ .13 PER CARTON	BILL OF	\$6.50 EA.
WEIGHTS:		LADING:	

**TRANSFER: \$.18 CWT** Transfer covers transportation of all frozen meat moving through our facility, from the vessel's berth at dock side to our delivery platform. The charge will be billed directly and only to the Importer of Record and will not be rebilled or handled in any other manner. This charge will apply to Break-Bulk vessels only.

### HOLIDAY CLOSINGS

New Year's Day  
Martin Luther King, Jr. Birthday  
Washington's Birthday  
Good Friday  
Memorial Day  
Flag Day  
Lincoln's Birthday  
Richard Askew's Birthday

Independence Day  
Columbus Day  
Labor Day  
November Election Day  
Veteran's Day  
Thanksgiving Day  
Christmas Eve Day  
Christmas Day

**Note:** Please check with "order department" for actual closing dates.

Neither the above "Explanation" nor the increased charges set forth in it has been filed with the Commission although Portside has charged the rates set forth. (Ex. C-10, pages 47, 48)

27. By letter dated April 19, 1979, two days after PSI entered into a partnership agreement with Robideau, Portside notified Pier that Portside would assess Pier a \$.10 per carton charge, covering the total number of cartons contained within each container, for the purpose of making meat products available to Pier for "stamping and for delivering, loading checking, and unloading samples," plus, if necessary, overtime labor expenses. The \$.10 charge would cover every container in the importer's shipment and not merely the ones designated for defrost-

ing and inspection. This charge has not been listed in any tariff filed with the Federal Maritime Commission. (SF. 7; Ex. C-10, page 40)

28. By letter dated May 9, 1979, Portside informed Pier that the \$.10 per carton charge was based upon Portside's maintaining available space on a year round basis and paying for a definite leased area, insurance, taxes, sewer, water maintenance, Wells Fargo Alarm System, all International Longshoremen Association personnel, consisting of at least one carloader and a fork truck. (SF. 14; Ex. C-10, page 41)

29. By letter dated May 25, 1979, Robideau Distribution Center (RDC) gave notice of a \$.10 per carton charge to Pier in connection with meat inspection services to Pier at RDC's refrigerated warehouses. (SF. 19; Ex. C-10, page 43)

30. In 1971, when Pier began trucking frozen meat samples from Portside to its meat inspection facility at 126 Federal Street, and through 1974 Portside did not assess any charge against Pier for the labor supplied by Portside in making samples available to Pier. (Tr. 142)

31. From some time in 1950 to 1975, Erb Strapping (Strapping) offered meat inspection services in the Port of Philadelphia. During that period, Strapping rented the inspection room located on Portside's premises and paid Portside for labor hired for his use. (Tr. 127, 128, 231, 327)

32. In 1975, immediately before PSI entered into a partnership agreement with Pier, Portside began assessing a \$.045 charge per container to Strapping to pay Portside for removing meat products from their freezer and loading onto and loading off of Strapping's trucks. Subsequently, Strapping went out of business, still owing money to Portside. (Tr. 187, 232, 234).

33. At the present time, Pier and Robideau-Portside are the only two meat inspection companies in the Philadelphia area offering their facilities and services to importers of frozen meat. (Tr. 124-125)

34. Between 1977 and 1979, Portside lowered its rates to become more competitive with the Port of New York, and to help cover expenses, Portside assessed the partnership (Pier-Portside) a \$2.00 a carton charge on each carton the partnership handled. (Tr. 119)

35. Portside does not now assess the present partnership (Robideau-Portside) a \$2.00 per carton charge. (Tr. 341-343)

36. As to Portside's \$.10 per carton charge against Pier, Portside prepared no written cost studies to justify its imposition. Portside's President testified he prepared some notes which he threw away. (Tr. 165)

37. Portside does not assess a \$.10 per carton charge against the Robideau-Portside partnership. (Tr. 346, 347)

38. In connection with warehousing and other terminal services and facilities for containerized frozen meat, the only additional service Port-



side performs for Pier that it does not perform for the Robideau-Portside partnership is the loading and unloading of Pier's trucks when samples are selected for inspection. No services are performed for "skipped" inspections. (Tr. 352)

39. The time required by Portside's labor to load 10 or 11 pallets onto Pier's trucks and to unload the pallets off Pier's trucks is approximately one-half hour for each act of loading or unloading. (SF. 10)

40. Other refrigerated warehouses in the Philadelphia area, i.e., Northern Metals, U. S. Cold Storage, Camden Refrigeration, and Hill Creek Farms, do not charge Pier for providing the necessary labor and equipment to make cartons designated as MID samples available to Pier so that Pier can perform the required meat inspection. (Tr. 119)

41. While Pier is not charged for picking up meat for inspection at warehouses other than Portside, the importer currently pays \$.18 per inspected carton to the warehouse or to the pier. The \$.18 tariff is adhered to by the Philadelphia Marine Terminal Association and includes assisting in the selection of cartons, loading trucks, returning inspected cartons, and returning them to the freezer or storage point. There is no charge to the importer for skip lots. (Tr. 259, 260, 287)

42. Pier charges the importer for the services it provides with respect to the government inspection of frozen meat. Pier charges the importer \$7.45 per carton for meat that is defrosted and \$4.75 per carton for meat that is individually wrapped and does not require defrosting. Those charges are assessed only against the cartons actually inspected and the charge includes stamping, picking up samples at Portside and other warehouses, trucking the samples to the Federal Street facility, unloading the samples, defrosting, presenting the samples to the MID inspector, reloading the samples into cartons and reloading the truck and returning the samples to Portside or other refrigerated warehouses. On "skip lots" Pier charges the importer \$.12 per carton for stamping "approved" on the containerload of cartons. (Tr. 72, 73)

43. On approximately October 1, 1979, Portside published and distributed to its customers a form letter describing a "complete new program for the handling of Australian and New Zealand frozen meat containers on a 'house to house' basis," effective October 19, 1979. The charges are based upon a "package arrangement" with an all inclusive per container rate to cover stripping, sample selection, inspection/stamping, immediate transfer to frozen protection, expediting and outbound tailgate loading, and credit to importer and charge to ex. dock customers on ex. dock deliveries. These rates, charges and services have not been filed with the Commission. (Ex. 14; Tr. 176, 330, 331)

44. Since it has begun the \$.10 per carton charge Portside has billed Pier approximately \$25,000 for May and June of 1979, \$11,000 for July, \$9,000 for August, \$6,700 for September and \$3,900 for October. Pier has not paid any of the charges. (SF. 13)

45. There are currently pending before the National Labor Relations Board two unfair labor practice proceedings styled *International Longshoremen's Association Local 1242* and *Hill Creek Farms*, Case Nos. 4-CC-1133 and 4-CE-55. These cases charge the ILA Local 1242 with violations of the National Labor Relations Act, section 8(b)(4)(ii)(B), 8(c) and 2(b) and (7). In these proceedings, the National Labor Relations Board is challenging the legality of Rule 2(B)(4) of the CONASA-ILA<sup>9</sup> Containerization Agreement in effect between the Philadelphia Marine Trade Association and the ILA. Section 2(B)(4) reads:

Rule 2. Containers Not To Be Loaded or Discharged by ILA Labor:

Cargo in containers referred to below shall not be loaded or discharged by ILA labor:

\* \* \*

B. Import Cargo:

\* \* \*

(4) Containers of a qualified consignee discharged at a bona fide public warehouse within the "geographic area" which comply with all of the following conditions:

1. The container cargo is warehoused at a bona fide public warehouse.

2. The qualified consignee pays the normal labor charges in and out; and the normal warehouse storage fees for a minimum period of thirty or more days; and

3. The cargo being warehoused (a) in the normal course of the business of the qualified consignee; (b) title to such goods has not been transferred from the qualified consignee to another.

46. On June 12, 1979, the court issued an injunction in *Hirsch v. ILA Local 1242*, C.A. No. 79-2022, enjoining the enforcement of Rule 2(b)(4). Prior to the injunction almost all frozen meat cargo coming into the Port of Philadelphia was stripped there because Lavino which operated the Port as well as providing stevedoring services, discouraged any other procedure. Since the injunction, containers of frozen meats as well as other cargo are being stripped outside the Port and there has been at least an 80 percent drop in the Robideau-Portside partnership's business. (Ex. C-8; Tr. 92, 93, 215)

#### DISCUSSION

This proceeding raises six basic issues, each of which will be considered in turn by setting forth, as is necessary, the argument of each of

<sup>9</sup> Council of North American Shipping Associations-International Longshoremen's Association.

the parties and arriving at a decision based on those arguments, the facts of record and the applicable statutory and case law.

*Issue No. 1 - Does the Complainant Have Standing to File a Complaint and Seek the Relief Requested, under Section 22, Shipping Act, 1916?*

Section 22 of the Shipping Act, 1916, as amended states:

SEC. 22. 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 reparation for the injury, if any, caused thereby. . . .

It seems clear enough that by its terms the statute allows *any person* to file a complaint without a showing of direct or indirect injury and without a claim for reparations. If there was any doubt in this regard it was resolved long ago in *Isthmian S.S. Co. v. United States*, 53 Fed. 251 (S.D.N.Y., 1931). There, in response to the petitioner's objection that the complaint must be filed by a "person" directly affected by the alleged violations of the Act, the Court stated:

. . . The statute contains no such limitation. Section 22 (46 USCA §821) provides that "any person may file \* \* \* a sworn complaint setting forth any violation of this Act by a common carrier by water \* \* \* and asking reparation for the injury, if any, caused thereby." While it is evident that in order to obtain "reparation" for injury "a person" must be directly affected by the violation, the words "injury if any" indicate that the remedy does not necessarily include "reparation," but may relate only to the prevention of unfair or discriminatory rates in the interest of the public. As was said in the analogous interstate commerce case of *Baer Bros. Mercantile Co. v. Denver & R.G.R. Co.*, 233 U.S. at page 488, 34 S. Ct. 641, 645, 58 L. Ed. 1055: "The grounds of complaint may be joint or separate, and the very fact that they may sometimes be separate shows that the presence of both is not jurisdictional. \* \* \*" The Supreme Court in that decision likewise said that "Awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its quasi judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi legislative capacity to prevent future injury to the public." . . .

The complainant and Hearing Counsel agree with the holding in *Isthmian, supra*. Despite the clarity of the holding, respondent clings to the belief that some injury must be shown. He attempts to obviate *Isthmian* by asserting there was indirect harm, ignoring the fact that the court clearly held that the presence or absence of that fact made no difference in resolving the issue. The respondent then proceeds to cite

*Federal Maritime Commission v. Seatrain Lines*, 411 U.S. 726, 790 (1973), in support of his view, quoting the language:

Finding that "the likelihood of any impact at all upon [Seatrain's] operations which might result from the approval of the agreement is a matter of mere speculation," the Commission concluded that "Seatrain has no standing in this matter and that its protest is without substance."

A reading of *Seatrain Lines* indicates it is totally inapplicable to the issue under consideration. It does not involve section 22, but rather the approval of an agreement under section 15. Furthermore, the language quoted by the respondent is a recitation by the court of what the Commission had done and omits a footnote that explains that since the Supreme Court decided the Commission did not have jurisdiction over the agreement it was not passing on the question of whether or not the Commission's decision that Seatrain was not entitled to a hearing would have been proper in a case where the Commission had properly asserted its jurisdiction.

Finally, respondent takes issue with complainant's citing of *FMC v. Zim Israel Navigation Co.*, 263 F. Supp. 618, 621 (S.D.N.Y. 1967), stating that since the complainants "asked for a cease and desist order and reparations as well," the language stating that complainants may seek relief whether or not they have been directly injured, is "dicta." The respondent is mistaken and indeed seems to have reversed what is dicta and what is not. For in *Zim, supra*, after citing *Isthmian*, the court said:

\* \* \* Their standing to file a complaint on the grounds alleged and the Commission's jurisdiction to entertain the proceeding does not stand or fail on whether the insurers can use the proceedings before the Commission as a vehicle to recover cargo claims which, as *Zim* contends, should be maintained in the courts. Whether or not the insurers are entitled to reparations in the proceedings before the Commission--a question which need not be decided here--they have standing to file the complaint and the Commission has jurisdiction to entertain it. Cf. *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 145, 57 S.Ct. 407, 81 L.Ed. 562 (1937).

Here then, it is held that Pier has standing to file a complaint under section 22, and to seek the relief requested.

*Issue No. 2 - Is the Respondent Portside an "Other Person" Within the Meaning of Sections 1, 16 and 17 of the Shipping Act, 1916?*

Section 1 of the Shipping Act defines "other person subject to this act" as:

\* \* \* any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing

wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

Section 16 of the Shipping Act provides in part:

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:

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

Section 17 of the Shipping Act states in part:

Every such carrier [common carrier by water] 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.

While consideration of the specific allegations of wrongdoing regarding sections 16 and 17 will be reserved for later portions of this decision, it should now be noted that it is obvious from the facts as found that Portside is an "other person" within the meaning of sections 1, 16 and 17 of the Shipping Act. Indeed, it has stipulated that Portside "carries on the business of operating a refrigerated warehouse as well as providing services incident to that business," in other words, that Portside is a terminal operator.

In its brief Pier argues that Portside is an "other person" citing *California v. United States*, 320 U.S. 577 (1944), *United States v. American Union Transport, Inc.*, 327 U.S. 437, 443 (1946), and *Baltimore and Ohio Railroad Co. v. United States*, 201 F. 2d 795 (CA 3rd, 1953). Hearing Counsel also cites *California, supra*, and relies heavily on the holding in *Investigation of Storage Practices*, 6 F.M.B. 301 (1961). He notes that Portside is located in the Packer Avenue Marine Terminal, that it receives custody of frozen meat from common carriers by water in the United States foreign commerce after the cargo is unloaded at a dock or pier, and that the operators of the Packer Avenue Marine Terminal are agents of the common carrier by water for the purposes of the carrier fulfilling its obligation to deliver cargo to the consignee. Further, Hearing Counsel points out that Portside acts as a terminal operator by providing free time for frozen meat cargo to fulfill the carrier's obligation to its shippers, since the carrier's tariff offers no free time for refrigeration, and that Portside maintains custody of the meat in its warehouse at the Port until it relinquishes the meat to an inland carrier or consignee, noting that Portside's warehouse facility is favored by carriers because of its advantageous location within the Port area.

Insofar as can be ascertained Portside's argument apparently does not deny that it is a warehouseman and terminal operator generally, but rather it seeks to characterize itself differently insofar as the activities involved in this proceeding are concerned. That aspect of its argument is discussed more fully in later portions of this decision.

As has been noted, the record compels a holding that Portside is an "other person" within the meaning of sections 1, 16 and 17 of the Shipping Act. In *California, supra*, where charges for wharf demurrage and storage were in question the Court at page 568 stated:

\* \* \* Whatever may be the limitations implied by the phrase "in connection with a common carrier by water" which modifies the grant of jurisdiction for those furnishing "wharfage, dock, warehouse or other terminal facilities," there can be no doubt that wharf storage facilities provided at shipside for cargo which has been unloaded from water carriers are subject to regulation by the Commission.

In *Baltimore and Ohio Railroad, supra*, it was found that water carriers entering the Port of Philadelphia generally did not own piers, but rather used piers owned by others, including railroads. The Court concluded at page 797 that:

If the railroads, for their own business reasons, provide the facilities which it is the obligation of the water carriers to furnish, it becomes very clear to us that they are furnishing "wharfage . . . in connection with a common carrier by water." It seems to us inescapable that they come within the very terms of the Shipping Act.

and further, with regard to the fact that railroads might also be simultaneously subject to the jurisdiction of the Interstate Commerce Commission that:

All we are deciding about that point in this decision is that these railroads who open their piers, for a charge, to truckers to take away or bring cargo to or from sea-going ships are subject to regulation under the terms of the Shipping Act.

Finally, in *Investigation of Storage Practices*, 6 F.M.B. 301 (1961), the question arose as to the jurisdiction of the Commission where a company (TOA) provided free warehousing in the Port of Stockton in order to induce carriers to use the Port. TOA claimed the Commission had no jurisdiction over it since the ocean transportation ended when TOA took possession of the goods at its warehouse. The Commission rejected the argument stating at page 314:

The terminal character of the facilities furnished continues until the inland carrier takes possession. The Board has assumed jurisdiction up to this point. . . . The terminal aspect of handling property is not complete at the time goods are deliv-

ered by Stockton to the "lessee" of its assigned warehouse space.

In citing *Investigation of Storage Practices* with approval, the Initial Decision in *Marine Terminal Practices of the Port of Seattle*, Docket No. 70-50, issued September 15, 1978, stated:

The Port derides Hearing Counsel's contention that until the cargo is relinquished to an inland carrier, the Port's services still fall within the jurisdiction of the Shipping Act. The Port sees no significance to the time of transfer of cargo to inland carriers since it believes the service in question relates to inland dispatching and not ocean shipping. The Port errs.

It is elemental law that the obligations of a common carrier by water do not terminate merely because it has discharged cargo at a marine terminal. The carrier, through his agent or contractor, who is usually a marine terminal operator, must provide adequate terminal facilities for deposit of the goods and allow a reasonable period of time for consignees or their agents to pick up the goods at an accessible place.

In *Marine Terminal*, the Port was contesting the Commission's jurisdiction by alleging that the consolidation service it performed was a "totally separate, independent service with no physical, operational or data connection with any other Port operation." The Commission rejected the Port's argument holding that:

The Commission agrees . . . that the consolidation service is part of a broader marine terminal process, to the extent that the Port, in providing it, is furnishing terminal facilities in connection with common carriers by water. We also concur that the service relates to the receiving, handling and storage, or delivery of property. . . . (21 F.M.C. 397, 399)

So here, it is clear that Portside is a warehouseman providing a terminal service, that it is an "other person" within the meaning of that term as used in the Shipping Act, and that therefore Portside is subject to the jurisdiction of the Commission.

*Issue No. 3 - Are the Services Provided By Portside in Connection With the Inspection of Imported Containerized Frozen Meat Related to or Connected With the Receiving, Handling, Storing or Delivery of Property Within the Meaning of Section 17, Shipping Act, 1916?*

Section 17, second paragraph, provides that:

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 delivery of property.* (Emphasis supplied.)

It is well-settled that the Shipping Act and other similar regulatory statutes are remedial in nature and are to be broadly construed to

eliminate wrongdoing and carry out the remedies intended. *Reduced Rates-Atlantic Coast Ports to Puerto Rico*, 9 F.M.C. 147, 149 (1965). *Richland Development Co. v. Stapler*, 295 F. 2d 122, 128 (5 Cir. 1961), *Gerusco, Inc. v. Aulling*, 327 U.S. 244, 260 (1945). This legal tenet is compatible with the Supreme Court's direction that an agency should not construe a statute so narrowly as to frustrate the intent of Congress. *Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. 261, 273 (1968); *United States v. American Union Transport, Inc.*, 327 U.S. 437, 457 (1946).

Here, the facts as found indicate that Portside, a refrigerated warehouse, takes frozen meat into its warehouse delivered to it by Lavino stevedores. In order to comply with a Department of Agriculture statute which requires the importer to have the meat inspected and provide meat inspection facilities, Portside moves the meat from its warehouse to a place from which it is delivered to an inspection facility within the Port, or to trucks which take the meat to an inspection facility without the Port. Once inspected, the meat returns to Portside's warehouse to be later delivered to an inland carrier or a consignee.

Given the above facts, and the law calling for a liberal interpretation of the Shipping Act there should not be any difficulty in adding the above activity to those the Commission has already held to be subject to its jurisdiction either because they are terminal related:

i.e., independent contractors who transferred property between railroad cars and the place of rest on an ocean terminal, *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761 (1946); terminal operators engaging in practices regarding the payments of penalties for truck detention, *American Export Isbrandtsen Line, Inc. v. Federal Maritime Commission*, 389 F. 2d 962 (D.C. Cir. 1968); terminal operator imposing charges on stevedores for the furnishing of "water, toilets, telephones and utilities," *Baton Rouge Marine Contractors, Inc. v. Cargill, Inc.*, 18 F.M.C. 140, 163 (1975), *aff'd sub nom. Cargill, Inc. v. Federal Maritime Commission*, 530 F. 2d 1062 (D.C. Cir. 1976); a public grain terminal operator assessing an equipment rental charge against stevedores using the operator's equipment, *California Stevedore and Ballast Co. et al. v. Stockton Elevators, Inc.*, 8 F.M.C. 97 (1964); and a port furnishing "bookkeeping" consolidation services, *Marine Terminal Practices of the Port of Seattle, Possible Violations of section 17, Shipping Act, supra*;

and/or because they constitute the operation of a terminal facility in that they furnish an important link in the chain of the transportation of goods:

i.e., *Status of Carloaders and Unloaders, supra*; *Philippine Merchants Steamship Co., Inc. v. Cargill, Inc.*, 9 F.M.C. 155, 163 (1965); *Shipping Association, Inc. v. Port of Boston*, 10 F.M.C. 409, 414 (1967), collateral appeal denied, *sub nom.*, *Port of*



*Boston Marine Terminal Assn. v. Rederi, Transatlantic*, 400 U.S. 62 (1970); *Marine Terminal Practices of the Port of Seattle--Possible Violations of Section 17, Shipping Act, 1916, supra*.

Portside's practices in connection with shipments of imported containerized frozen meats, like the practices considered in the above-cited cases, furnish a vital link in the chain of transferring goods from the common carrier by water to the inland carrier or consignee. Certainly, they constitute "practices relating to or connected with the receiving, handling, storing, or delivering of property" within the meaning of section 17. The facts clearly establish that the imported frozen meat cannot enter the free flow of U.S. commerce without government approval, that Portside has a minimum 72 hour free time period, that it segregates the frozen meat to be inspected during that period, that its location at the Port gives it a favored position in that importers prefer using facilities at the terminal, that Portside or PSI operates the meat inspection room at the terminal and that the room is supplied to a partnership of which PSI is a member on a preferential basis, that Portside charges importers for "selecting MID samples," and that Pier performs inspection services on behalf of the importers.

Despite the above and despite the fact that it admits it operates a refrigerated warehouse and is a terminal operator, Portside would have the Commission hold that it is not an "other person" within the meaning of sections 1 or 17 as applied to the facts of this case. It cites no case law whatsoever and states:

If, for example, it [Portside] discriminates against a common carrier by water it could be subjected to Commission control for such conduct. . . .

and further:

Lavino or its affiliates did the stevedoring and also operated as an independent terminal operator. Stevedoring itself conceivably might qualify as an agency relationship but as a terminal operator it is not an agent of the common carrier by water. Portside received the meats, just as would any other warehouse, from Lavino as a completely independent operator and did not receive the meats from the common carrier by water.

and finally:

The contention that inspection was a necessary link in the transportation network misses the mark. The record shows that inspection was the concern of another agency of the government. Importers could provide their own inspection facilities or look to others. Warehouses, like Portside, could at their option provide inspection services by themselves or by permitting off-sight inspections. These voluntary operations were no more a necessary link to justify commission regula-

tion that services to effect local sales of the imported meats would be.

Certainly, the fact that Portside is a terminal operator for some purposes does not mean that everything it does must or should be regulated by the Commission. However, here we are not considering ownership of some remote facility or the operation of an activity unrelated to ocean transportation. We are rather considering an activity which we have found as a fact is related to or connected with the receiving, handling, storing or delivering of property. That being so the Commission cannot accept the respondent's own declaration of its status, *Possible Violations of Shipping Acts*, 16 SRR 425, 434-435 (1975), and it must look to what the respondent does, *United States v. California, supra*. Further, where outward appearances (interlocking ownership of close-held corporations, intervening partnerships) do not properly reflect the true nature of a business the Commission will look behind the surface to pierce the ambiguity. *Lifschultz v. United States*, 144 F. Supp. 606, 611 (SDNY, 1956). Even more appropriately in this particular case, where the respondent seems to pick and choose how it wants to characterize and charge for its services, the Commission must make certain that a person subject to the Shipping Act is not segregating its activities for the purpose of avoiding lawful regulation and engaging in discriminatory acts. *New Orleans Steamship Association v. Bunge Corp.*, 8 F.M.C. 687, 695 (1965); *Agreement 9597*, 12 F.M.C. 83, 101-102 (1968).

In view of the above, it is held that the services provided by Portside which are related to the inspection of imported frozen meats entering the commerce of the United States, are services that are related to or connected with the receiving, handling, storing and delivery of property within the meaning of section 17.

*Issue No. 4 - Has Portside Violated Section 17 of the Shipping Act and General Order 15?*

Section 17 provides in pertinent part:

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

General Order 15<sup>10</sup> provides in pertinent part:

Section 533.2-Purpose. The purpose of this part is to enable the Commission to discharge its responsibilities under Section

<sup>10</sup> 46 C.F.R. 533.1, *et seq.*

17 of the Shipping Act, 1916, by keeping informed of practices and rates and charges related thereto, instituted and to be instituted by terminals, and by keeping the public informed of such practices.

Section 533.3-Persons Who Must File. Every person . . . carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities as described in Section 533.1, including, but not "limited to terminals owned or operated by states and their political subdivisions . . . shall file in duplicate . . . a schedule or tariff showing all its rates, charges, rules and regulations related to or connected with the receiving, handling, storing and/or delivering of property at its terminal facilities."

The facts as found detail the history of how Portside filed tariffs regarding the services it performed for importers in the selection of frozen meat samples. Initially, it did not file any tariffs until the Commission notified it that it was a terminal operator and should do so. Its first filing, effective October 1, 1974, listed an \$.11 per carton charge. Its second filing which again was occasioned by Commission prodding was made effective October 1, 1975, raised the charge to \$.12 a carton. Later, on October 1, 1978, Portside raised the charge to \$.13, as follows:

#### M.I.D. SAMPLE SELECTION \$.13 PER CARTON

Assessment by terminal operator for cost of I.L.A. labor involved in assisting in the selection of frozen meat samples by the Meat Inspection Division of the United States Department of Agriculture, covering containerized product only. *Charge will be billed directly and only to the Importer of Record and will not be rebilled or handled in any other manner.* (Emphasis supplied.)

While Portside collected the \$.13 charge from the importer it did not file a new tariff with the Commission, despite the fact that all the correspondence between it and the Commission indicated it was required to do so. Further, on October 19, 1979, Portside sent a letter to its customers instituting "a complete new program for the handling of Australian and New Zealand frozen meat containers on a 'House to House basis,'" as follows:

\* \* \*

## TOTAL ALL INCLUSIVE RATE

1 TO 10 CONTAINERS-----\$525.00 EACH

11 TO 15 CONTAINERS----- 515.00 EACH

16 AND OVER----- 500.00 EACH

"HOUSE-TO-HOUSE" at Portside Refrigerated Terminals, Inc., will include:

STRIPPING	IMMEDIATE TRANSFER TO FREEZER PROTECTION
SAMPLE SELECTING	EXPEDITING & OUTBOUND TAILGATE LOADING
INSPECTION/ STAMPING	EX. DOCK DELIVERIES-CREDIT TO IMPORTER- CHARGE TO EX. DOCK CUSTOMER

\* \* \*

As you know, Portside Refrigerated Terminals, Inc., located within seconds from dockside, is by far, the most advanced freezer facility on the entire East Coast, with such advantages as 1,500,000 cubic feet of frozen storage, appointment loading, a complete meat inspection operation equipped with fully automated conveyors and "defrosting" tank and automatic strapping, all performed under *controlled* refrigerated temperatures, a U.S.D.A. consumer and Marketing Service office located directly within our building, with the services of the Animal Health Division, the U. S. Customs Service and U. S. Food & Drug Administration within the terminal. . . All this, plus a *MINIMUM* of seventy-two (72) hours free time, availing shippers and importers the additional time for processing documents or conducting sales before the added expense of warehousing "unsold" product which completely avoids the necessity of "restuffing charges."

\* \* \*

The House-to-House rates quoted above were and are being charged by Portside to customers although, once again, they have not been filed in any tariff with the Commission. Finally, on February 27, 1979, Portside initiated a "skip" inspection charge of \$.07 per carton as opposed to the \$.13 charge made for what it termed "random sampling" inspection. The \$.07 charge has not been filed by Portside in any tariff with the Commission.

On the basis of the above facts alone it is clear that Portside has violated section 17 of the Shipping Act and General Order 15. Not only did it fail to file a proper tariff in the first instance, but it has been charging a rate (\$.13 per carton) which differs from the rate set forth

with the tariff on file and instituted a \$.07 per carton charge for "skip" inspection which it did not place on file with the Commission in any tariff. Further, since October 19, 1979, it has instituted a "package deal" plan whereby it charges an all inclusive rate for the terminal services it performs--none of which has been made part of any tariff on file with the Commission.

When one moves to consideration of the \$.10 per carton charge Portside seeks to assess against Pier, the violation changes in character from a failure to file a tariff or a failure to charge a proper rate to a violation which constitutes an abuse of the regulatory process by the use of unfair, discriminatory acts. In seeking to assess the \$.10 charge against Pier, Portside made no real attempt to correlate the charge for the service it allegedly performed to the cost of the service rendered. No cost studies were made and although Portside's President testified he prepared some notes which were thrown away, the testimony attempting to justify the charge is weak and unconvincing. For example, it fails to address the fact that Portside would apply the \$.10 per carton or \$60.00 per container (600 cartons x \$.10) charge on "skipped" cartons even though it performs *no* services regarding them and even though Pier receives only \$72 per container from the importer for stamping the cartons. Obviously, Portside's charge, if allowed to stand, would effectively put Pier out of business. Further, given the fact that the \$.10 assessment came within two days of the dissolution of the Pier-Portside partnership agreement, and the creation of Robideau-Portside, the fact that Portside's principal officer had made prior statements that Portside would impose "all kinds of costs" on any meat inspection company which had to get its meat from Portside, the fact that it did assess such a charge against a Pier-Portside competitor (Erb Strapping), which subsequently went out of business still owing money to Portside and the fact that other warehouses did not charge Pier or other similar businesses for picking up meat for inspection, it is all too clear that the \$.10 per carton charge indicates that Portside has failed to adopt reasonable practices related to or connected with the use of warehouse terminal facilities in the Port of Philadelphia.

Perhaps the best way to understand what has transpired in this case is to consider the arguments raised by the respondent on brief. While those arguments are somewhat vague they tend to emphasize just how flagrant and basic the violations are. The respondent argues that there is an "absence of maritime tariff control over incidental services of a warehouse," without bothering to define what it means by "incidental services" and without addressing those cases cited in the preceding section where a host of so-called "incidental services" (loading, consolidating, equipment-rental charge, penalties for truck detention, charges for water, toilets, etc.), have been held to come under section 17. In citing *State of California, supra*, and *City of Los Angeles v. Federal*

*Maritime Commission*, 385 F. 2d 678 (D.C.C.A., 1967), for the proposition that:

. . . as to warehouses, there is no rate control unless and until such control has been found necessary or desirable to effect a remedy after it has been established that there was some violation of the Act.

the respondent misreads the import of the cases and simply "begs" the question involved here. In the *California* case, for example, the Court precisely delineates the difference between rate-making and the power of the Commission to establish reasonable practices under section 17.<sup>11</sup>

The respondent also argues that the tariff filing requirement is only for informational purposes citing 46 C.F.R. 533.2:

The purpose of this part is to enable the Commission to discharge its responsibilities under section 17, Shipping Act, 1916, by keeping informed of practices and rates and charges related thereto, instituted and to be instituted by terminals, and by keeping the public informed of such practices.

Respondent also cites *Alabama Great S. R. Co. v. Federal Maritime Commission*, 379 F. 2d 100, 103 (4th Cir. 1967):

. . . where the court acknowledged with approval the Commission viewpoint that:

The Commission's order is designed only to keep the Commission fully informed concerning matters subject to its jurisdiction.

While the exact import of the respondent's argument is unclear, if it is meant to convey the idea that the tariff filing requirement is informational only, as opposed to the use of such information to effect "reasonable regulations and practices," then it is in error and contravenes the clear language of the statute itself. As to the case cited, it involves a Commission order asking for tariff information. The petitioner contested the order because he feared the Commission would attempt to regulate rates. The court rejected the argument and allowed the order to stand thereby affirming the Commission's section 17 jurisdiction.<sup>12</sup>

<sup>11</sup> The Court stated:

. . . We fully agree that no rate-making power such as the Commission has been given over water carriers is conferred over other persons subject to the Shipping Act. But the order of the Commission, though it pertains to demurrage charges, is not an exercise of conventional rate-making. By §17 all those who are subject to the Act are under a duty to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property." When the Commission finds a breach of this duty, the same section authorizes it to "determine, prescribe, and order enforced a just and reasonable regulation or practice." . . .

<sup>12</sup> The Court stated:

What seems most to disturb the Petitioners is not that they are asked to supply tariff information, but that such data are called for in advance of the effective date of the tariffs. As the Petitioners see it, the contested Order is the first step leading to Maritime Commission regula-

The respondent also argues that Portside did not violate section 17 by failing to file or correct its tariff because the regulation contains a specific exception, at 46 C.F.R. 533.3, as follows:

*Provided, however,* That rates and charges for terminal services performed for water carriers pursuant to negotiated contracts, and for storage of cargo and services incidental thereto by public warehousemen pursuant to storage agreements covered by issued warehouse receipts need not be filed for purposes of this part.

The respondent's argument was first made to the Commission in 1973 and was rejected.<sup>13</sup> At that time it presented no documentary evidence, even when requested to do so, and none is presented in the record of this case despite the unsupported allegation that "the undisputed evidence is that Portside is a public warehouse and it issues warehouse receipts." The fact is the respondent has not even requested the "undisputed fact" be found as a fact. Further, even assuming that Portside was a public warehouseman issuing warehouse receipts, that fact alone would hardly justify its failure to publish a tariff regarding the services it performed in making available frozen meats for inspection. Portside itself apparently recognized that fact because when it filed its tariff it specifically pointed to only two items directly related to warehousing (Item #6--Handling and Item #7--Storage), which it noted were "not subject to the filing requirements of General Order No. 15." The item involving selection of MID samples (Item #5) was not so delineated. It is clear that the filing exemption for public warehousemen, contained in General Order No. 15, was meant to protect public warehousemen from the unfair competition which might ensue from public disclosure of their warehouse rates. Certainly, it was not meant to allow a public warehouse to avoid publication of rates for services which did not constitute warehousing and which are "related to or connected with" the handling, or delivery of property. The respondent's attempt to do so here is improper and invalid.

The respondent further argues that the \$.10 per carton charge was fair and reasonable. It argues that the work for which Pier was charged "commenced after the original physical selection of samples to be selected. For the prior service the importer was charged." The respondent then proceeds to cite testimony, most of which is somewhat

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tion of their rates, rules and practices pertaining to facilities over which Petitioners claim the Maritime Commission has no jurisdiction. Although the Maritime Commission insists it is only seeking information, it points out that this information is necessary in advance to avoid the possibility of deferring corrective action until after it is required. We need not seek to penetrate all background to ascertain some vague but unspoken Commission intent. We take the Order at its face and view it in light of what the Commission represents to the court as its purpose and appraise the Order in terms of the applicable statutes. . . .

<sup>13</sup> Ex. C-10, pages 69, 74, 75.

argumentative and unclear, allegedly supporting the notion that what Portside did for the importer was something separate and distinct from what it did for Pier. The respondent's arguments lack validity because they ignore too many pertinent facts. First of all, when Portside first published its tariff in October of 1974 it (or PSI) was not a partner of Pier. The \$.11 per carton charge to the importer for the "selection" of the MID samples did not limit the importer to the use of the Portside inspection facility and Pier, which used its own facility, was not assessed a charge by Portside for labor in making samples available to Pier. This seems to indicate that Portside included in its charge to the importer whatever labor was necessary to make the samples available for inspection and to place them back in the warehouse, once the inspection was completed. It is also consistent with the idea that the inspection of frozen meat was the responsibility of the importer under the law, and whether or not Pier was an agent of the importer as Hearing Counsel suggests, certainly Pier was acting on behalf of the importer in performing the inspection services. The parties have stipulated this fact. Secondly, the respondent's brief studiously avoids consideration of the fact that no other warehouse assessed a charge against Pier or other inspection companies for making frozen meat available for inspection. Instead, an \$.18 per carton charge was assessed against the importer for samples actually selected, and no charge was made for "skip" shipments. A comparison of the \$.18 charge with Portside's \$.13 charge for selected samples, \$.07 charge for "skipped lots" which the evidence indicates involved two-thirds of the shipments of frozen meat, and \$.10 charge against Pier--all unfiled in any tariff--emphasized the fact that Portside was improperly segregating its activities and services as it saw fit.

Finally, the respondent argues that its dealings with Pier should be contrasted and differentiated from its dealing with Robideau-Portside because:

. . . there was an entirely different system of operations with Pier in contrast to the operations with Robideau-Portside.

The record in this case indicates that rather than a "different system of operations," Robideau-Portside (as did Pier-Portside) represents an attempt by Portside to use its favored position as a refrigerated warehouseman at the Philadelphia port to acquire some of the meat inspection business that evolved as a result of the Agricultural Department's requirements. While this of itself might not be wrong, the manipulation of the charges relating to the meat inspection, which inspection was necessary before the meat could enter the commerce of the United States and be delivered to the consignee, was a violation of section 17.

Here, the facts show that Portside does have a favored position at the Philadelphia Port and that a large percentage of frozen meat coming into the Port is handled by Portside. When the Pier-Portside



partnership was entered into PSI with the same ownership as Portside was a party to the partnership. While the record contains no documentary evidence regarding the exact relationship of PSI to Portside, it is clear from the testimony that all of the parties consider Portside to be the controlling entity. Further, while the partnership agreement talks of the use of Portside's inspection room (apparently meaning PSI) there are several instances where the testimony indicates Portside considered itself the owner. As to the Pier-Portside partnership agreement, it does provide that Pier will use "Portside's" inspection room without charge or Pier's inspection room at 124 Federal Street with no rent to be charged to the partnership for the use of either room. The agreement specifically provides that the partnership will:

. . . engage in the inspection services of perishable foodstuffs or other perishables that may be required by the U.S. Government or any agency thereof, *prior to their entry into the commerce of the United States.* . . . (Emphasis supplied.)

So given this factual background where Portside did not charge the partnership for making samples available for meat inspection, even though they ostensibly were being inspected by a separate entity and even though the inspection may or may not have taken place at the Packer Avenue Terminal, Portside now seeks to justify a \$.10 per carton charge against Pier by differentiating between what it did formerly with the partnership and what it did once the partnership was terminated. Its attempt at that differentiation is invalid. Actually, whether the first partnership, or Pier or the second partnership performed the inspection service, the actions of Portside should have been the same. It was required to move the samples from the warehouse to a point where they could be made available for inspection and then after inspection, to move them back to the warehouse for delivery to the consignees. If the partnership and Portside had a different arrangement than did Portside and Pier, that difference ought not to be allowed to thwart and defeat the purpose of section 17. By manipulating the partnership agreement, the tariff filed with the Commission, and the \$.10 per carton charge against Pier, Portside is simply attempting to compete in a discriminatory fashion. Ultimately, not only does it fail to file a proper tariff of its charges to the importer but in attempting to assess the \$.10 per carton charge against Pier, it damages Pier and favors the Robideau-Portside partnership. The \$.10 per carton charge is ostensibly for services different from services connected with the selection of the MID samples. Actually the only conceivable difference is the loading and unloading of Pier's trucks which consists of 15 to 18 cartons per container and which takes about an hour of labor. Given Portside's original tariff filing and its failure to initially charge Pier for the same service, it is held that the original tariff filing included the loading and unloading service performed by Portside. Even assuming,

*arguendo*, that it did not, a \$.10 per carton charge is completely unreasonable, especially when one considers that it is levied on "skipped" cartons, where, as has been noted, Portside provides *no* services at all.

Perhaps, the best indicator of what Portside is attempting to do in this matter is to note the fact that during the Pier-Portside partnership, Portside had to lower its rates to become more competitive with the Port of New York. Portside forced the partnership to subsidize the alleged loss by assessing the partnership a \$2 per carton charge on cartons the partnership handled. As to Robideau-Portside, it does not pay the \$2 per carton charge, and instead, Portside absorbs it. In effect then, while Portside implies that its rates are not compensatory despite assessing the importer a multitude of charges for the services offered, it neglects to file proper tariffs reflecting fully compensatory rates and instead "picks and chooses" how and where the charges will be made to its competitive advantage. Its actions violate section 17.

What Portside is attempting to do here is comparable to what transpired in *California Stevedore & Ballast Co., et al. v. Stockton Elevator Inc.*, 8 F.M.C. 97 (1964). In *Stockton*, the grain terminal operator employed a company to perform its stevedoring exclusively and did not assess its own stevedore an equipment rental charge for the use of certain loading equipment. However, Stockton assessed outside stevedores using its loading equipment a \$.15 per ton charge. Other grain elevators in the area did not assess any rental charge to the complaining stevedores for the use of similar equipment. Further, there was no evidence of record giving cost figures justifying the \$.15 charge.

The Commission found Stockton Elevators in violation of section 17 by engaging in an unreasonable practice of assessing a charge designed to exclude complainants and other stevedores from the terminal area, of failing to assess the charges against the company which performed Stockton's own stevedoring under exclusive contract, and of assessing the charge exclusively against the complaining stevedore.

The Commission's ruling in *Stockton* compels the same finding in this proceeding. The facts are strikingly similar, i.e., Portside, a public warehouse terminal, has entered into an agreement with Robideau (via PSI), to perform all its own meat inspections; Portside imposes a \$.10 per carton charge on Pier but none on the partnership; other Philadelphia area refrigerated warehouses do not assess Pier a charge for unloading Pier's trucks and even assess importers a different charge than does Pier; and there is a conspicuous absence in the record of cost data to justify the \$.10 charge.<sup>14</sup>

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<sup>14</sup> In its brief Portside argues that the burden of proof is on Pier to show that the \$.10 per carton charge is unreasonable. The facts of record as discussed above show that Pier has sustained that burden and that Portside has failed to refute or rebut the facts of record presented by Pier.

The favored position in the Port of Philadelphia of Portside, its attempts to "orchestrate" the charges it alleges should be assessed to its own competitive advantage and the deleterious impact of the \$.10 per carton charge on Pier, warrants a finding that the \$.10 charge results in an unreasonable and unjust practice under section 17, and it is so held.<sup>15</sup>

*Issue No. 5 - Has Portside Violated Section 16?*

Section 16, First, Shipping Act, 1916, provides that it shall be unlawful for any common carrier or other person furnishing wharfage, dock, warehouse or other terminal facilities:

[t]o make or give any undue or unreasonable preference or advantage to any particular person . . . or to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Since the facts and surrounding circumstances involved in the preceding issue (section 17) overlap this issue they are incorporated in this section by reference insofar as they are pertinent. The facts in this case clearly establish that the Robideau-Portside partnership has been given unreasonable preference or advantage by Portside and that conversely Pier has been subjected to unreasonable prejudice or disadvantage. There is no real basis for the \$.10 per carton charge Portside seeks to impose on Pier. The service performed is either already included in the rate charged the importer, or if not, is not justified on the basis of the cost data presented. The \$.10 charge is more a reflection of Portside's attempt to destroy anyone in competition with the Robideau-Portside partnership performing meat inspection services, rather than a good faith attempt to publicize and record a justifiable rate for a necessary service. The evidence is clear that the \$.10 per carton charge is out of all proportion to the service rendered and may well force Pier out of business so that the shipping public will have no choice with respect to meat inspection service.

In *A. P. St. Philip, supra*, the respondent terminal operator was found in violation of section 16 for granting an "exclusive right to one party to furnish tugboat services to all vessels loading or unloading at a public marine terminal." The Commission stated:

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<sup>15</sup> See *California Stevedore & Ballast Co. v. Stockton Port District*, 7 F.M.C. 75 (1962); *A. P. St. Philips, Inc. v. The Atlantic Land and Improvement Company, et al.*, 13 F.M.C. 166 (1969); *In the Matter of Agreements Nos. T-2455/T-2553 Between Philadelphia Port Corporation and Delaware River Terminal and Stevedoring Co., Inc./Lavino Shipping Company, Respectively*, 18 F.M.C. 115 (1974); *Berthing of Seatrain Vessels in San Juan, Puerto Rico*, 21 F.M.C. 279 (1978); *Greater Baton Rouge Port Commission v. United States*, 287 F. 2d 86 (5th Cir. 1961); and *Perry's Crane Service, Inc. v. Port of Houston Authority of Harris County, Texas*, 19 F.M.C. 548 (1977), where arrangements which grant one party the exclusive right to stevedore vessels or to perform other terminal-related activities at a public terminal are *prima facie* unjust in violation of section 17.

. . . The manifest purpose of section 16 of the Shipping Act is to impose upon "persons subject to this Act" the duty to serve the public impartially. In no other area is this requirement of equality of treatment between similarly situated persons more important than in the terminal industry. The reason is obvious. Terminals are for all practical purposes public utilities. [Citation omitted.] Thus the operation of terminal facilities imposes upon those who furnish them the same duties and obligations as attached to any other public utility.

In *Investigation of Free Time Practices--Port of San Diego*, 9 F.M.C. 525, 547 (1966), the Commission held that unequal treatment among persons "has no place in a regulated industry," and that a marine terminal's obligation to treat persons equally is absolute.

So here, it is held that Portside's action in imposing the \$.10 per carton fee on Pier demonstrates a partiality and inequality of treatment which cannot be condoned under section 16. The fee is unwarranted and illegal. It should neither be collected for past services nor should it be imposed for future services on the basis of the facts presently available in the record.

*Issue No. 6 - Filing of Agreements Under Section 15, Shipping Act, 1916*

Section 15 of the Shipping Act provides that:

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The facts in this proceeding indicate that initially Lavino leased the Packer Avenue Marine Terminal, which included a refrigerated warehouse building, from the City of Philadelphia. Then Lavino sub-leased the refrigerated warehouse to PRT, which in turn sub-leased the facility to Portside. As to meat inspection services, PSI entered into a partnership agreement with Pier, and after that agreement expired, with Robideau.

The complainant argues that Portside's sublease agreement with Lavino and the Robideau-Portside partnership agreement must be filed with the Commission under section 15. The respondent replies that the agreements need not be filed because there was no direct "harm" to Pier, because the lease was an "ordinary real estate lease for the use of the premises as a public warehouse without any continuing control over operations," and, as to the partnership agreement, because it was not an exclusive, preferential or cooperative working arrangement, and was similar to the Pier-Portside partnership agreement which was not filed. Hearing Counsel take the position that there are insufficient facts to make a finding as to these violations and that the parties to these agreements, except Portside, were not named respondents in the complaint, so that, "the Commission lacks personal jurisdiction over the parties to these alleged violations."

On the basis of the record made in this proceeding, we agree with Hearing Counsel that the facts are insufficient to warrant a definitive holding that either the Lavino-City of Philadelphia lease or the Robideau-Portside partnership agreement is subject to section 15. Certainly, the nature of the lease would tend to indicate that it is subject to section 15, but the facts are so sparse they do not warrant an affirmative holding at this time. There is no copy of the Lavino-City of Philadelphia lease in the record, and while the Lavino-PRT sublease, which is in the record, seems to involve the operation of a terminal facility, the factual development of the issue as to the Lavino-PRT sublease leaves much open to question. As to the Robideau-Portside partnership agreement there is a host of questions, not only regarding the application of section 15, but as to other issues as well, which questions remain unanswered. For example, while the partnership agreement ostensibly involves an entity different from Portside (PSI), Portside itself speaks of PSI as its "alter ego." The record leaves doubt as to just who has beneficial ownership of the "inspection room" so that it is simplistic to accept the respondent's argument that its dealings with the partnership are to be distinguished from its dealings with Pier. Questions arise as to whether or not the partnership can be preferred over Pier, by Portside, a terminal operator, in the use of the inspection room and what effect that would have on the \$.10 per carton charge.<sup>16</sup>

In light of the above facts and discussion, it is held that the various agreements need not be filed under section 15 on the basis of the present record. However, we would recommend that should the Commission deem it feasible a non-adjudicatory investigation be instituted under Rule 281 et seq., 46 C.F.R. 502.281, et seq., whereby the Com-

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<sup>16</sup> If Pier and the partnership had equal access to the "inspection room," it would be unnecessary to ship the samples elsewhere so that even were one to adopt Portside's views, the \$.10 charge would not be necessary.

mission staff could assimilate all the necessary facts and evidence relating to the agreements involved in this proceeding with a view to ascertaining whether or not they are required to be filed under section 15. Such facts should include inquiry into the ownership of the various entities involved, their relationships with one another and whether or not Portside or any "other person" subject to the Commission's jurisdiction is using the agreements to engage in any activity which violates any provisions of the Shipping Act.

Wherefore in view of consideration of the above issues it is held that:

(1) The complainant has standing to seek the relief requested.

(2) Portside is an "other person" within the meaning of sections 1, 16 and 17 of the Shipping Act, 1916.

(3) Portside's services in making imported frozen meats available for inspection so that they could enter the commerce of the United States are services related to or connected with the receiving, handling, storing, and delivery of property within the meaning of section 17, Shipping Act, 1916.

(4) Portside violated section 17 of the Shipping Act by failing to file proper tariffs with the Commission, and by charging rates in excess of those rates on file with the Commission. Further, the \$.10 per carton charge assessed against Pier is an illegal charge and cannot be collected by Portside for past services. Further, Portside is ordered to cease and desist from making such a charge in the future.

(5) Portside violated section 16 of the Shipping Act by subjecting Pier to undue and unreasonable prejudice and disadvantage through the imposition of the \$.10 per carton charge on Pier and not on the Robideau-Portside partnership. Portside is ordered to refrain from engaging in such conduct in the future.

(6) The agreements involved in this proceeding are not subject to section 15 on the basis of the evidence in the record. However, further investigation of facts relating to this as well as other issues is warranted should the Commission deem it feasible.

(S) JOSEPH N. INGOLIA  
*Administrative Law Judge*

Washington, D. C.  
June 19, 1980

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 78-29****SEATRAN GITMO, INC. AND  
SEATRAN INTERNATIONAL, S.A.****v.****PUERTO RICO MARITIME SHIPPING AUTHORITY AND  
PUERTO RICO PORTS AUTHORITY**

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**NOTICE***October 30, 1980*

Notice is given that no appeal has been taken to the September 17, 1980 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

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DOCKET NO. 78-29  
SEATRAN GITMO, INC. AND  
SEATRAN INTERNATIONAL, S.A.

v.

PUERTO RICO MARITIME SHIPPING AUTHORITY  
AND PUERTO RICO PORTS AUTHORITY

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DISMISSAL OF COMPLAINT  
DISCONTINUANCE OF PROCEEDING

*Finalized October 30, 1980*

On July 11, 1980, the Complainants' Motion to Stay the proceedings herein until the United States Court of Appeals for the District of Columbia issued its further decision in Nos. 78-1950, 78-1969, 78-1970, and 78-1978, was granted.

In a letter (treated as a motion) dated August 29, 1980, Respondent Puerto Rico Ports Authority states: "This is to inform you that the Court of Appeals has denied petitions for rehearing filed by Seatrain Lines and the Federal Maritime Commission in *Puerto Rico Ports Authority and Puerto Rico Maritime Shipping Authority v. Federal Maritime Commission and United States of America*, CA No. 78-1950, 78-1969, and the mandate of the Court's judgment has been issued. Accordingly, we believe the time is now appropriate to dismiss the complaint filed in Federal Maritime Commission Docket No. 78-29."

No party has replied or objected to the above letter.

In a letter (treated as a motion) dated September 3, 1980, Respondent Puerto Rico Maritime Shipping Authority stated: "This letter supplements our response of July 10, 1980, concerning the status of this proceeding. As you know, the Court of Appeals for the District of Columbia has denied the petitions for rehearing filed by the Seatrain companies and the Federal Maritime Commission in CA Nos. 78-1950 and 78-1969, *Puerto Rico Ports Authority and Puerto Rico Maritime Shipping Authority v. Federal Maritime Commission and United States of America*. Thus, we recommend that the complaint of the Seatrain companies in this docket be dismissed."

No party has replied or objected to the above letter.

Upon consideration of the above and the record herein, the motions to dismiss the complaint are granted.



SEATRAN COMPANIES V. PRMSA & P.R. PORTS  
AUTHORITY

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Wherefore, it is ordered:

(A) Complaint is dismissed.

(B) Proceeding is discontinued

(S) WILLIAM BEASLEY HARRIS  
*Administrative Law Judge*

September 17, 1980

**FEDERAL MARITIME COMMISSION**

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**INFORMAL DOCKET NO. 720(1)**

**3M**

**v.**

**HAPAG-LLOYD**

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**ADOPTION OF DECISION OF SETTLEMENT OFFICER**

*November 5, 1980*

Upon review of the record in this proceeding the Commission has determined to adopt the decision of the Settlement Officer. It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY  
*Secretary*

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 720(1)

3M

v.

HAPAG-LLOYD

Decision of Juan E. Pine, Settlement Officer<sup>1</sup>

*Adopted November 5, 1980*

## DISMISSAL OF PROCEEDING

Minnesota Mining and Manufacturing Company (3M--claimant), by informal docket claim filed July 27, 1979, seeks recovery of alleged overcharges of \$3,358.44 in behalf of its Belgian subsidiary, 3M Belgium S.A./N.V., Zwivndrecht, Belgium, from Hapag-Lloyd (respondent). Claimant is located in St. Paul, Minnesota, and is engaged in manufacturing of a multi-product line including chemicals. Respondent is a common carrier by water subject to the provisions of the Shipping Act, 1916. Claimant alleges that respondent is in violation of section 18(b)(3) of the Shipping Act, 1916, in charging rates in excess of the lawfully published rate.

This claim involves the movement of 1 container transported on respondent's vessel LUDWIGSHAFEN, from New Orleans, Louisiana to Antwerp, Belgium, on bill of lading No. 27-00642-5, dated July 20, 1977. The bill of lading describes the shipment as:<sup>2</sup>

Compound Textile Processing or  
Finishing NOS Item 599.7430 21 plts. 41,830 lbs. 984/6 CFT  
Door to Door Movement (12 drums)  
Hazardous Material included in this Container:

19 Plts. at 38260 lbs. (74 drums - 912 CFT)

Resin Solution

Flammable Liquid Label

IMC Flashpoint 77 degrees

IMCO #3 UN #1866

Shipper's Load Stowage and Count

<sup>1</sup> Both parties having consented to the informal procedure of Rule 19 (a) of the Commission's Rules of Practice and Procedure (46 C.F.R. 520.301 - 304), this decision will be final unless the Commission elects to review it within 30 days from the date of service thereof.

<sup>2</sup> Claimant advises that this description was taken from its bill of lading master which was in stencil form to be used by its agent in New Orleans. A copy of the bill of lading master is in the record.

Respondent assessed the following transportation rates and charges on the movement:

Synthetic Resin, Liquid, having a flashpoint 100 degrees or below:

Declared value per freight ton - over \$1500<sup>3</sup>

<sup>912</sup>/<sub>40</sub> CFT = 22.8 MT (\$221.25) = \$5,044.50

Textile Processing or Finishing Compounds, N.O.S.

<sup>3570</sup>/<sub>2240</sub> lbs. = 1.59 WT (\$125.50) = \$200.02<sup>4</sup>

Total = \$5,244.52

Claimant alleges it should have been assessed:

Textile Processing or Finishing Compound, N.O.S. Minimum  
40,320 lbs. per container

<sup>41830</sup>/<sub>2240</sub> lbs. = 18.67 WT (\$101.00) = \$1,886.08<sup>5</sup>

Amount of claim - \$3,358.44

In effect, claimant states that it believes that the 19 pallets which it described on its bill of lading master and on the actual bill of lading (No. 27-00642-5) as:

Resin Solution

Flammable Liquid Label

IMC Flashpoint 77 degrees

IMCO #3 UN #1866

and on which the carrier assessed a rate of \$221.25 per measurement ton of 40 cubic feet per Item No. 581.0004.229 of the subject tariff which covers Synthetic Resin, Liquid, having a flashpoint 100 degrees or below, declared value per freight ton - over \$1500, should have moved at the lower rate of \$125.50 per long ton of 2,240 pounds per Item No. 599.7401.587 of the subject tariff which covers Textile Processing or Finishing Compounds, N.O.S.

A shipper (or his agent) must be charged with superior knowledge of the proper description of commodities being shipped, particularly where products having highly technical commodity designations, such as chemicals, are concerned. Accordingly, it is not unreasonable to

<sup>3</sup> Gulf European Freight Association Agreement No. 9360-3, Tariff No. 3 (FMC-3), 3rd Revised Page 148, Item No. 581.0004.229. Claimant's invoice value on the Synthetic Resin Liquid (Description No. 41-2700-3853-6) is \$49,284. The bill of lading shows 912 CFT or <sup>912</sup>/<sub>40</sub> = 22.8 MT of this commodity was shipped. The actual value per freight ton is <sup>49284</sup>/<sub>22.8</sub> = \$2,161.58. Based on this valuation, the carrier used the correct actual value (over \$1500 per freight ton) in assessing the rate of \$221.25 per MT. Computing with the claimant's alleged 886/8 CFT or <sup>886.007</sup>/<sub>40</sub> = 22.17 MT, results in a slightly higher actual value per freight ton <sup>49284</sup>/<sub>22.17</sub> = \$2,223. However, as the assessed rate of \$221.25 applies on any actual value in excess of \$1,500 per MT the rate of \$221.25 per MT would still apply.

<sup>4</sup> Same tariff as in footnote 3, 2nd Revised Page 152, Item No. 599.7401.000. The Settlement Officer computes this second rate assessment as \$199.55. As this difference is less than \$1.00, respondent's computation will not be changed.

<sup>5</sup> Same Tariff, 2nd Revised Page 152, Item No. 599.7401.587. The Settlement Officer computes \$1,885.67. As this difference is less than \$1.00, claimant's computation will not be changed.

attach a strong presumption of correctness to descriptive documentation prepared by the shipper or his agent, and a heavy burden of proof to overcome that presumption.

Claimant states that the cargo does *not* require "on deck" stowage per page 65 of R. M. Graziano's Tariff No. 31. A review of the subject page reveals that Resin Solution under either hazard class, combustible liquid or flammable liquid (flammable liquid was typed on the bill of lading master and bill of lading) is flagged "1, 2" with respect to the authorized locations on board cargo vessels for shipments of said hazardous material. The authorized locations are identified on page 24 of Graziano's Tariff, i.e.:

"1" means the material may be stowed "on deck" subject to requirements of §176.63(b) of this subchapter. When both "on deck" and "under deck" are authorized "under deck" should be used if it is available.

"2" means the material may be stowed "under deck" in a compartment or hold subject to the requirements of §176.63(c). When both "on deck" and "under deck" are authorized, "under deck" should be used if it is available.

While the rule does not require on deck stowage, it is clear that Resin Solution may be stowed on deck subject to specified requirements or under deck in a compartment or hold subject to specified requirements. When both on and under deck stowage are available, under deck stowage should be used. These are not regulations which apply to a routine commodity.

Claimant's "belief" and its reference to Graziano's Tariff is all that is submitted in the claim proper. However, two letters appended to the claim give every indication that respondent assessed the proper rate on the 19 pallets. Claimant's letter to respondent's agent of June 14, 1979 states in part:

. . . However, there are not two commodities in the container, but one. The "19 pallets at 38260 LBS" refers only to that portion of the whole which carries hazardous labels. It, therefore, necessitated the hazardous description "Resin Solution Flammable Liquid Label."

On June 26, 1979, respondent's agent wrote to the Gulf European Freight Association Chairman:

. . . to reduce the problem to a single sentence 3M has advised us that the content of the entire container can be described as Compound Textile Processing or Finishing, NOS, but to serve Coast Guard requirements they had to break out the "Resin Solution" and because of this requirement they feel they have been penalized in the rating of the Bill of Lading claiming that the entire shipment should have been rated as Compound Textile Processing etc.

The Commission has determined that where the goods have left the custody of the carrier, a complainant alleging a misclassification and an overcharge has a heavy burden of proof and must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim. Claimant, having furnished evidence which is uncertain and indefinite, or otherwise lacking in probative value, has failed to sustain this burden. See *Merck, Sharp and Dohme v. Atlantic Lines*, 17 F.M.C. 244, 247 (1973).

As will be apparent in addressing claimant's allegation with respect to a slight overstatement of cubic measurement by the respondent later herein, neither the invoice or the packing list submitted by claimant refute the commodity description of the 19 pallets in question used by claimant on the bill of lading master, i.e., "Resin Solution, Flammable Liquid Label, IMC Flashpoint 77 degrees, IMCO #3 UN #1866." Both claimant's invoice and packing list merely refer to the commodity on the 19 pallets by its stock number, i.e., "41-2700-3853-6." Such an identification in no way can raise any doubt as to the cargo description used in the bill of lading nor the rate assessed thereon by respondent.

In its letter of May 2, 1980, submitting documentation requested, claimant raised for the first time, the question of a possible overcharge based on measurement, i.e.:

. . . Please note that our master indicates 21 pallets at 41,830 pounds at 968/3 cube. It appears that someone has changed the cube on the bill of lading to read 984/6. Our packing slips support what is shown on our master bill of lading namely 968/3 cube.

As the packing slip indicates, the 21 pallets measure:

2 x 40/10	=	81/8
18 x 46/8	=	840/0
1 x 46/8	=	46/8
		968/4

Claimant's first paragraph above alleges the correct cube as 968/3 and in the computations immediately below, claimant arrives at a cube of 968/4. The latter cube will be verified from data obtained from its packing list. Obviously the concern is not 968/3 v. 968/4, but claimant's concern is with the higher cube shown on the bill of lading of 984/6.

An analysis of the packing list develops the cubic measurements of the complete shipment:

2 pallets Scotchguard Fluorechemical

$$35" L \times 42" W \times 48" D = 70,560(2)$$

$$\frac{141120}{1728} = 81.67 \text{ or } 81/8 \text{ CFT}$$

18 pallets "41-2700-3853-6"

$$40" L \times 42" W \times 48" D = 80,640(18)$$

$$\frac{1451520}{1728} = 840 \text{ CFT}$$

1 pallet Scotchguard Fluorechemical "41-2700-3853-6"

40" L x 42" W x 48" D =

$\frac{80840}{1728} = 46.67$  or  $46/8$  CFT

Total is  $967/16$  or  $968/4$  CFT

Claimant's May 2, 1980, allegation that the total cube on the bill of lading is overstated is correct. It is overstated by  $984/6$  minus  $968/4$   $16/2$  cubic feet.

However, the two pallets of Scotchguard Fluorechemical which measure  $81/8$  CFT, and weigh 3,570 pounds per claimant's computations, have been and should be assessed the rate of \$125.50 per ton of 2,240 pounds, i.e.,  $\frac{3570}{2240}$  lbs. = 1.59 WT (\$125.25) = \$200.02. The tariff description embracing this commodity is Textile Processing or Finishing Compounds, N.O.S., and the tariff rate of \$125.50 applies per ton of 2,240 pounds. The commodity is rated only on a weight basis. The fact that this portion of the shipment measures  $81/8$  CFT is academic as there is no measurement rate to apply. The General Cargo, N.O.S rate is \$221.00 per ton of 2,240 pounds, or 40 cubic feet, which ever produces the greater revenue. As the two pallets weigh less than two long tons and cube at greater than two measurement tons, application of the General Cargo rate would result in a transportation charge of  $\frac{81.667}{40} = 2.04$  (\$221.00) = \$450.84. The \$200.02 assessed on this portion of the shipment stands.

Therefore, from the total cube of  $968/4$  CFT developed from the invoice, must be subtracted the  $81/8$  CFT covering these two pallets resulting in a cube of  $886/8$  CFT for the remaining 19 pallets.

It has been determined herein that the 19 pallets are subject to the Synthetic Resin, Liquid, rate of \$221.25 per measurement ton of 40 cubic feet. On this portion of the shipment respondent assessed:

$\frac{912}{40}$  CFT = 22.8 MT (\$221.25) = \$5,044.50

The above analysis of the packing list reveals that the subject 19 pallets measure  $886/8$  CFT. Thus, on this portion of the shipment respondent should have assessed:

$886/8$  or  $\frac{886.667}{40}$  CFT = 22.17 MT (\$221.25) = \$4,905.11

Overcharge based on overstatement of cubic measurement = \$139.39

With respect to respondent's overstatement of the cubic measurement of the 19 pallets of Synthetic Resin, documentation submitted by claimant as indicated above, develops that reparations of \$139.39 would be due claimant for same. As indicated above, of the total claim for \$3,358.44 of claimant, it has only sustained its burden of proof for reparations of \$139.39.

However, the claim must be dismissed inasmuch as the evidence shows that it was filed by one other than the payer of the ocean freight, and no showing has been made that claimant has succeeded to the

claim by valid assignment or other means. Such a requirement has been established in *Trane Company v. South African Marine Corp. (N.Y.)*, 19 FMC 375 (1976); *Carton-Print, Inc. v. The Austasia Container Express Steamship Company*, 20 FMC 31 (1977), and recently upheld in Informal Docket No. 623(I), served February 26, 1980. The freight here was paid by 3M Belgium S.A./N.V. and the claim was brought by 3M of St. Paul, Minnesota.

Neither could the claim now successfully be amended to name a new claimant. Amendments to complaints which do not merely add parties but substitute different and indispensable parties are in reality new complaints and must face the two year time limit on their own merits. 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, as here. *Trane v. South African* and *Carton-Print v. Austasia, supra*, and *Mine Safety Appliances Co. v. South African Marine Corp.*, Order on Review, 18 SRR 1467 (1978). Further, the mere fact that the claimant may be the owner of or related to the party paying the freight, without more, does not confer standing to seek reparation. *Trane v. South African, supra*.

The claim is hereby dismissed.

(S) JUAN E. PINE  
*Settlement Officer*

August 20, 1980



**FEDERAL MARITIME COMMISSION**

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INFORMAL DOCKET NO. 621(I)  
E.S.B. INCORPORATED

v.

**SOUTH AFRICAN MARINE CORPORATION**

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**ORDER ON REVIEW**

*November 6, 1980*

The proceeding is before the Commission upon its own Motion to review the Settlement Officer's ruling dismissing the complaint for failure to name an indispensable party.

The complaint filed by E.S.B. Incorporated alleges freight overcharges by South African Marine Corporation, a common carrier by water and a member of the United States/East and South African Conference. A copy of the complaint was mailed to the Respondent in New York. An answer was filed by the South African Marine Corporation (N.Y.) which advised that it was not a common carrier but acted solely as agent for the carrier and asked that the complaint be dismissed for failure to name an indispensable party.

**DISCUSSION**

The question presented here is whether "South African Marine Corporation," the name set forth in the complaint, sufficiently identifies the carrier whose full name is "South African Marine Corporation, Ltd.," or whether it must be read to refer to the agent whose full name is "South African Marine Corporation (N.Y.)."<sup>1</sup>

The precedents cited in the answer and on the basis of which the Settlement Officer dismissed the complaint, *Trane Company v. South African Marine Corporation (N.Y.)*, 19 F.M.C. 314 (1976); *Caterpillar Overseas S.A. v. South African Marine Corporation (N.Y.)*, 19 F.M.C. 315 (1976); and *Mine Safety Appliances Company v. South African Marine Corporation*, 18 S.R.R. 1467 (1978), may be distinguished from the instant case. In the *Trane Company* and *Caterpillar* cases the complaints were brought against the agent.

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<sup>1</sup> In the Manhattan telephone directory "South African Marine Corporation" is listed at the same address as "South African Marine Corporation N.Y.," the agent. Furthermore, "South African Marine Corporation" advertises its services as carrier in the Journal of Commerce Transportation Telephone Tickler which promotes the "fast, regular service of Safmarine [an abbreviation for South African Marine Corporation]" and emphasizes that "no other carrier sails to South Africa as often as Safmarine." Transportation Telephone Tickler (1980) pp. 452, 453.

In *Mine Safety Appliances*, as in the instant proceeding, the complaint named as respondent "South African Marine Corporation." There, as here, the complaint was mailed to the same address in New York. In the first instance, the carrier "South African Marine Corporation, Ltd." answered the complaint, whereas in this instance, the agent "South African Marine Corporation (N.Y.)" entered the case. No explanation is offered for the different actions taken by South African Marine Corporation in these two cases.

In any event, while the complaint did not set forth the name of the carrier in full nor, for that matter, that of its agent, it was made abundantly clear that the action was being brought against the ocean carrier. Service of the complaint in New York whether on the carrier or its agent was sufficient notice to the carrier of the claim being brought against it. *International Shoe Company v. Washington*, 326 U.S. 310 (1945). Under the circumstances, the filing of an answer by the agent was inappropriate, unless the agent was acting on behalf of the carrier.

In view of the foregoing, the Commission has determined to vacate the decision of the Settlement Officer dismissing the complaint and to remand the proceeding to the Settlement Officer for such further proceedings as the Settlement Officer deems appropriate, including a decision on the merits.<sup>2</sup>

It is so ordered.

By the Commission.\*

(S) FRANCIS C. HURNEY  
*Secretary*

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<sup>2</sup> As the bill of lading indicates that freight was collect, the Settlement Officer should, as a threshold matter, address the issue of who paid freight charges and whether E.S.B. has standing with respect to the subject claim.

\* The separate opinion of Chairman Richard J. Daschbach is attached.

*Separate Opinion of Chairman Daschbach.*

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The settlement officer's decisions in informal dockets do not have precedential value, Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 79-69****RICHMOND TRANSFER AND STORAGE CO.,  
D/B/A RICHMOND EXPORT SERVICE AND INTERNATIONAL  
CARGO SERVICES****POSSIBLE VIOLATIONS OF SECTIONS 16, FIRST, AND 17,  
SHIPPING ACT, AND GENERAL ORDER 15, 46 C.F.R. 533**

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**ORDER ADOPTING INITIAL DECISION***November 7, 1980*

This proceeding is before the Commission upon its own determination to review the Initial Decision of Administrative Law Judge Charles E. Morgan. No Exceptions were filed.

This proceeding was initiated by Order of Investigation and Hearing served July 17, 1979, pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. 821) to determine whether: (1) the activities of Respondent, Richmond Transfer and Storage Co., are those of an "other person" subject to the Commission's jurisdiction under section 1 of the Shipping Act, 1916 (46 U.S.C. 801); (2) Respondent's failure to file a tariff as a terminal operator is violative of the Commission's regulations (General Order 15, 46 C.F.R. Part 533) and section 17 of the Shipping Act, 1916 (46 U.S.C. 816); (3) the free time practices of Respondent on export cargo are in violation of section 16 First or 17 of the Shipping Act, 1916 (46 U.S.C. 815, 816); and (4) Respondent's practice of paying commissions to some freight forwarders is contrary to sections 16 First or 17 of the Shipping Act, 1916.

In his Initial Decision, the Presiding Officer determined that Respondent, which operates an off-dock container freight station, performs terminal services for oceangoing common carriers by water pursuant to negotiated contracts as well as other terminal services in connection with common carriers by water for the general shipping public. He concluded that the section 1 definition of "other person . . . furnishing . . . terminal facilities in connection with common carriers by water" does not require that these services be performed at the dock or on the water's edge. As a result, the Presiding Officer found Respondent to be an "other person" within the meaning of section 1 of the Shipping Act, 1916. In addition, the Presiding Officer found that Respondent had violated 46 C.F.R. Part 533 and section 17 of the Shipping Act, 1916, by failing to file a terminal tariff reflecting its services and charges to the general shipping public. However, the Presiding

Officer found no evidence to support a finding that Respondent's free time and freight forwarder commission practices are in violation of sections 16 First and 17 of the Shipping Act, 1916.

Upon review of the entire record in this proceeding, the Commission finds the Initial Decision to be proper and well founded and accordingly adopts it as its own. Accordingly, and consistent with the Initial Decision affirmed herein, Respondent is directed to file a tariff in accordance with the provisions of 46 C.F.R. Part 533 within 30 days of the date of this Order.

**THEREFORE, IT IS ORDERED,** That the Initial Decision served in this proceeding on July 16, 1980 is adopted as the decision of the Commission and made a part hereof; and

**IT IS FURTHER ORDERED,** That in accordance with the provisions of 46 C.F.R. Part 533, Richmond Transfer and Storage Co., within 30 days of the date of this Order, file a tariff with this Commission showing all of its rates, charges, rules, and regulations relating to or connected with the receiving, handling, storing, and/or delivery of property at its terminal facility; and

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

By the Commission.\*

(S) FRANCIS C. HURNEY  
*Secretary*

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\* Commissioner Teige concurring in the result and issuing a separate opinion.

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 79-69**

**RICHMOND TRANSFER AND STORAGE CO.,  
D/B/A RICHMOND EXPORT SERVICE AND INTERNATIONAL  
CARGO SERVICES**

**POSSIBLE VIOLATIONS OF SECTIONS 16, FIRST AND 17,  
SHIPPING ACT, AND GENERAL ORDER 15, 46 C.F.R. 533**

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**CONCURRING OPINION**

**Concurring Opinion of Commissioner Peter N. Teige**

I concur in the result in this case. The obligation imposed by Commission General Order 15 on marine terminals in the United States to file tariffs showing their charges to the shipping public is, in my opinion, of questionable regulatory value, and I hope the Commission will soon undertake a re-examination of the desirability of continuing this requirement.

Nevertheless, until that occurs, the requirements of General Order 15 and Section 17 of the Shipping Act must be enforced.

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 79-69

RICHMOND TRANSFER AND STORAGE CO.,  
D/B/A RICHMOND EXPORT SERVICE AND INTERNATIONAL  
CARGO SERVICES

POSSIBLE VIOLATIONS OF SECTIONS 16, FIRST, AND 17,  
SHIPPING ACT, AND GENERAL ORDER 15, 46 C.F.R. 533

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Activities of respondent, an operator of an off-dock container freight station, found to be those of an "other person" carrying on the business of furnishing warehouse or other terminal facilities in connection with a common carrier by water; and respondent's failure to file a tariff as a terminal operator found to be in violation of General Order 15, and of section 17 of the Shipping Act.

*Alan F. Wohlstetter and Edward A. Ryan* for respondent.

*John Robert Ewers and Aaron W. Reese* as Hearing Counsel.

INITIAL DECISION<sup>1</sup> OF CHARLES E. MORGAN,  
ADMINISTRATIVE LAW JUDGE

*Adopted November 7, 1980*

The respondent, Richmond Transfer and Storage Company (RTS), doing business as Richmond Export Service (RES), also doing business as International Cargo Services, Inc., (ICS), operates an off-dock container freight station in Richmond, California. This container freight station (CFS) is not adjacent to piers or vessel berths, and is not located within the port areas of San Francisco, Oakland, or Richmond. The respondent furnishes warehouse and other terminal facilities at its CFS for ocean common carriers operating in and out of these three ports. In general the respondent provides terminal services the same as or similar to those which a terminal operator located adjacent to piers or vessel berths would provide for ocean carriers, shippers and consignees.

The Commission, by its order of investigation and hearing, served July 17, 1979, pursuant to sections 16, 17, and 22 of the Shipping Act, 1916 (the Act), instituted this investigation and hearing to determine if the activities of the respondent, are those of an "other person" subject to the Commission's jurisdiction under section 1 of the Act.

Also it was ordered, that it be determined whether RTS's failure to file a tariff as a terminal operator is violative of the Commission's

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<sup>1</sup> 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).

General Order 15 (46 C.F.R. Part 533), and is violative of section 17 of the Act; whether RTS's practice of paying commissions to some freight forwarders is violative of section 16, First, or contrary to section 17 of the Act; and whether RTS's alleged practice of allowing up to two weeks free time for outbound cargo is violative of section 16, First or section 17 of the Act.

With respect to RTS's practice of paying commissions to some freight forwarders, and with respect to RTS's practice of allowing free time for outbound cargo, Hearing Counsel found no evidence to support findings that these practices were violative of section 16, First, or contrary to section 17 of the Act. It was ascertained, during the taking of depositions, that RTS did not pay commissions to all forwarders, but that those forwarders who had not been paid had not requested commissions. Upon request of a forwarder, RTS pays commissions to the forwarder for services rendered.

Although the fact sheet distributed by RTS states that up to two weeks free time is allowed, RTS assertedly allows free time only in accordance with the free time provisions of the Port of Richmond's terminal tariff. In accordance with this Port of Richmond tariff, on inbound cargo moving in the foreign trades, a free time period of seven days exclusive of Saturdays, Sundays and holidays is allowed, and on outbound cargo moving in the foreign trades, a free time period of ten days, exclusive of Saturdays, Sundays and holidays is allowed. The free time practices of RTS apparently conform to the free time practices mandated by the Commission for the San Francisco Bay Area marine terminals and by applicable conference tariffs. Hearing Counsel found no information of any irregularities with respect to RTS's free time practices. Nevertheless, RTS hereby is cautioned to avoid any appearance of encouraging possible improprieties with regard to free time, and accordingly RTS hereby is directed to delete from its fact sheet any reference to the allowance of up to two weeks free time, that is, any reference to free time which is inconsistent with the applicable conference tariffs and the Port of Richmond tariff.

There was no oral hearing, but in lieu thereof, both counsel for respondent and Hearing Counsel agreed that certain responses to interrogatories, certain stipulations, and the deposition of Donovan Daniel Day, Jr., Chairman of the Pacific Westbound Conference would constitute the record herein, as follows:

- Exhibit 1 = Stipulation filed 09-17-79;
- Exhibit 1A = Stipulation dated 11-27-79;
- Exhibit 2 = Stipulation dated 11-19-79;
- Exhibit 3 = Responses of RTS to Interrogatories of Hearing Counsel sworn to by Al Burda 10-15-79;



- Exhibit 4 = Responses of Hearing Counsel to Interrogatories of RTS dated 09-19-79;  
Exhibit 5 = Deposition of Donovan Daniel Day, Jr.

Hearing Counsel's proposed findings of fact also propose a finding of fact (their number 23) which is based in part on the testimony of Witness Day, Chairman of the Pacific Westbound Conference and in part on the tariff of the Pacific Straits Conference as filed with the Commission, to the effect that Conference tariffs provide for the use of off-dock container freight stations and establish regulations pertaining thereto. The record will be deemed to include this finding 23.

Proposed finding 19 of Hearing Counsel states that in addition to RTS there are numerous other off-dock container-freight-station operators providing service on shipments transported by ocean carriers serving the ports of Oakland, Richmond and San Francisco. Respondent names five specific CFS operators, which are listed in Exhibit 2, which exhibit in its entirety is part of the record. Respondent would add to Hearing Counsel's proposed finding 20, the fact that these other CFS operators perform services for ocean carriers identical to those performed by RTS. Again, this additional finding is part of the record, because it is in Exhibit 2.

RTS also points out (as shown in Exhibit 2) that none of the off-dock CTS operators specifically named in Exhibit 2 have filed marine terminal tariffs with the Commission pursuant to General Order 15, and that the Commission's staff has not requested or directed such filings; and that it was agreed that the parties to this proceeding (No. 79-69) may refer to all pleadings in No. 73-30, *American Warehousemen's Association v. The Port of Portland*, and to other matters such as are set out in Exhibit 2 of the present proceeding, including that the Commission and its staff prior to this proceeding have not issued any statement, and have not suggested, that the Commission has jurisdiction over off-dock CFS operators.

Be that as it may, presently the Commission has undertaken to determine whether it has jurisdiction over RTS as an "other person," furnishing off-dock facilities. As defined in the Act, an "other person subject to the act" means any person not included in the term common carrier by water, carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The additional findings of fact below are not in dispute. *RTS carries on the business of furnishing warehouse and other terminal facilities for common carriers by water.* (Emphasis supplied.) Such carriers serve the ports of San Francisco, Oakland and Richmond, California, and operate in the Pacific Westbound, Pacific Straits, Pacific Australia, and East-

bound land-bridge routes. Both conference and non-conference carriers by water designate RTS as their CFS.

The RTS facility (CFS) in Richmond consists of 9 acres with 75,000 square feet of covered area, it has depressed railroad sidings, and it has a lift capacity of up to 40 tons. Generally the services performed by RTS are in connection with less-than-container-load (LCL) cargo.

RTS holds itself out as a port facility although not located adjacent to piers or vessel berths.

RTS publishes and distributes to steamship agents and common carriers by water a fact sheet (Appendix A to Exhibit IA) which describes RTS's services and rate schedules. This fact sheet with attachments consists of two cover pages and five pages of rates. At the top of each rate sheet is the statement, "Used in the absence of any other agreement or applicable tariff."

RTS's fact sheet provides in part:

*Extended receiving time*--Cargo may be delivered to the neutral container freight station one working day prior to sailing and as much as two weeks before without charge.

*Accessorial services*--Complete export packing and marking services are available on premises. Thus fragile cargo may still be crated prior to vaning, on request. Warehousing and bonded storage facilities are also available.

*Diversion capabilities*--When requirements arise, shipments can be withdrawn from sea routing and diverted to air or whatever is desired.

*Conclusion*--Our purpose has been to service the transportation industry not only as a port facility but to offer as many connecting services as possible in order to take the burden off the shipper and assure fast, accurate, and safe delivery to the receiver at the lowest possible cost to all concerned.

The rate schedules of RTS attached to its fact sheet provide in part:

When booked for export "Via Richmond CFS" shipper's payment for services ends when cargo is unloaded and segregated at the "Richmond Off Dock Pier." Services from that point on are included in the Steamship rates regardless of shipside location, Richmond, Oakland, San Francisco. If booked "CY" loading charges and drayage are charged to the Shipper, imports are the reverse.

RTS states in its fact sheet that all cargo (LCL) loaded into containers at the CFS of RTS is at the ocean carrier's count, and that such carrier assumes liability for the cargo when it is received at the RTS facility. RTS consolidates LCL export cargo, loads it into containers, and transports the containers to the designated vessel.

Common carriers by water deliver containers of LCL cargo to the RTS-CFS facility where the containers are unloaded and the cargo made available to consignees.

The services performed by RTS for common carriers by water, consignees and shippers include container loading and unloading, terminal storage, packing and crating, cargo handling, packaging, and drayage.

Cargo delivered to the RTS facility is considered in transit, and is afforded all the privileges of a steamship pier with regard to absorption of terminal charges and overland common point (OCP) freight rates.

RTS's charges for loading and unloading containers, and for drayage of containers between vessel berth and the RTS facility are for the account of and paid by the designated ocean carriers.

A terminal service provided by RTS is free time. RTS's fact sheet is silent as to the payment of commissions to independent ocean freight forwarders.

RTS has not filed a terminal tariff with the Federal Maritime Commission showing RTS's rates, charges, rules and regulations related to or connected with the receiving, handling, storing, and/or delivery of property at its terminal facility.

The services performed by RTS for ocean carriers are part of the transportation obligation of these carriers and are identical to the services performed by the ocean carriers or for the ocean carriers at dockside container freight stations.

Container freight stations at off-dock locations (such as the CFS of RTS) are necessary due to the lack of sufficient dockside property. If container freight stations were restricted to dockside locations, the resulting congestion would virtually bring CFS operations to a halt. This latter finding is supported by the opinion and conclusion of witness Day.

All member lines of the Pacific Westbound Conference have designated RTS as one of their container freight stations.

RTS provides free time at its CFS facility of seven days on inbound cargo, and of ten days on outbound cargo, both exclusive of Saturdays, Sundays and holidays, and both in accordance with the Port of Richmond's Terminal Tariff No. 1.

On both export and import cargo, RTS assesses demurrage charges at the expiration of free time at the rate of \$.13 per day, or \$1.67 per month, per ton W/M per 1,000 kilograms or 1 cubic meter whichever produces the greater revenue. Apparently the RTS demurrage charges are the same as the wharf storage charges of the Port of Richmond, item No. 480 of its tariff, on merchandise, n.o.s. Notice is taken of this tariff item, 3rd revised page 27.

RTS pays commissions to licensed independent ocean freight forwarders for referring business to RTS, as well as for the performance of various services, such as the pickup, delivery and copying of documents necessary for custom clearances, tracing shipments, and assisting

with handling of claims for loss or damage. Generally the commission is computed at the rate of \$1.00 per ton, weight or measurement.

RTS has entered into written agreements with ocean carriers relating to rates, charges, rules and regulations with respect to services performed by RTS for such ocean carriers. Since January 1, 1979, RTS has had such written agreements with members of the Pacific Westbound Conference, Transpacific Freight Conference, Pacific Straits Conference, Pacific Australian Conference, as well as with non-conference lines and other ocean carriers, including Farrell Lines, Sea-Land Service, Seatrain Lines and Lykes Bros. Steamship Co.

At present, there are no tariffs on file with the Commission covering terminal services performed by off-dock terminal operators, and no such tariff ever has been filed.

The Pacific Westbound Conference member lines utilize the services of off-dock container freight stations in the San Francisco bay area as provided by the Conference tariff. This tariff requires members to advise the Conference in writing of the locations of the container freight stations and any changes in container freight station locations prior to using the container freight stations.

The services performed at the container freight stations of the Pacific Westbound Conference include the traditional functions associated with the receipt of cargo and performed by the ocean carrier for the shipper, such as issuance of receipts for the cargo, measurement, weighing, gathering together of the cargo, packing or loading of the cargo into containers, and the transfer of the containerized cargo from the container freight station to container yards or to shipside facilities.

These services above are included as part of the ocean carriers' obligations to transport the cargo, and the costs of these services are included in the overall ocean freight rates or as a container freight station receiving charge as an accessorial charge.

The ocean carrier assumes responsibility for the safe care and custody of cargo at the time the cargo is received at the CFS by the ocean carrier's agent, the CFS operator.

After less-than-container-load cargo is containerized at the CFS, the CFS operator, acting as the ocean carrier's agent, arranges for the movement of the container to the vessel's pier side location, and the ocean carrier assumes the cost of such drayage.

Official notice is taken, according to Pacific Westbound Conference Local and Overland Tariff No. 11, FMC-19, that it is provided that there is a CFS receiving charge of \$11 per measurement ton which includes the charges for packing of cargo into containers at the CFS and the transferring of the containers from the CFS to shipside (Rules 55.1.14 and 55.2.3(b) of the tariff). If the containers are packed by the shipper and delivered by the shipper to the ocean carrier's container yard within the port terminal area, then the ocean carrier's CFS receiv-

ing charge does not apply and a lower container yard (CY) receiving charge of \$6.50 per measurement ton is assessed (Rules 55.1.13 and 55.2.3(a) of the tariff).

#### DISCUSSION AND CONCLUSIONS

Ocean common carriers must provide for shippers and consignees certain services which require the use of terminal facilities. The ocean carriers may provide their own facilities or they may rely in whole or in part on terminal facilities operated by other persons. Where an other person, such as a port, provides the only terminal facility, or where an ocean carrier itself does not provide any terminal facility but relies on others, clearly the port or other persons are the "other person" described in section 1 of the Act as furnishing terminal facilities in connection with common carriers by water. And in accordance with section 17 of the Act and General Order No. 15 of the Commission's General Orders, such other persons must file tariffs with the Commission showing all rates, charges, rules, and regulations relating to or connected with the receiving, handling, storing, and/ or delivering of property at their terminal facilities.

In the present situation ocean carriers serving the ports of San Francisco, Oakland and Richmond rely on the respondent to perform, at least in part, certain terminal services. If respondent had performed these terminal services for these ocean carriers at the waterfront or alongside the docks, it clearly would be an "other person" furnishing terminal facilities. Also, even though located away from the dock, respondent is an "other person," because it performs terminal services for the ocean carriers.

The advent of containerization and the lack of sufficient waterfront property or property alongside docks in recent years has led to the necessity for the performance of some traditional terminal services for ocean carriers at locations away from the docks. If all terminal operations for containerized cargoes were performed at the docks, presently the resulting congestion might bring terminal operations to a halt at some dock locations. Apparently it has become financially feasible to provide terminal services for ocean carriers in connection with containerized cargo at container freight stations away from the docks. Whether or not these terminal services are performed adjacent to or away from the docks, the services of the terminal operators in relation to the shipping public are the same, and equally should be and are subject to regulation.

The respondent, RTS, chose to engage in the business of furnishing terminal facilities in connection with ocean common carriers at its offdock facility in Richmond, California. Since it performs the same service away from the docks as the ocean carrier or some other terminal operator would perform at the docks, the respondent is subject to

regulation by the Federal Maritime Commission just the same as if it had chosen to engage in the terminal business at water's edge.

The definition of an "other person subject to this Act" in section 1 of the Act does not specify at the dock or at water's edge or away from the port area, but in pertinent part refers to carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water. (Emphasis supplied.)

A cursory reading of respondent's brief, according to Hearing Counsel, could convey the impression that RTS is engaged exclusively in providing services for ocean carriers for which services RTS is fully compensated by the ocean carriers, and which charges are included in the ocean freight rates. At page 12 of its brief, the respondent argues that in all cases in which cargo is received at the CFS facilities of RTS, the ocean carrier's tariff expressly sets forth the charges to be assessed the shipper for the CFS services performed for the ocean carrier by RTS. This is true as far as it goes.

The facts are that RTS performs other services for the shipper which are not performed for the ocean carrier by RTS, but which are performed for the shipper and paid for by the shipper. These other services are marine related, and include storage, labeling, etc., as shown in Exhibit 1A.

RTS offers a wide range of marine terminal services and actively solicits the trade to utilize these services. RTS provides free time. RTS pays commissions to forwarders for referring business to RTS's facility, for the pickup and delivery and copying of documents necessary for customs clearance, tracing shipments and assistance with handling of claims for loss or damage. RTS distributes a fact sheet (Exhibit 1A) describing in detail its operation. RTS offers many accessorial services to shippers, including complete export and marking services, crating of fragile cargo, and warehousing and storage facilities, as well as diversion capabilities with routing changes from sea to air. The fact sheet lists two pages (4 and 5 of Exhibit No. 1A) of charges for accessorial services, including container storage. It is concluded that RTS is not merely a private contractor which performs terminal services for ocean carriers, but also performs other terminal services in connection with common carriers by water for the general shipping public.

One contention of RTS sounds plausible, but in reality is not pertinent to the issues. This contention is that no regulatory purpose would be achieved by requiring RTS and other CFS operators to file tariffs setting forth *the charges which the container freight station operators assess the ocean carriers*, because these charges are a matter of private agreement between the CFS operators and the ocean carriers, and because if the ocean carriers elected to provide their own terminal facilities, the shippers would not be interested in the ocean carriers' costs for operating terminal facilities. Also, RTS contends that where the ocean carri-

ers elect to use the terminal facilities of an agent, such as RTS, the shippers have no interest in the financial arrangement between the ocean carriers and their agents. RTS is correct about these ocean carrier costs, but these are not the matters required to be filed under General Order 15. The charges to be shown in the terminal tariff are those to be charged to the shipping public, and not the contract charges agreed to between the terminal operator and the ocean carriers. As provided in General Order 15 the charges for terminal services performed for ocean carriers pursuant to negotiated contracts need not be filed.

Also, as seen, the shippers are provided services by RTS in addition to those services covered by the ocean carriers' obligations.

RTS further contends that the term "other person" in section 1 of the Act excludes any person included in the term "common carrier by water," and that while RTS does not operate as a common carrier by water, that RTS performs its services as an agent for common carriers by water, and that the services of RTS as a container freight station operator are under the direction and control of its principal or principals, which are common carriers by water, and therefore that RTS is included within the term common carrier by water, which excludes RTS from the definition of "other person."

This RTS argument is not valid for at least two reasons. First, RTS does not perform all of its marine terminal services as agent for ocean carriers. Second, respondent's argument, if followed, would mean that every marine terminal operator at every ocean and Great Lakes port which provides or furnishes for common carriers by water any of the ocean carriers' marine terminal obligations would be excluded from the term "other person." It is concluded that there is no basis for holding that "other persons" should be included in the term "common carrier by water" by virtue of the performance of certain terminal services as agents for common carriers by water. Further, if RTS and other CFS operators are to be considered as ocean carriers for the purposes of section 1 of the Act, as RTS contends, then RTS would have to file a tariff as an ocean carrier, in accord with section 18 of the Act. Surely, RTS seriously does not believe that it is an ocean common carrier with all the obligations of such a carrier, including the common carrier's tariff filing obligation.

In its brief, page 13, RTS states that the novel question presented in this proceeding is whether RTS's charges for performing CFS services for common carriers by water must be set forth in a tariff. To repeat, this is not the issue in this proceeding, but rather the central issue is whether RTS's charges to shippers and consignees for its terminal services must be set forth in a tariff. For example, RTS charges 13 cents per ton per day, or 167 cents per ton per month, on both export and import cargo as a demurrage charge (Exhibit 3, No. 13). This is not

in accordance with *wharf demurrage rates* in the Port of Richmond tariff, but rather apparently is in accordance with *wharf storage rates* in that tariff. Needless to say, the shipping and receiving public is entitled to know what demurrage rates are applicable at RTS's facility, and the proper method is through tariffs filed with the Federal Maritime Commission in accordance with General Order 15, and section 17 of the Act.

Respondent contends that the Commission may not amend its General Order No. 15 regulations *sub silentio* by an unauthorized administrative interpretation. The respondent contends that the Commission would be acting so, by including off-dock terminal operators under the same tariff filing requirements as are provided for water's edge terminal operators. The respondent's view is incorrect because no amendment of General Order No. 15 is needed or contemplated in this proceeding. The respondent and other off-dock terminal operators have brought themselves under the ambit of General Order No. 15 and section 17 of the Act, by going into the business of furnishing warehouse or other terminal facilities in connection with common carriers by water in the foreign commerce of the United States.

The respondent argues that the requirement for RTS and other off-dock CFS operators to prepare, file and distribute tariffs will be unduly burdensome on small businesses, and contrary to the President's goal to minimize the paperwork burden on persons outside the Federal government, but there is no good reason shown why off-dock terminal operators should be afforded special and preferential treatment not available to their dockside competitors.

It is ultimately concluded and found that the respondent RTS is an "other person" carrying on the business of furnishing warehouse or other terminal facilities in connection with common carriers by water in the foreign commerce of the United States, and that RTS's failure to file a tariff with the Commission is violative of General Order 15, and of section 17 of the Shipping Act, 1916.

It is further concluded and found that no evidence has been shown to prove that RTS's alleged practice of paying commissions to some freight forwarders is violative of section 16, First, or contrary to section 17 of the Act; and that no evidence has been shown to prove that RTS's alleged practice of allowing up to two weeks free time for outbound cargo is violative of section 16, First, or section 17 of the Act.

(S) CHARLES E. MORGAN  
*Administrative Law Judge*

Washington, D. C.  
July 16, 1980



# FEDERAL MARITIME COMMISSION

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DOCKET NOS. 78-35, 78-42, 78-43, 78-48, 78-55, 79-44 AND  
79-62

ALLIED CHEMICAL, S.A.

ALLIED CHEMICAL INTERNATIONAL CORP.

v.

FARRELL LINES, INC.

PACIFIC AMERICA CONTAINER EXPRESS

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## ORDER ADOPTING INITIAL DECISION

*November 10, 1980*

This proceeding was initiated by the filing of seven separate complaints<sup>1</sup> alleging overcharges in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)), on shipments of polyamide yarn transported from Charleston, South Carolina and Norfolk, Virginia to Sydney and Melbourne, Australia.<sup>2</sup> Each shipment was made in 40-foot dry containers and was assessed on the basis of the U.S. Atlantic & Gulf/Australia-New Zealand Conference's dual-rate contract schedule.

Polyamide yarn is rated solely on a weight basis of \$270.25 per long ton.<sup>3</sup> The determination of the correct weight against which to assess this tariff rate is the crux of the dispute before the Commission. This determination is dependent upon the application, *vel non*, of Tariff Rules 31(c)1 and 31(c)6 of the Conference's Freight Tariff No. 3, F.M.C. No. 12.<sup>4</sup> Complainants argued both before the Administrative Law Judge and the Commission that Rule 31(c)6 applies to each shipment and, as a result, serves to limit the lawful freight charges. Respondents claim that this particular rule does not apply at all and that Rule 31(c)1 is the sole basis for the computation of freight charges.

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<sup>1</sup> The complainant in Docket No. 78-35 is Allied Chemical, S.A. The complainant in the remaining six dockets is Allied Chemical International Corporation (ACIC). Both are wholly-owned subsidiaries of the International Division of Allied Chemical Corporation and shall hereafter be referred to collectively as "Allied," when appropriate.

The respondent in Docket Nos. 78-42 and 55 is Pacific America Container Express (PACE). The respondent in the other five dockets is Farrell Lines, Inc.

<sup>2</sup> All seven complaints were subsequently consolidated into the present proceeding.

<sup>3</sup> Item 3236, Tariff No. 3, F.M.C. No. 12, 15th revised page 306.

<sup>4</sup> Tariff Rules 31(c)1 and (c)6 are set forth in the Appendix to this Order.

In his Initial Decision, Administrative Law Judge Seymour Glanzer: (1) held that Rule 31(c)6 was inapplicable to the shipments at issue; (2) held that ACIC was entitled to the contract rates which it had been charged by both carriers; (3) denied reparations; and (4) dismissed the complaints. Complainants filed Exceptions to the Initial Decision, to which Farrell and PACE replied.

#### DISCUSSION

After thoroughly considering the basis of Allied's arguments and the entire administrative record, the Commission finds that the Presiding Officer was generally correct and, accordingly, adopts his conclusions concerning the disputed tariff rules and ACIC's entitlement to contract rates.

##### *Applicability of Rule 31(c)6*

Rule 31(c) of the Conference Tariff sets forth the procedures for the assessment of freight. Subsection (c)1 states that freight shall be paid on the actual weight and/or measurement of cargo in containers, but in no case less than 70% of the cubic or weight capacity. This section of the Rule thus establishes a pricing floor and can be fairly termed a minimum utilization rule. Such a rule is especially appropriate for bulky commodities like polyamide yarn which use up the cubic capacity of a container well before its weight limit is met. Pursuant to this provision of the tariff, the Respondents freighted the subject shipments on a weight basis of 70% of the weight capacity for 40 foot dry containers as stated in Note 1, *i.e.*, on a basis of 34,580 pounds.

Subsection (c)6, relied upon by Allied, states:

In no case shall the total ocean freight charges assessed for either 20' or 40' equipment moving house to house or house to pier be based on weight or measurement factors in excess of either the inside cubic capacity or weight capacity as shown on the manufacturer's plate affixed to the container.

This rule, however, is simply a limit on the maximum charges which can be assessed a shipper in those cases where the container capacities, as stated on the manufacturer's plate, are actually exceeded. Since the weight of each container shipped was less than the weight capacity of the container, this section of the assessment rule does not apply to these shipments. Allied's position that this section, in conjunction with section (c)1, "limits freight charges to those based on the maximum weight of the commodity shipped that could be loaded into the container" is untenable. To reach this position Allied has had to misconstrue certain language and read additional language into these rules. The result, which requires a cumbersome computation on top of what is already a complex process, alters the clear intent of the framers of the rule. The Presiding Officer's conclusion that Rule 31(c)6 was inapplicable to the shipments in question is, therefore, affirmed by the Commission.

### *Contract Rates*

In 1964, Allied Chemical Corporation, International Division, signed the Conference's Uniform Merchant's Rate Agreement. Subsequently, in 1971, Allied Chemical, S.A. was added to the contract as a "related company."<sup>5</sup> ACIC was never similarly made party to this Agreement. However, for 10 shipments which are part of this proceeding, both Farrell and PACE billed ACIC and collected from it freight charges based on the contract rate schedule. Neither carrier ever questioned ACIC's qualifications for the contract rate, until this proceeding was instituted. Now, on Exceptions, PACE raises the question of ACIC's entitlement to contract rates. The relevant Merchant's Rate Agreement provides in part:

2.(a) . . . . The term "Merchant" shall include the party signing this contract and any of his present, subsidiary, or related companies or entities who may engage in the shipment of commodities in the trade . . . and over whom he regularly exercises direction and working control . . . in relation to shipping matters. . . . The names of such related companies and entities, all of whom shall have the unrestricted benefits of this contract and be fully bound thereby, are listed at the end of this contract. The party signing this contract as "Merchant" warrants and represents that the list is true and complete, [and] that he will promptly notify the Carriers in writing of any future changes in the list. . . .

Under the express terms of this agreement it would appear that the "Merchant" (Allied Chemical Corporation) would have to notify the carriers that ACIC was a related company in order for ACIC to take advantage of the contract rates. However, it is clear that whether or not a technically correct notification occurred, ACIC was and is a "related company" of Allied Chemical Corporation. The fact that Allied Chemical Corporation never notified the carriers "in writing" of ACIC's status does not defeat its entitlement to contract rates. The actions of the two Conference carriers presently before the Commission indicate that they deemed ACIC a company which had "the unrestricted benefits of this contract."<sup>6</sup> Under principles of waiver or equitable estoppel these carriers will be precluded from maintaining that ACIC was not entitled to the contract rates which they assessed against it. See *Cities Service International, Inc. v. Lykes Bros. Steamship Co., Inc.*, 19 F.M.C. 128 (1976), where the Commission awarded reparations not-

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<sup>5</sup> The Wilputte Coke Oven Division of Allied Chemical Corporation was the only other "related company" added to the agreement.

<sup>6</sup> Since Allied Chemical Corporation became a signator to the agreement, all of its twelve sales and marketing subsidiaries used conference vessels for their shipments.

During 1978, these various subsidiaries were charged contract rates on 118 shipments carried by 6 different Conference members.

withstanding the fact that the shipper had not complied with a similar, related-company notice requirement of a dual rate contract.

*Appropriateness of Reparation*

Because it is unnecessary to do so in this proceeding, the Commission takes no position on the Presiding Officer's holding that even if Rule 31(c)6 were applicable to these shipments, an award of reparations to Allied would be inappropriate under the circumstances. (Initial Decision at 22-24). As discussed above, however, the Initial Decision is adopted in all other respects.

**THEREFORE, IT IS ORDERED**, That the Exceptions filed by Allied Chemical, S.A., Allied Chemical International Corporation, and Pacific America Container Express are hereby denied, and

**IT IS FURTHER ORDERED**, That to the extent mentioned above, the Initial Decision is adopted by the Commission as its own, and

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

By the Commission.

(S) FRANCIS C. HURNEY  
*Secretary*

APPENDIX

Rule 31(c) *Assessment of Freight*

1. Freight shall be paid on the actual weight and/or measurement of cargo in containers but not less than:
  - A. Twenty (20) Foot Containers
    1. Cargo freighted on measurement basis - 70% of the inside cubic capacity.
    2. Cargo freighted on weight basis - 70% of the weight capacity. (See Note 1)
  - B. Forty (40) Foot Containers
    1. Cargo freighted on measurement basis - 70% of the inside cubic capacity.
    2. Cargo freighted on weight basis - 70% of the weight capacity. (See Note 1)
  - C. If both weight and measurement rates are involved, freight shall be assessed on the unused weight or cubic, whichever is smaller, to meet the minimum utilization stated in Rule 31(c) A and B. For purposes of clarification aggregate cargo will be rated on an individual basis as freighted. In determining utilization requirements set forth in Rule 31(c)1A and B either the combined total cubic or combined total weight of all cargo in the container, whichever is closer to the utilization requirements of 70% for a 20' container or 70% for a 40' container will be used to determine the additional cubic or weight necessary for minimum utilization. The additional cubic or weight necessary will then be rated at the level of the highest rated commodity in the container. If either the total aggregate cubic or weight of the commodities combined equals or exceeds the utilization requirement no additional freight charges will be assessed. SEE NOTE 1.

NOTE 1: For the purposes of this Tariff and the application of rates, in determining the utilization factors the containers shall be considered to have the following capacity:

TYPE	LENGTH	CUBIC	WEIGHT
Dry	20'	1100	40,000 lbs.
O/T	20'	1050	38,500 lbs.
H/H	20'	550	38,500 lbs.
Flat Racks	20'	1017	40,000 lbs.
Insulated	20'	940	39,500 lbs.
Dry	40'	2200	49,400 lbs.
O/T	40'	2300	49,400 lbs.
H/H	40'	1100	49,400 lbs.
Flat Racks	40'	2200	49,400 lbs.
Self Contained Reefer	20'	816	36,512 lbs.
Self Contained Reefer	40'	1800	49,400 lbs.

\* \* \*

6. In no case shall the total ocean freight charges assessed for either 20' or 40' equipment moving house to house or house to pier be based on weight or measurement factors in excess of either the inside cubic capacity or weight capacity as shown on the manufacturer's plate affixed to the container.

# FEDERAL MARITIME COMMISSION

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DOCKETS NOS. 78-35, 78-42, 78-43, 78-48, 78-55, 79-44 & 79-62

ALLIED CHEMICAL, S.A.

ALLIED CHEMICAL INTERNATIONAL CORP.

v.

FARRELL LINES, INC.

PACIFIC AMERICA CONTAINER EXPRESS A/K/A PACE LINE

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The complainants have failed to establish that they were overcharged, on shipments of polyamide yarn during 1976 and 1977, in violation of section 18(b)(3) of the Shipping Act, 1916.

In computing the freight charges the respondents properly applied appropriate tariff provisions to the shipments. The shipments, as pertinent to this proceeding, were governed by Tariff Item No. 3236 and Rule 31(c)1, which, together, established a pricing floor for the shipments based on constructive weights determined by a minimum utilization rule. Complainants' arguments, which would make Rule 31(c)6 of the Tariff applicable to the shipments is without merit. Rule 31(c)6 is a maximum charge rule which becomes operative only when container capacities are actually exceeded. Patently, the latter rules cannot be made to apply to shipments whose charges are subject to the constructive weight determinations made in accordance with the minimum utilization rule.

There is no merit to the respondents' contention that Allied Chemical International Corp. is not entitled to the Tariff's contract rates. Although there was no formal written notification given to the Conference that the "Merchant" intended that Allied Chemical International Corp. be bound by the terms of the Merchants Rate Agreement, the course of conduct adhered to by the "Merchant" and the Conference's member lines clearly shows that the parties to the Rate Agreement deemed its terms binding on Allied Chemical International Corp.

The complaints filed in the consolidated proceeding are dismissed.

*William Levenstein* for Allied Chemical, S.A., and Allied Chemical International Corp., complainants.

*Edward Aptaker* and *George J. Weiner* for Farrell Lines, Inc., respondent.

*John R. Mahoney* and *Wade S. Hooker* for Pacific America Container Express a/k/a Pace Line, respondent.

INITIAL DECISION<sup>1</sup> OF SEYMOUR GLANZER,  
ADMINISTRATIVE LAW JUDGE

*Adopted November 10, 1980*

This is a consolidated proceeding incorporating seven complaints severally filed by two wholly owned subsidiaries of Allied Chemical Corporation against two members (individually) of the U. S. Atlantic and Gulf/Australia-New Zealand Conference (hereafter, the Conference), pursuant to section 22 of the Shipping Act, 1916, 46 U.S.C. 821.<sup>2</sup> Each complaint alleges an overcharge in violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3),<sup>3</sup> arising from the transportation of house to house containers of "polyamide yarn" from Charleston, South Carolina, or Norfolk, Virginia, to Sydney or Melbourne, Australia. All of the shipments were transported during the period from October 5, 1976 through July 16, 1977, and payment of the freight charges took place between October 27, 1976 and August 16, 1977.<sup>4</sup> Each complaint asks for reparation and the issuance of a cease and desist order.

The complainant, in Docket No. 78-35, is Allied Chemical, S.A. In the other six dockets, the complainant is Allied Chemical International Corp. (ACIC).<sup>5</sup> In Docket Nos. 78-35, 78-43, 78-48, 79-44 and 79-62,

<sup>1</sup> 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. 302.227).

<sup>2</sup> Section 22 provides, as pertinent:

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 reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. 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.

<sup>3</sup> Section 18(b)(3) provides, as pertinent:

No common carrier by water in foreign commerce or conferences of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

<sup>4</sup> Each complaint was filed within two years of the date of payment of the freight charges. Thus, none of the causes of action is time barred by the jurisdictional statute of limitations of section 22. Section 22 provides that reparation claims must be filed "within two years after the cause of action accrue[s]." It is well settled by Commission decisions that "A cause of action arises under section 18(b)(3) of the Act upon delivery of the cargo to the carrier or upon payment of the freight charges whichever is later." *United States of America v. Hellenic Lines Limited*, 14 F.M.C. 253, 260 (1971); *Commercial Solvents Corporation International, Inc. v. Moore-McCormack Lines, Inc.*, 19 F.M.C. 424, n. 3 (1977); *Sun Company Incorporated v. Lykes Bros. Steamship Company, Incorporated*, 20 F.M.C. 67, 69 (1977). Cf. *U.S. ex rel Louisville Cement Company v. I.C.C.*, 246 U.S. 638, 644 (1918).

<sup>5</sup> As will be seen, *infra*, the respondents contend that ACIC is ineligible for the Conference's contract rates because ACIC did not become a signatory to the Conference's Merchant Rate Agreement.



the respondent is Farrell Lines, Inc. In Docket Nos. 78-42 and 78-55, the respondent is Pacific America Container Express a/k/a Pace Line.<sup>6</sup>

There is little or no disagreement regarding the facts. Primarily, the dispute centers on the applicability of a particular tariff rule to the shipments. The complainants urge that Tariff Rule 31(c)<sup>67</sup> applies to each shipment, while the respondents claim that it does not apply to any of the shipments. That rule is a maximum charge rule and provides:

In no case shall the total ocean freight charges assessed for either 20' or 40' equipment moving house to house or house to pier be based on weight or measurement factors in excess of either the inside cubic capacity or weight capacity as shown on the manufacturer's plate affixed to the container.

There is a second issue in the proceeding. It derives from the primary issue but applies only to ACIC shipments. ACIC was billed for and paid the freight charges for the shipments of polyamide yarn on the basis of the Conference's contract rate schedule. Contending, however, that ACIC was not a signatory to the Conference's Merchant Rate Agreement and, therefore, not entitled to the lower contract rates, the respondents argue that even if ACIC's position on the primary issue is found to be meritorious the amount of reparation should be determined by reference to the non-contract rates in effect at the time of shipment. The case was submitted on stipulated facts.<sup>8</sup>

#### FACTS<sup>9</sup>

1. ACT and Farrell are common carriers by water within the meaning of the Shipping Act, 1916, serving the trade from U.S. Atlantic Coast ports to ports in Australia under the trade name Pace Line and Farrell Lines, respectively. At all times here relevant, ACT and Farrell have been members of the U.S. Atlantic and Gulf/Australia-New Zealand Conference (the "Conference") in that trade.

2. ACIC and Allied Chemical, S.A., are wholly-owned subsidiaries of the International Division of Allied Chemical Corporation.

On July 6, 1964, Allied Chemical Corporation, International Division, signed the Conference's Merchant's Rate Agreement. Shippers (merchants) signing that agreement become entitled to contract rates, which are lower than non-contract rates, when shipping with members of the Conference.<sup>10</sup> Under the express terms of that agreement "Con-

<sup>6</sup> Pace Line's appearance in the proceeding was made in the style of Associated Container Transportation (Australia) Ltd. Trading as Pace Line (ACT).

<sup>7</sup> U. S. Atlantic & Gulf/Australia-New Zealand Conference Freight Tariff No. 3, F M.C. No. 12. 3rd revised p. No. 38, effective May 3, 1976.

<sup>8</sup> Revised Joint Stipulation of Facts dated November 6, 1979.

<sup>9</sup> Additional Facts appear in the Discussion and Conclusion portion of this decision.

<sup>10</sup> Merchant's Rate Agreement. paragraph 6.

tract rates on every commodity or class of commodities shall be lower than the ordinary rates set forth in the . . . tariff by a fixed percentage of fifteen (15) per centum of the ordinary rates."<sup>11</sup>

Generally, that agreement defines "Merchant" to include subsidiaries or other related companies or entities of the shipper, but requires the shipper to list those related companies at the foot of the agreement and to notify the Conference, in writing, of changes to be made in the future.<sup>12</sup> At the time the agreement was signed, no related companies were shown on the list. Thereafter, in accordance with the International Division's letter of October 5, 1965, Wilputte Coke Oven Division of Allied Chemical Corporation was added. Later, Allied Chemical, S.A.,

<sup>11</sup> *Id.*

<sup>12</sup> As pertinent, paragraph 2 of the Merchant's Rate Agreement provides:

2. (a) The Merchant undertakes to ship or cause to be shipped all of its ocean shipments, for which contract and non-contract rates are offered, moving in the trade on vessels of the Carriers unless otherwise provided in this agreement.

The term "Merchant" shall include the party signing this contract and any of his parent, subsidiary, or other related companies or entities who may engage in the shipment of commodities in the trade covered by this contract and over whom he regularly exercises direction and working control (as distinguished from the possession of the power to exercise such direction and control) in relation to shipping matters, whether the shipments are made by or in the name of the "Merchant", any such related company or entity, or an agent or shipping representative acting on their behalf. The names of such related companies and entities, all of whom shall have the unrestricted benefits of this contract and be fully bound thereby, are listed at the end of this contract. The party signing this contract as "Merchant" warrants and represents that the list is true and complete, that he will promptly notify the Carriers in writing of any future changes in the list, and that he has authority to enter into this contract on behalf of the said related companies and entities so listed.

In agreeing to confine the carriage of its (their) shipments to the vessels of the Carriers the Merchant promises and declares that it is his (their) intent to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or persons, firms or entities affiliated with or related to the Merchant.

The Carriers agree that they will not provide contract rates to anyone not bound by a merchant's rate agreement with the Carriers. The Merchant agrees that he will not obtain contract rates for any person not entitled to them, including related companies not bound by this contract, by making shipments under this contract on behalf of any such person.

(b) (1) If the Merchant has the legal right at the time of shipment to select a carrier for the shipment of any goods subject to this Agreement whether by the expressed or implied terms of an agreement for the purchase, sale or transfer of such goods, shipment for his own account, operation of law, or otherwise, the Merchant shall select one or more of the Carriers.

(2) If Merchant's vendor or vendee has the legal right to select the carrier and fails to exercise that right or otherwise permits Merchant to select the carrier, Merchant shall be deemed to have the legal right to select the carrier.

(3) It shall be deemed a breach of this Agreement, if before the time of shipment, the Merchant, with the intent of avoiding his obligation hereunder, divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier not a party hereto.

(4) For the purposes of this Article, the Merchant shall be deemed prima facie to have the legal right at the time of shipment to select the carrier for any shipment:

- (a) with respect to which the Merchant arranged or participated in the arrangements for ocean shipment, or selected or participated in the selection of the ocean carrier, or
- (b) with respect to which the Merchant's name appears on the bill of lading or export declaration as shipper or consignee.

was added, pursuant to International Division's letter of August 16, 1971. No such formal written notification was sent by International Division to the Conference concerning ACIC.

3. The two proceedings against ACT involve four shipments of one or more 40-foot dry containers of "polyamide yarn," carried on a house-to-house basis by ACT from Charleston or Norfolk to Melbourne or Sydney under bills of lading issued to ACIC. In the chart below, for each bill of lading by docket number, are the number and issue date of such bill of lading; the date of payment and total amount of freight paid by ACIC to ACT under such bill of lading; and the BIC code (serial) number of the containers<sup>13</sup> carried under such bill of lading:

Dkt. No.	B/L No.	Issued Date	Payment Date	Freight Paid	BIC Code No(s).
78-42	6255959	11/9/76	12/6/76	\$ 4,922.24	UFCU203831-7
78-55	6257141	12/28/76	1/21/77	4,834.89	ACTU288342-7
78-55	6257150	12/28/76	1/26/77	9,669.79	UFCU207909-1
					ACTU2881199-6
78-55	6257168	12/28/76	1/21/77	14,504.68	ACTU288036-7
					ACTU288530-6
					UFCU204765-9

4. The five proceedings against Farrell involve shipments of forty-two, 40-foot dry containers of "polyamide yarn," carried on a house-to-house basis by Farrell from Charleston to Sydney and Melbourne under bills of lading issued to ACIC or Allied Chemical, S.A. In the chart below, for each bill of lading by docket number, are the number and issue date of such bill of lading; the date of payment and total amount of freight paid by ACIC or Allied Chemical, S.A., to Farrell under such bill of lading; and the BIC code (serial) numbers of the containers<sup>14</sup> carried under such bill of lading:

Docket No.	B/L No.	Date Issued	Payment Date	Freight Paid	BIC Code No.
78-35	615	10/5/76	10/27/76	\$39,388.79	FRL 2014431-9
					FRL 201670-3
					FRL 201332-4
					FRL 201639-1
					CTIU 414276-5
					INTU 428284-P
					ICSU 204157
					CTIU 411712-4
					CTIU 411434-6
78-43	608	11/3/76	11/29/76	4,922.25	ICSU 212144-7
	609	11/3/76	11/29/76	44,300.23	FRL 201123-4
					FRL 201600-4

<sup>13</sup> Appendix I is a full listing of those containers showing their inside cubic capacity, in cubic feet, according to the manufacturer's plate affixed to each container.

<sup>14</sup> *Id.*

Docket No.	B/L No.	Date Issued	Payment Date	Freight Paid	BIC Code No.
					INTU 423129-0 FRL 201148-7 FRL 201175-9 CTIU 200703 FRL 201080-8 ICSU 209711 FRL 201561-1
	610	11/3/76	11/29/76	4,273.88	FRL 201451
78-48	604	11/24/76	12/20/76	10,017.40	FRL 201379-3 FRL 201302-6
	606	11/24/76	12/20/76	10,017.40	FRL 201131-6 FRL 201220-4
	608	11/24/76	12/16/76	15,026.09	FRL 201016-1 FRL 201513-7 CTIU 292617-7
	612	12/11/76	1/10/77	10,017.40	INTU 432394-6 FRL 201108-6
79-44	605 (Sydney)	4/22/77	5/22/77*	4,909.52	FRL 201157-4
	605 (Melbourne)	4/22/77	5/22/77*	\$54,004.78	FRL 201001-1 FRL 201259-1 FRL 201032-5 CTIU 415157-7 FRL 201564-6 FRL 201279-7 FRL 201071-0 ICSU 220017-1 FRL 201437-8 SSIU 219131-6 SSIU 219053-6
79-62	605	7/16/77	8/16/77	4,925.04	FRL 201191-2

\*Approximate.

5. The tariff applicable to the foregoing shipments is the Conference's Freight Tariff No. 3, F.M.C. No. 12.<sup>15</sup> In accordance with applicable provisions of that Tariff, ACT and Farrell performed the following computations to determine the amounts they billed for freight charges:

*Step 1:*

Since the rate under the commodity item applicable to polyamide yarn (Tariff, 15th revised p. 306, Item 3236) is on a weight basis,<sup>16</sup>

<sup>15</sup> See n. 7, *supra*.

<sup>16</sup> As pertinent, Item 3236 provides for a contract rate of \$270.25 and a non-contract rate of \$317.75 per ton of 2240 pounds from Atlantic Ports to Australia for shipments measuring not more than 100

ACT and Farrell applied Tariff Rule 31(c)1B providing that the freight on a 40-foot dry container would be assessed on the basis of not less than 70 percent of the weight capacity thereof specified in Note 1 to Rule 31(c)1, i.e., on the basis of not less than 34,580 lbs. (70 percent of 49,400 pounds).<sup>17</sup> Since the actual weight of the contents of each container was less than 34,580 pounds, the freight was calculated thereafter on the basis that the cargo carried under each bill of lading weighed 34,580 pounds for each container.

*Step 2:*

Pursuant to the Note to Item 3236 (specifying procedures for determining the exact number of cubic feet per 2240 pounds), for each bill of lading the cubic measurement per 2240 pounds was calculated on the basis of the number of cubic feet of cargo specified in the bill of lading, divided by the weight of the cargo (i.e., 34,580 pounds) determined under Step 1 above, multiplied by 2,240.

*Step 3:*

Pursuant to the contract rate specified in Item 3236, each bill of lading was given a base commodity rate of \$270.25 per 2240 pounds, except for Farrell Bill of Lading No. 615 where, in the belief that Allied Chemical, S.A., was entitled to the rate in effect prior to a contemporaneous rate increase, that bill of lading was given a base commodity rate of \$241.50 per 2240 pounds.<sup>18</sup>

*Step 4:*

The additional commodity rate applicable to each bill of lading pursuant to the provisions of Item 3236 was calculated on the basis of \$2.80 per ton of 2240 pounds (except for Farrell Bill of Lading No. 615, where it was calculated on the basis of \$2.50), multiplied by the amount

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cubic feet per 2240 pounds. For shipments over 100 cubic feet per 2240 pounds, \$2.80 per ton of 2240 pounds, for each cubic foot over 100 cubic feet, would be added to the rate.

<sup>17</sup> Tariff Rule 31(c), entitled "Assessment of Freight," appears at 2nd revised p. 36, 1st revised p. 37 and 3rd revised p. 38 of the Tariff. Rule 31(c)1B provides, as pertinent:

1. Freight shall be paid on the actual weight and/or measurement of cargo in containers but not less than:

B. Forty (40) Foot Containers— Cargo freighted on weight basis— 70% of the weight capacity. (See Note 1)

Note 1 provides, as pertinent:

For the purposes of this Tariff and the application of rates, in determining the utilization factors the containers shall be considered to have the following capacity:

Type	Length	Cubic	Weight
Dry	40'	2200	49,400 lbs.

Allowances will be granted on cargo meeting the requirements of Rule 31(c)1 as follows:  
House-to-House—An allowance of 10% of the total ocean freight charge up to a maximum of \$13.00 per ton.

<sup>18</sup> Following an informal conference attended by all parties, Farrell submitted a recomputation of the freight charges for Bill of Lading No. 615. The recomputation utilized the methodology described in paragraph 5 but was based upon a base rate of \$270.25 instead of \$241.50. The freight charges should have been \$44,300.22 instead of \$39,388.79, as shown in paragraph 4. In the light of the conclusions which follow, Farrell should determine whether an adjustment in its billing is required.

by which the cubic measurement per 2240 pounds (i.e., the amount derived under Step 2 above) exceeded 100 cubic feet per 2240 pounds.

*Step 5:*

The total commodity rate applicable to the shipment was calculated by adding the amounts obtained under Steps 3 and 4.

*Step 6:*

The total freight payable on each bill of lading under Item 3236 was calculated on the basis of the total commodity rate, multiplied by the weight of the cargo (i.e., 34,580 pounds) determined under Step 1 above, divided by 2,240.

*Step 7:*

Pursuant to Note 1 to Rule 31(c)1, a house-to-house container allowance in the amount of \$13.00 per 2240 pounds was subtracted from the amount obtained under Step 6.

*Step 8:*

In the case of the containers shipped with ACT under the three bills of lading dated December 28, 1976, pursuant to Tariff Rule 27, a negative currency surcharge in the amount of 3.47<sup>19</sup> percent was subtracted from the balance obtained under Step 7. In the case of the containers shipped with Farrell under two bills of lading dated April 22, 1977, and one bill of lading dated July 16, 1977, pursuant to Rule 27, a negative currency surcharge in the amount of 1.98<sup>20</sup> percent and 1.67<sup>21</sup> percent, respectively, was subtracted from the balance obtained under Step 7.

6. Under the steps described in paragraph 5 above, the freight charged on each bill of lading amounted to the following:

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<sup>19</sup> Tariff, 14th revised p. 27.

<sup>20</sup> Tariff, 15th revised p. 27.

<sup>21</sup> Tariff, 16th revised p. 27.

## ACT Bills of Lading Numbers

	6255959	6257141	6257150	6257168
Step 1 (in lbs.)	34,580	34,580	69,160	103,740
Step 2 (in cu. ft. per 2,240 lbs.)	122	124	124	124
Step 3 (in \$ per 2,240 lbs.)	\$ 270.25	\$ 270.25	\$ 270.25	\$ 270.25
Step 4 (in \$ per 2,240 lbs.)	\$ 61.60	\$ 67.20	\$ 67.20	\$ 67.20
Step 5 (in \$ per 2,240 lbs.)	\$ 331.85	\$ 337.45	\$ 337.45	\$ 337.45
Step 6	\$5,122.93	\$5,209.38	\$10,418.77	\$15,628.15
Step 7	\$ (200.69)	\$ (200.69)	\$ (401.38)	\$ (602.06)
	\$4,922.24	\$5,008.69	\$10,017.39	\$15,026.09
Step 8		\$ (173.80)	\$ (347.60)	\$ (521.41)
Total Freight	\$4,922.24	\$4,834.89	\$ 9,669.79	\$14,504.68

## Farrell Bill Of Lading Numbers

	615	608	609	610	604	606	608	612	605 (Sidney)	605 (Melbourne)	605
Step 1 (in lbs.)	311,220	34,580	311,220	34,580	69,160	69,160	103,740	69,160	34,580	380,380	34,580
Step 2 (in cu. ft. per 2,240 lbs.)	122	122	122	107	124	124	124	124	124	124	124
Step 3 (in \$ per 2,240 lbs.)	241.50	270.25	270.25	270.25	270.25	270.25	270.25	270.25	270.25	270.25	270.25
Step 4 (in \$ per 2,240 lbs.)	55	61.60	61.60	19.60	67.20	67.20	67.20	67.20	67.20	67.20	67.20
Step 5 (in \$ per 2,240 lbs.)	296.50	331.85	331.85	289.85	337.45	337.45	337.45	337.45	337.45	337.45	337.45
Step 6	\$41,194.97	\$5,122.93	\$46,106.41	\$4,474.56	\$10,418.77	\$10,418.77	\$15,628.15	\$10,418.77	\$5,209.38	\$37,503.23	\$5,209.38
Step 7	(1,806.18)	(200.68)	(1,806.18)	(200.68)	(401.37)	(401.37)	(602.06)	(401.37)	(200.69)	(2,207.56)	(200.69)
Step 8	---	---	---	---	---	---	---	---	(98.17)	(1,090.89)	(83.65)
Total Freight	\$39,388.79	\$4,922.25	\$44,300.23	\$4,273.88	\$10,017.40	\$10,017.40	\$15,026.09	\$10,017.40	\$4,909.52	\$54,004.78	\$4,925.04



7. It is beyond cavil that, absent the presence of Rule 31(c)6 in the tariff, the freight charges shown in paragraphs 3, 4 and 6, above, satisfied the Tariff's requirements.<sup>22</sup> Indeed, complainants have "no quarrel with the carriers' method of arriving at the total freight charges to this point."<sup>23</sup>

8. However, in the belief that the wording of Rule 31(c)6, which provides that the "total ocean freight charges" shall not "be based on weight or measurement factors in excess of either the inside cubic capacity or weight capacity as shown on the manufacturers plate affixed to the container," is a rule which serves to supersede and further diminish the minimum utilization<sup>24</sup> rule embodied in Rule 31(c)1B, the complainants have constructed a different methodology to compute freight charges. The following chart shows how that method affects the minimum utilization and reflects the amount of freight charges which would result if their method were employed. The chart also compares their result with the respondents' computations and shows the difference between the two methods under the column heading entitled "Amount Claimed."

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<sup>22</sup> This finding assumes that ACIC was entitled to contract rates.

<sup>23</sup> Complainant's letter to me dated November 9, 1979, p. 2.

<sup>24</sup> Rule 31(c)1 is a minimum utilization rule, one part of which, Rule 31(c)1A, deals with measurement utilization, while the other part, Rule 31(c)1B, deals with weight utilization.

## FEDERAL MARITIME COMMISSION

Docket	B/L	Weight (1)	Rate	Subtotal	House to House Allowance (2)	Negative Surcharge	Complainants' Computation of Total Freight	Respondents' Computation of Total Freight (Amount Paid by Respondents)	Amount Claimed
78-35	615	214832 as 271291	\$331.85	\$40,190.35	\$1,574.43		\$38,615.92	\$39,388.79	\$772.87
78-42	625959	23592 as 29783	331.85	4,412.27	172.85		4,239.42	4,232.24	682.82
78-43	608	23215 as 28642	331.85	4,208.95	166.27		4,042.68	4,922.25	876.79
78-43	609	208918 as 263825	331.85	39,085.29	1,531.14		37,554.15	44,200.23	6,746.08 as
78-43	610	24862 as 35959	289.85	4,652.06	208.69		4,444.37	4,273.88	No
78-48	604	43415 as 54283	337.45	8,176.41	314.99		7,861.42	10,017.40	Overpay- ment
78-48	606	41573 as 51993	337.45	7,832.61	301.73		7,530.88	10,017.40	2,486.52
78-48	608	65470 as 82053	337.45	12,560.79	476.19		11,884.60	15,026.09	3,141.49
78-48	612	46121 as 57607	337.45	8,679.21	334.36		8,344.85	10,017.40	1,672.55
78-55	6257141	22463 as 27799	337.45	4,187.84	161.33	139.72(3)	3,886.79	4,834.89	948.10
78-55	6257150	44261 as 55231	337.45	8,320.40	320.54	277.60(3)	7,722.26	9,669.79	1,947.53
78-55	6257168	67429 as 83961	337.45	12,648.50	487.27	421.99(3)	11,739.24	14,504.68	2,765.44
79-44	605	20954 as 26211	337.45	3,648.62	152.12	75.17(4)	3,721.33	4,909.52	1,188.19
79-44	605	271187 as 340505	337.45	51,295.78	1,976.13	976.53(4)	48,343.12	54,004.78	5,661.66
79-62	605	23600 as 29526	337.45	4,447.59	171.34	74.27(5)	4,201.98	4,925.04	743.06

(1) The greater weight is that based upon the actual cubic capacity of each container. Formula - Actual Weight divided by Actual Measurement x cubic capacity of containers.

(2) At \$13/ton

(3) Negative Surcharge - 3.47%

(4) Negative Surcharge - 1.98%

(5) Negative Surcharge - 1.67%

25 Under complainants' theory, Rule 31(c)6 does not apply to loaded containers with a "weight" (as shown in the third column) which exceeds 70% of the weight capacity of a 40' dry container (34,580 pounds).

## DISCUSSION AND CONCLUSION

## I: RULE 31(C)6

A: The Rule is a maximum charge and not a maximum utilization rule and clearly does not undercut the minimum utilization rule

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Each complaint was filed under that portion of the Commission's Rules of Practice and Procedure dealing with Shortened Procedure.<sup>26</sup> Among other requirements, the Shortened Procedure Rules provide for a memorandum of arguments to accompany the complaint at the time the complaint is filed.<sup>27</sup>

As indicated in Fact No. 8, the complainants' case is predicated on the theory that Rule 31(c)6 overrides the minimum utilization rule in the Tariff. The argument they make in support of this theory in the memoranda attached to the several complaints, e.g.--Memorandum attached to Complaint in Docket No. 78-43 at p. iii, is that "Rule 31(c)6 of the Tariff limits freight charges to those based on the maximum weight of the *commodity shipped* [emphasis supplied] that could be loaded into the container."

By way of explanation of their belief that Rule 31(c)6 "means that the carrier will not collect freight charges for cargo in excess of those for a fully loaded container of the *commodity shipped* [emphasis supplied],"<sup>28</sup> complainants "note especially that Rule 31(c)6 limits the allowable charges when *either* the weight or the measurement capacity of the container would be exceeded if the 70% utilization factor is used."<sup>29</sup> They go on to point out that "Here the 70% weight utilization factor is 34,580 lbs., which is more than the weight of this commodity, as shipped, that a 2200 cu. ft. 40' container could actually hold."<sup>30</sup> From this they conclude that "Accordingly, the maximum charges must be those computed on the basis of the theoretical fully loaded weight of this commodity."<sup>31</sup>

<sup>26</sup> Rules 181-187, 46 C.F.R. 502.181-187.

<sup>27</sup> Rule 182, 46 C.F.R. 502.182.

<sup>28</sup> Memorandum attached to Complaint in Docket No. 78-43 at p. iii.

<sup>29</sup> *Id.*, p. iv.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

The cited Memorandum attached to the Complaint also made two other observations in support of complainants' argument. First, it noted that Rule 31(c)6 is shown in the Tariff as a reduction. It is implicit in their theory, although they do not explicitly say, that it is a reduction of charges computed under Rule 31(c)1B. Second, it noted that it was not relying on the cubic capacity shown on the manufacturer's plate affixed to the container to compute damages under its theory of the case because "the shipper would not as a practical matter even look at the manufacturer's plate on the container." Memorandum attached to the Complaint at p. iii. This statement was apparently the justification for using the utilization factor of 2200 cubic feet shown in Note 1 of Rule 31(c) in computing damages, initially. Now that complainants have learned the actual cubic capacity, see Appendix I, they have recomputed their damages. The recomputation is included in the chart in paragraph 8 of the Facts.

All of this means, according to complainants, that "to determine what weight of the commodity shipped the containers could hold we must find out what each cubic foot of the commodity weighed."<sup>82</sup> This calculation is done by performing the exercise of dividing the total actual weight by the number of actual cubic feet the shipment measured and multiplying that result by the cubic feet shown on the manufacturer's plate. The result of that exercise provides the "weight factor" which the complainants contend that Rule 31(c)6 says cannot be exceeded.<sup>83</sup> The entries under the heading "Weight," in the third column of the chart in paragraph No. 8 of the Facts, reflect the application of this exercise to the shipments involved in this proceeding.

At the informal conference, see n. 18, *supra*, I directed complainants to amplify their argument by explaining their understanding of the word "factor" as it appears in Rule 31(c)6. By letter dated September 17, 1979, they made the following answer:

Staying solely within the tariff itself, you will note that the word "factor" appears in two places in Rule 31(c). Note 1 on page 37 speaks of "determining the utilization factor" and Rule 31(c)6 speaks of "weight or measurement factors". In Note 1 there is one column showing cubic capacities for the listed types of containers and a second column showing the weight capacities of the same containers. The tariff provides that freight will be assessed upon not less than 70% of the weight capacity of the container. Since in our cases the containers were all forty foot dry containers the utilization factor would be 70% of 49,400 pounds or 34,580 pounds. That is the weight factor - not an actual weight, but an arbitrary figure specified by the carrier, which when multiplied by the dollar rate would normally result in the total freight charge.

But Rule 31(c)6 specifies that the charges so obtained, rate times weight factor, shall not exceed those obtained by use of a weight factor in excess of the inside cubic capacity of the container. In each case, excepting the shipment under bill of lading 610, the weight factor obtained by taking 70% of 49,400 pounds, or 34,580, would indeed exceed the cubic capacity of the container. Rule 31(c)6 limits charges to the use of a weight factor which is not in excess of the cubic capacity of the container. In other words, what weight of the commodity as shipped would fit into the container used to carry that shipment? How much polyamide yarn, as actually shipped, could a 40 foot container theoretically hold. That weight is the maximum factor that may be used to compute the charges.

Since Rule 31(c)6 applies, unless otherwise specified, to the assessment of charges for all shipments in containers and since

<sup>82</sup> Reply Memorandum of Complainant, pp. 4-5.

<sup>83</sup> *Id.*, p. 5

some rates and rate items apply on a measurement basis and some as here, apply on a weight basis, the rule speaks of weight or measurement factors. If the actual weight of a given shipment exceeds 70% of the weight shown in the last column of Note 1, charges would be computed on that weight and the weight factor would be irrelevant. In any event, 70% of the cubic capacity of a container is a measurement factor and 70% of the weight capacity is the weight factor.

The argument thus made by complainants has a surface allure, but its infirmity lies in its dependence upon a contrived misreading of Rule 31(c)6, a rule which "simply has no bearing on the minimum utilization requirements of container shipments."<sup>34</sup> Indeed, the contrived misreading, itself, turns upon complainants' unilateral injection of language into Rule 31(c)6 which that rule neither contains nor was intended to contain, either expressly or inferentially.

The weakness of the complainants' contentions becomes apparent when the role of Rule 31(c)1B and its interplay with Item No. 3236 of the Tariff and the purpose of Rule 31(c) 6 are understood. Rule 31(c)1B is a minimum utilization rule which provides that, with respect to cargo freighted on a weight basis, rates will be assessed on a minimum of 70 percent of the weight capacity of the container if the actual weight of the shipment is below that level. This minimum utilization provision acts to reduce complainants' shipping costs because it is applicable to "bulky" commodities, such as yarn which has a high measurement to weight ratio. Under Tariff Item 3236, such commodities are rated on a weight basis, although they are subject to minimum utilization requirements in view of the "deadfreight" represented by the unused weight capacity of the container.

Because the minimum utilization rule requires the shipper to pay freight on a certain amount of unused weight capacity, Tariff Item No. 3236 allows the shipper to make use of the unused capacity for which he is charged in calculating the measure of cubic feet per long ton of cargo. Thus, Item No. 3236 provides that, where the minimum utilization provision applies, a weight equivalent to the minimum utilization factor, rather than the actual weight of the cargo, will be used in determining the cubic measurement per 2,240 pounds. For example, as reflected in the bills of lading in Docket No. 78-43, these shipments had actual weights and actual measurements as follows:

- 1) Bill of Lading 608: one container at 23,215 pounds (10.36 long tons), measuring 1,890 cubic feet = 182 cubic feet per long ton.

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<sup>34</sup> See letter dated February 14, 1978, from Farrell to Ocean Freight Consultants, Inc., in Docket No. 78-48, declining polyamide yarn claims filed on behalf of Allied Chemical Corp. See, also, letter dated March 8, 1978, from the Conference to Ocean Freight Consultants in Docket No. 78-48, regarding those claims.

- 2) Bill of Lading 609: nine containers totalling 208,918 pounds (93.27 long tons), with an aggregate measurement of 17,010 cubic feet = 182 cubic feet per long ton.
- 3) Bill of Lading 610: one container at 24,862 pounds (11.10 long tons). measuring 1,649 cubic feet = 149 cubic feet per long ton.

In calculating the applicable rate, Farrell used the minimum weight utilization factor of 34,580 pounds per container, for all 11 containers. As a result, the number of cubic feet per long ton was factored in at 122 (Bill of Lading 608), 122 (Bill of Lading 609), and 106 (Bill of Lading 610), instead of the actual cubic feet per long ton, as the Tariff required.

The unadorned language of Rule 31(c)6 makes its twofold purposes clear. It is designed to discourage overloading of containers beyond their stated capacities as shown on the manufacturer's plate and to assure that the shipper is not required to pay more for the shipment than he would for a shipment weighing or measuring the amount shown as the container's capacity.<sup>35</sup> For example, an item such as a sailboat, might fill out the stated cubic capacity of a container, but still leave room for the stowage of spare parts under portions of the curved keel or transom. Thus, if the outside dimensions of the boat measured 2200 cubic feet, but empty space in the container allowed stowage of another 800 cubic feet of parts, it would not be fair to charge the shipper for more than the stated capacity of the container. By limiting the basis for total charges to the measurement or weight capacity of the container as shown on the manufacturer's plate, this result is accomplished, and by accomplishing this result, Rule 31(c)6 causes a reduction of tariff charges separate and apart from the operative provisions of Rule 31(c)1A or B.

But, despite this clarity of purpose, the complaints have innovatively restructured Rule 31(c)6, converting it from a maximum charge rule to a maximum utilization rule. This is demonstrated by the sequence of elaborate calculations, superimposed on the cumbersome Rule 31(c)1B computations, which they engaged in to show that if the cubic capacity of a 40 foot container were loaded with polyamide yarn, the weight of the containers, e.g., in Docket No. 78-43, would have been 28,642 pounds (Bill of Lading 608), 29,314 pounds (Bill of Lading 609),<sup>36</sup> and 35,959 pounds (Bill of Lading 610). Therefore, the complainants contend that except for the container carried under Bill of Lading 610, none of the containers could have physically accommodated 34,500 pounds (the minimum utilization factor) of polyamide yarn. Applying

<sup>35</sup> This accounts for the cumbersome arithmetical computations under the minimum utilization rule.

<sup>36</sup> There were nine containers in this shipment. The figure of 29,314 is an average arrived at by dividing the weight shown in the 3rd column of the chart in paragraph No. 8 of the Facts by nine.

those computations to their argument, complainants conclude that the shipments (except for Bill of Lading 610) were charged for on the basis of a weight factor "of the commodity shipped" in excess of the inside cubic capacity of the container.

This restructuring of Rule 31(c)6 by complainants is not warranted. Rule 31(c)6 simply bars the assessment of freight charges based on measurement or weight factors, respectively,<sup>37</sup> "in excess of either the inside cubic capacity or weight capacity, as shown on the manufacturer's plate affixed to the container." Manifestly, complainants' error in reading "of the commodity shipped" into the rule stems from their failure to differentiate between "weight or measurement factors" as used in Rule 31(c)6 and the weight and measurement "*utilization factors*" as used in Rule 31(c) Note 1. Conveniently and selectively, the complainants treat those factors as being one and the same merely because "the word 'factor' appears in two places in Rule 31(c)."

A further reason for complainants' construction of Rule 31(c)6 seems to lie in the mistaken belief that because the minimum utilization rule allows for constructive weight, Rule 31(c)6 should be deemed to authorize theoretical weights. However, Rule 31(c) clearly states that "freight shall be paid on the *actual* [emphasis supplied] weight and/or measurement of cargo," except in those circumstances in which the minimum utilization rule governs. No similar exception is provided for Rule 31(c)6 which addresses only maximum charges and not minimum utilization.

There are certain well established principles which serve as guides to construing tariffs. Some of the more pertinent principles of tariff construction and interpretation are as follows:<sup>38</sup>

(a) The terms used in a tariff must be read in the sense in which they are understood generally and accepted commercially. All of the pertinent provisions of a tariff must be considered together and the reasonable construction which results from such consideration is controlling.

(b) Tariffs must be considered as a whole. Their intent is not to be defeated by reason of the uncertainty of any particular item, if some other item in the same tariff clearly indicates how the item should be construed.

(c) Neither carriers nor shippers can be permitted to urge for their own purpose a strained and unnatural tariff construction.

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<sup>37</sup> The meaning of Rule 31(c)6 is clear and not ambiguous, even though the word "respectively" does not appear. This does not mean that the rule could not be improved, grammatically, by the inclusion of that word or a term such as, "measurement or freight factors, as freighted." But, the absence of grammatical purity in this instance scarcely calls for a determination of ambiguity or lack of clarity.

<sup>38</sup> See *National Cable and Metal Co. v. American-Hawaiian Steamship Company*, 2 U.S.M.C. 470, 473 (1941); Docket No. 37027F, *Scope Imparts, Inc. v. The Atchison, Topeka and Santa Fe Railway Company Interstate Commerce Commission Decision*, Decided January 28, 1980, Slip opinion at p. 3.

The application of those principles to the tariff provisions involved in this proceeding underscores the conclusion that complainants' interpretation of Rule 31(c)6 is tortured, illogical and unfair. This may be seen from a brief examination of the shipment carried under Bill of Lading No. 609 in Docket No. 78-43.

The cubic measurement carried in each container was arrived at not by the volume of the commodity shipped, but by the volume of the cartons in which the commodity was packed. Each of the nine containers held 108 cartons measuring 1,890 cubic feet. However, the weight of those 108 cartons varied from 22,227 pounds to 23,640 pounds.<sup>39</sup> It does not take the wisdom of a Solomon to recognize that, under complainants' construction of Rule 31(c)6, a shipper could configure its shipments in such a way that it could obtain transportation for a lower cost than it could under a minimum utilization rule, even though it is well known and understood that a minimum utilization rule is designed as a pricing floor for the carriage of a container.<sup>40</sup> It is just not plausible to reason that the Conference introduced Rule 31(c)6 in its tariff to subvert the minimum utilization rule. Yet it would take just such logic to give Rule 31(c)6 the meaning that complainants attribute to it.

While it is quite correct to say, as complainants do, that "Tariffs are to be interpreted according to the reasonable construction of their language; neither the intent of the framers nor the practice of the carriers controls, for the shipper cannot be charged with knowledge of such intent or with the carrier's canons of construction." *National Cable & Metal Co. v. American Hawaii S.S. Co.*, 2 U.S.M.C. 470, 473. "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; it is inappropriate to conclude that those rules of construction militate in favor of the complainants' argument. In the context of the tariff as a whole, Rule 31(c)6 clearly and unambiguously expresses its framers' intent. It is not applicable to the shipments in this proceeding.<sup>41</sup>

**B:** Assuming Rule 31(c)6 does supersede the minimum utilization rule, reparation would be inappropriate

Moreover, even if there were some merit to complainants' theory that Rule 31(c)6 does apply to the shipments because somehow despite

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<sup>39</sup> Cf. Docket No. 78-48 in which the carton each measured 1,907 cubic feet, but weighed anywhere from 20,577 pounds to 23,566 pounds.

<sup>40</sup> It is significant that the only shipment carried in bales, as opposed to cartons, weighed more than 34,580 pounds. It is this shipment, under Bill of Lading No. 610 in Docket No. 78-48, which complainants agree was not subject to its version of Rule 31(c)6.

<sup>41</sup> Inasmuch as it has been determined that Rule 31(c)6 is not applicable to any of the shipments in this proceeding, it is not necessary to engage in a discussion of subordinate contentions proffered by respondents dealing with errors in methodology in computing charges under Rule 31(c)6.



a patent contrary intent, the Conference drafted that rule in such a way that it could only be construed to have created a new and lower minimum utilization floor, there has been no showing calling for the exercise of the Commission's discretion in favor of reparation.

The complainants have not come forward with any evidence to establish that they acted to their detriment in reliance upon a rationally formed belief, conceived of prior to the shipments, that Rule 31(c)6 applied to those shipments or that they were otherwise harmed.<sup>42</sup> In making this statement I am mindful that the Commission has disavowed equity theories, generally, in section 18(b)(3) overcharge cases involving misdescription of cargo or incorrect weights or measurements, and has awarded reparation without a showing of shipper reliance or damage, even where it was the shipper's fault that he was overcharged because in those cases it is what was actually shipped that determines the rate. See e.g.--*The Carborundum Company v. Royal Netherlands Steamship Company (Antilles) M.V.*, 19 F.M.C. 431, 435-436 (1979); *Pan American Health Organization v. Prudential Lines, Inc.*, 19 F.M.C. 412, 414-415 (1976); *Durite Corporation, Ltd. v. Sea-Land Service, Inc.*, 20 F.M.C. 674 (1978), Order on Reconsideration, November 8, 1978 (unreported), aff'd without opinion, sub nom., *Sea-Land Service, Inc. v. Federal Maritime Commission*, 610 F. 2d 1000 (D.C. Cir. 1978).

This is, however, neither a misdescription, misweighing, or mismeasurement case and is distinguishable in that respect. It is well established that an award of reparation under section 22 is not a mechanistic act dismembered from the judicial function. In *United States v. Columbia Steamship Company*, 17 F.M.C. 8, 9-10 (1973), the Commission emphasized the discretionary nature of an award of reparation, as follows:

This avenue of relief provided by section 22, however, as clearly stated and maintained, is discretionary and permissive, and the mere fact that a violation of the Act has been found "does not in itself compel a grant of reparation", *Consolo v. Flota Mercante Grancolombiana*, 783 U.S. 607 (1965); *Ballmill Lumber v. Port of New York, et al.*, 11 F.M.C. 494, 510 (1968).

In *Columbia Steamship*, the Commission refused to award reparation despite a finding that the carrier had overcharged a shipper in violation of section 18(b)(3). The shipper and carrier had negotiated a rate which was higher than the rate shown in the carrier's tariff, but, due to error, the carrier neglected to file the higher rate. The carrier charged the shipper the higher rate and the shipper paid. In denying the prayer for reparation, the Commission stressed, 17 F.M.C., at 9:

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<sup>42</sup> The record merely shows that Ocean Freight Consultants, Inc., filed its claims on behalf of complainants long after the shipments took place. There is no evidence that either respondent ever applied Rule 31(c)6 in the manner urged by complainants to shipments of any other shipper.

\* \* \* That application of the negotiated rate was a foregone conclusion by both parties is clearly shown by subsequent issuance of respondent's Bill of Lading No. 1, and the payment by complainant of the negotiated rate stated therein without demurrer. Further, when the discrepancy was found pursuant to audit six months after payment, this error was not brought to respondent's attention for an additional five months thereafter.

The circumstances in the case at bar bear a striking similarity to the ones found to be controlling in *Columbia Steamship*, even if Rule 31(c)6 accomplishes what complainants say it does. From October 1976, complainants had actual knowledge of the minimum utilization rule and paid the charges computed under that rule for the first time on October 27, 1976. They continued to place their shipments for the next nine months--through July 1977--in the certain knowledge that the minimum utilization rule applied to those shipments and paid the charges computed under that rule without protest during that time.<sup>43</sup>

## II. CONTRACT RATES

The argument made by the respondents which would deny to respondent, ACIC, its entitlement to contract rates seems to be a reflexive response to a lawsuit and is not well taken.

Unquestionably, Allied Chemical Corporation's International Division did not fulfil, to the letter, the requirements of the Merchant's Rate Agreement by notifying the Conference, in writing, that ACIC should be added. But, the Merchant's Rate Agreement does not become mutually binding on the Conference's member lines and shippers solely by the act of written notification. Paragraph 2(a) makes the agreement binding on the "Merchant," its subsidiaries and related companies which engage in the shipment of commodities in the trade covered by the Rate Agreement over whom the Merchant regularly exercises direction and working control in relation to shipping matters.

In the first place, it ill behoves the respondents to infer that the charging of contract rates to ACIC was inadvertent or an oversight. It is patent that respondents never varied their practice of charging the contract rates to ACIC because they considered ACIC to be as much bound by the Rate Agreement as Allied Chemical Corporation itself.

Indeed, Allied Chemical Corporation construed the Rate Agreement to be binding on all twelve sales and marketing subsidiaries which make up the International Division. ACIC is one of those subsidiaries. An affidavit signed by Allied Chemical Corporation's Manager of Distribu-

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<sup>43</sup> Complainants offered no evidence to show when an audit of charges was made or when the alleged error was discovered. Neither does the record disclose precisely when the alleged error was brought to respondent's attention, although the record does reveal that Farrell declined some claims in February 1978. See n. 42.

tion Operations states that "since becoming a signator of the Dual Rate Agreement with the U.S. Atlantic and Gulf-Australia New Zealand Conference, we have made our shipments between ports covered by this agreement on conference vessels."<sup>44</sup>

A letter sent by that Manager to the Conference confirms the mutuality of the understanding.<sup>45</sup> He wrote:

We have heretofore considered Allied Chemical Corporation, International Division, to be the "merchant" whose shipments were covered by the contract regardless of which of its operating subdivisions was shown as shipper. The conference carriers have obviously agreed with our understanding, since all shipments were assessed the contract rates regardless of which company was shown as shipper.<sup>46</sup>

The record is clear then that as a matter of custom and usage, the Conference considered ACIC bound by the Rate Agreement and entitled to contract rates and that Allied Chemical Corporation considered itself bound to utilize the Conference's carriers for all ACIC shipments. Custom and usage cannot vary the terms of a tariff. But, custom and usage, as demonstrated by the actions of the carrier and shipper, are useful and reliable factors to be considered in determining the meaning of a tariff item. Cf. *Aleutian Homes, Inc. v. Coastwise Line, supra*, 5 F.M.B. at 608, 609. Here, there is no room for doubt that both the Conference's member lines and Allied Chemical Corporation considered ACIC shipments to be governed by the terms of the Merchant's Rate Agreement.

#### SUMMARY

The complainants have failed to establish that they were overcharged, on shipments of polyamide yarn during 1976 and 1977, in violation of section 18(b)(3) of the Shipping Act, 1916.

In computing the freight charges the respondents properly applied appropriate tariff provisions to the shipments. The shipments, as perti-

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<sup>44</sup> Affidavit dated February 9, 1979, attached to Reply Memorandum of Complainant.

<sup>45</sup> Letter dated January 19, 1979. The letter poses an intricate question to the Conference pointing up the frivolous nature of the defense asserted by the respondent. The question, which remains unanswered by the Conference, reads as follows:

Our records indicate that notification to this conference of various subsidiaries, which change from time to time, has not been made. We will, if necessary, remedy this situation in the near future. Before doing so, however, please advise us if our failure to list a specific division places such divisions outside the coverage of the dual rate agreement for shipments made in the subsidiaries' name, even if the controlling or "parent" company is the signator. If this is the case, we could be in a position to list only a few subsidiaries and ship via non-conference or conference carriers at our discretion to all areas where we have agreements.

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<sup>46</sup> An attachment to the Reply Memorandum of Complainant establishes that, during 1978, the only year for which records were available at the time the memorandum was prepared, various Allied Chemical Corporation's subsidiaries were charged contract rates for 118 shipments carried by 6 different member lines of the Conference.

ment to this proceeding, were governed by Tariff Item No. 3236 and Rule 31(c)1, which, together, established a pricing floor for the shipments based on constructive weights determined by a minimum utilization rule. Complainants' argument, which would make Rule 31(c)6 of the Tariff applicable to the shipments, is without merit. Rule 31(c)6 is a maximum charge rule which becomes operative only when container capacities are actually exceeded. Patently, the latter rule cannot be made to apply to shipments whose charges are subject to the constructive weight determinations made in accordance with the minimum utilization rule.

There is no merit to the respondents' contention that ACIC is not entitled to the Tariff's contract rates. Although there was no formal written notification given to the Conference that the "Merchant" intended that ACIC be bound by the terms of the Merchants Rate Agreement, the course of conduct adhered to by the "Merchant" and the Conference's member lines clearly shows that the parties to the Rate Agreement deemed its terms binding on ACIC.

#### ORDER

In accordance with the foregoing, the complaints filed in the consolidated proceeding are dismissed.

(S) SEYMOUR GLANZER  
*Administrative Law Judge*

Washington, D. C.  
July 24, 1980

## APPENDIX I

Dkt. No.	B/L No.	BIC Code No (s).	Inside Cubic Capacity (in cu. ft.)	
78-35	615	FRL 2014431-9	2,385	
		FRL 201670-3	2,385	
		FRL 201332-4	2,385	
		FRL 201639-1	2,385	
		CTIU 414276-5	2,362	
		INTU 428284-P	2,398	
		ICSU 204157	2,381	
		CTIU 411712-4	2,400	
		CTIU 411434-6	2,400	
78-42	6255959	UFCU 203831-7	2,386	
78-43	608	ICSU 212144-7	2,313	
		609	FRL 201123-4	2,385
			FRL 201600-4	2,385
			INTU 423129-0	2,377
			FRL 201148-7	2,385
			FRL 201175-9	2,385
			CTIU 200703	2,389
			FRL 201080-8	2,385
			ICSU 209711	2,381
			FRL 201561-1	2,385
	610		FRL 201451	2,385
78-48	604	FRL 201379-3	2,385	
		FRL 201302-6	2,385	
	606	FRL 201131-6	2,385	
		FRL 201220-4	2,385	
	608	FRL 201016-1	2,385	
		FRL 201513-7	2,385	
		CTIU 292617-7	2,400	
	612	INTU 432394-6	2,378	
FRL 201108-6		2,385		
78-55	6257141	ACTU 288342-7	2,360	
	6257150	UFCU 207909-1	2,398	
		ACTU 2881199-6	2,360	
	6257168	ACTU 288036-7	2,360	
		ACTU 288530-6	2,378	
		UFCU 204765-9	2,386	

## FEDERAL MARITIME COMMISSION

## APPENDIX I—Continued

Dkt. No.	B/L No.	BIC Code No (s).	Inside Cubic Capacity (in cu. ft.)
79-44	605(Sydney)	FRL 201157-4	2,385
	605(Melbourne)	FRL 201001-1	2,385
		FRL 201259-1	2,385
		FRL 201032-5	2,385
		CTIU 415157-7	2,400
		FRL 201564-6	2,385
		FRL 201279-7	2,385
		FRL 201071-0	2,385
		ISCU 220017-1	2,460
		FRL 201437-8	2,385
		SSIU 219131-6	2,394
		SSIU 219053-6	2,394
79-62	605(Melbourne)	FRL 201191-2	2,385

# FEDERAL MARITIME COMMISSION

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INFORMAL DOCKET NO. 774(F)  
EXIM, LTD.

v.

KUEHNE & NAGEL

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## ORDER

*November 13, 1980*

This proceeding has been referred to the Commission by Administrative Law Judge Paul J. Fitzpatrick, while he holds in abeyance a Motion to Dismiss filed by Kuehne & Nagel. The Presiding Officer notes that the status of "Kuehne & Nagel, S.A.," and "Kuehne & Nagel Overseas Corp." is somewhat unclear, and suggests that the Commission's staff conduct an investigation to clarify this matter and take "appropriate action."

The Commission agrees that the role of both "Kuehne & Nagel, S.A.," and "Kuehne & Nagel Overseas Corp." requires further exploration. However, a staff investigation is not necessary to answer the basic question of whether the proper party is before the Commission. It would appear that the Presiding Officer has the authority and the means under the Commission's Rules to explore these questions and dispose of the matter before him. Therefore, the Commission is referring this case back to the Presiding Administrative Law Judge for such further proceedings as he deems appropriate.

By the Commission.

(S) FRANCIS C. HURNEY  
*Secretary*

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 79-104  
SPECIFIC COMMODITY RATES OF FAR EASTERN  
SHIPPING COMPANY IN THE PHILIPPINES/U.S.  
PACIFIC COAST TRADE

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## ORDER ON RECONSIDERATION

*November 17, 1980*

Sea-Land Service, Inc. has petitioned the Commission to reconsider its Report and Order in this proceeding served on August 5, 1980. Sea-Land requests review of that portion of the Report and Order declining to find rates of the Far Eastern Shipping Company (FESCO) on "Reefer Cargo, other" and "Fruit Juice Concentrates" unjust and unreasonable in violation of section 18(c) of the Shipping Act, 1916. (46 U.S.C. 817(c)). FESCO and the Commission's Bureau of Hearing Counsel have filed replies in opposition to the Petition.

In its Report and Order, the Commission noted that FESCO's total charges for these commodities were significantly less than those of the Philippines North America Conference and Seatrain Pacific Services, S.A., a comparable independent carrier in the trade. Nonetheless, the Commission did not disapprove the subject rates, finding that: ". . . these rates have also had a minimal impact on the trade because of FESCO's failure to carry any cargo under them in 1979 (*See Exhibit 15*)." Report and Order at 12.

Sea-Land contends that this finding is based on a "substantive error in material fact," one of three acceptable grounds for a petition for reconsideration. *See* 46 C.F.R. 502.261(a). It maintains that FESCO could not have carried any reefer cargo under those rates in 1979 because they were suspended by the Commission on December 28, 1979, before they ever became effective. Sea-Land additionally fears that if the perceived rationale for the Commission's decision is upheld, non-controlled carriers will have to await injury, in the form of reduced market shares before a controlled carrier's lower rates are ever disapproved. This result, claims Sea-Land, is contrary to Congress' intent in enacting the Ocean Shipping Act of 1978.

FESCO and Hearing Counsel make essentially the same arguments in opposition to Sea-Land's Petition. They note that Sea-Land has taken one sentence out of the Commission's Report and Order in an effort to establish a "substantive error of material fact." However, these parties assert that if this one sentence is viewed in the context of the entire



Report and Order its meaning becomes clear and unambiguous. In addition, Hearing Counsel argues that Sea-Land has questioned this one aspect of the Report and Order simply as a pretext for challenging the Commission's determination, in this case, that some sort of "harm" must be evident before rates will be disapproved solely on the basis of rate differentials.

#### DISCUSSION

Sea-Land is indeed correct that FESCO could not have carried any fruit juice concentrate or reefer cargo under the subject rates because they were suspended prior to their implementation. Thus, the statement that "these rates have also had a minimal impact on the trade because of FESCO's failure to carry any cargo under them in 1979" may in isolation be misleading. However, Exhibit 15, which was cited by the Commission as its basis for this statement, indicates that FESCO carried *no* fruit juice concentrate or reefer cargo under *any* commodity description in 1979. The point being made was that neither the subject rates nor any predecessor rates for these particular commodities were shown to have caused or could be expected to cause any identifiable harm or injury to this trade. When the finding to which Sea-Land objects is read in context, the Commission's basis for not disapproving these rates is abundantly clear. Though FESCO's rates on "Reefer Cargo, other" and "Freight Juice Concentrates" were somewhat lower than rates offered by relevant competitors, the Commission was unable to conclude on this record that they would have a detrimental impact on the trade.

Sea-Land's broader argument concerning the Commission's reliance on injury or harm in the form of market penetration, is inappropriate for a petition for reconsideration. In any event, Sea-Land's position that, for rate comparison purposes, the Commission should ignore the impacts of a controlled carrier's rates on a given trade seems unwarranted. The Commission has never stated that in all cases where rate comparisons are employed it will require "the sustaining of injury" before it disapproves a rate. There may well be circumstances where a controlled carrier's rate is so much lower than those offered by its competitors that the Commission will find such rates unreasonable solely on that basis. However, in cases like this one, where the differential in total charges is not extreme, the Commission will examine, *inter alia* whether there will be or has been market penetration or other injury to the trade as a result of the subject rate or its predecessors before disapproving them. Such considerations are clearly within the realm of "other appropriate factors" which the Commission is permitted to consider under the Ocean Shipping Act of 1978. (46 U.S.C. 817(c)).

**THEREFORE, IT IS ORDERED,** That the Petition for Reconsideration filed by Sea-Land Service, Inc. is hereby denied.

By the Commission.\*

(S) FRANCIS C. HURNEY  
*Secretary*

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\* Chairman Richard J. Daschbach, dissenting and issuing a separate opinion.

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Chairman Richard J. Daschbach, dissenting.

I disagree with the majority's decision to deny Sea-Land Service, Inc.'s petition for reconsideration of the Commission's August 5, 1980 Report and Order in Docket No. 79-104, *Specific Commodity Rates of Far Eastern Shipping Company in the Philippines/U.S. Pacific Coast Trade*.

Although I concurred in the issuance of the Commission's order in Docket No. 79-104, I believe that we made a mistake. That order reflects a serious misunderstanding of the purposes of the Ocean Shipping Act of 1978 (P.L. 95-483) and the gravity of the threat that led to its enactment. Regardless of whether the Commission can or should change its findings on the eight commodity rates in question, it must recognize the flaws in its reasoning in order to ensure strict and effective administration of the controlled carrier statute in the future.

In reaching its conclusion in this proceeding, the Commission:

- 1) Ignored the clear intent of the Congress to place the burden of proof on state-controlled carriers whose rates have been suspended under section 18(c) of the Shipping Act;
- 2) Went beyond the four factors enumerated in that law for determining whether rates are just and reasonable, despite the fact that additional tests were not needed to make a finding on the reasonableness of FESCO's rates; and
- 3) Established a vague standard requiring the Commission to determine whether a controlled carrier's rates cause harm to a given trade. This new test may prove impossible to effectively apply in future rate proceedings under the controlled carrier statute, thus creating a major loophole in the law.

In its December 28, 1979 Order to Show Cause, the Commission stated that "under the circumstances presented, particularly since only individual commodity rates are being considered...the Commission believes that the last three factors set forth in section 18(c)(2) are those most appropriate to its decision." It reiterated that "no statements here should be construed to shift the burden of proof under section 18(c)", which lies with the controlled carrier whose rates have been suspended.

This direction to FESCO was consistent with the Commission's final order in Docket No. 79-10, *Rates of Far Eastern Shipping Company* which found that "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."

The Commission therefore clearly delineated the factors under which FESCO needed to satisfy its burden of proof in order to show that its rates were just and reasonable.

Did FESCO justify its rates by showing that they were "the same as or similar to those filed or assessed by other carriers in the same trade" (section 18(c)(2)(ii))?

No.

Did FESCO prove that its rates were "required to assure movement of particular cargo in the trade" (section 18(c)(2)(iii))?

No.

Did FESCO show that its rates were "required to maintain acceptable continuity, level, or quality of common carrier service to or from affected ports" (section 18(c)(2)(iv))?

No.

FESCO thus failed to sustain its burden of proof and the subject rates should have been disapproved as unjust and unreasonable.

It is disturbing that some consideration of equity apparently motivated the Commission to provide FESCO with yet another means of showing that its rates were just and reasonable.

It is essential for the Commission to understand the rationale of the Congress in empowering it to develop criteria beyond those provided in the statute.

The law authorizes the Commission to employ alternative factors in order to give it optimal flexibility in controlled carrier rate proceedings. It is not intended to provide the carrier with another "bite at the apple" when it has failed to justify its rates under criteria embodied in the statute and specifically delineated in the Commission's Order of Suspension as the tests which must be met.

Furthermore, the criterion which the Commission chose to add to its arsenal in enforcing the law, a showing of harm to the trade or injury to its participants, establishes a troublesome precedent. Although the Congress clearly intended the controlled carrier statute to *prevent* harm caused by predatory rate-cutting, this new criterion would enable the Commission to take action in controlled carrier rate proceedings only after a showing that damage had already been done, undermining the basic purpose of the law.

Finally, any additional factors that we use to supplement those already enunciated in the statute should be clear and precise. Requiring a showing of harm to a particular trade carries us into vague and amorphous territory, particularly in a volatile trade influenced by a variety of political and commercial factors. What constitutes actual harm? From whom do we obtain that information? How do we establish a clear correlation between disruption that is found in an entire trade and the rate established by a single carrier in that trade on any given single commodity?

This test inappropriately transfers the burden of proof from the controlled carrier to the Commission and it frustrates our obligation to provide the liner shipping industry with clear and precise regulations.

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In reviewing our responsibilities under the controlled carrier statute, we must bear in mind the circumstances that distinguish our activities under this law from other areas in which we exercise far more limited rate regulation. The Ocean Shipping Act of 1978 was not simply an extension of our regulatory authority, but an *expansion* of that authority for the express purpose of *protecting* privately owned steamship lines and the U.S. foreign commerce from the predatory rate-cutting of certain state-controlled carriers.

The Congress viewed the rate-cutting of state-controlled carriers as a dangerous threat to our commerce. The Commission must consider its actions under the controlled carrier statute within the context of that threat. Before a misguided sense of equity encourages us to grant controlled carriers opportunities for justifying their rates not contemplated by our governing statute, we should remember that it was inequitable and unfair competition that led to enactment of the controlled carrier statute in the first place.

I believe that we have strayed from this realization in our final order in Docket No. 79-104. I would therefore grant Sea-Land's petition for reconsideration so that we might have the opportunity to reject the new standard of trade disruption we have created and nullify its potential for interfering with our mandate to protect participants in the U.S. foreign commerce from predatory rate-cutting.

Sea-Land's petition is properly founded on a "material error of law." The Commission's order of August 5, 1980 specifically errs in creating an unnecessary and ambiguous new factor for determining the reasonableness of a controlled carrier's suspended rates which improperly transfers the burden of proof for making that determination from the carrier to the Commission. The August 5 order also commits the larger error of failing to diligently adhere to our strict legal obligation under the Ocean Shipping Act of 1978 to vigorously combat unfair competition.

## FEDERAL MARITIME COMMISSION

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INFORMAL DOCKET NO. 566(I)

EXCAM, INC.

v.

LYKES LINES AGENCY, INC. AND

COSTA LINE

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### DENIAL OF PETITION FOR RECONSIDERATION

*November 18, 1980*

The Commission by order served August 29, 1980 in this proceeding determined that claimant had failed to prove its claim. The Commission determined that the shipments in question were not shown to be other than as described on the bills of lading. The bills of lading described them as "firearms" and "rifles". They were rated as "firearms". Claimant had sought a rating for "replica arms". The August 29, 1980 order allowed claimant an additional opportunity to submit evidence to support its contention.

Claimant now has submitted various materials, most of which duplicate what was already in the record. The only new materials are catalogues describing various products of claimant. These catalogues contain descriptions both of replica arms and of firearms. The catalogues are of no value in proving the claim because nothing has been furnished to show that the particular items shipped match any particular catalogue item. If anything, the invoice which was originally in the record and resubmitted now, would suggest that the items were not replica arms because they describe the items as "percussion rifles".

Based on the foregoing it is determined that the petition for reconsideration should be denied. It is so ordered.

By the Commission.\*

(S) FRANCIS C. HURNEY  
*Secretary*

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\* Commissioner Teige not participating.

Vice Chairman Kanuk, *dissenting*:

I believe that complainant has met its burden of proof, and therefore I would affirm the Settlement Officer's decision awarding reparation.

## FEDERAL MARITIME COMMISSION

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### CHAPTER IV - FEDERAL MARITIME COMMISSION SUBCHAPTER B - REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[GENERAL ORDER 23, REVISED; DOCKET NO. 80-34]

#### PART 524 - EXEMPTION OF CERTAIN AGREEMENTS FROM THE REQUIREMENTS OF SECTION 15, SHIPPING ACT, 1916

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*November 18, 1980*

**ACTION:** Final Rule

**SUMMARY:** The Federal Maritime Commission exempts from the filing and approval requirements of section 15 of the Shipping Act, 1916 (46 U.S.C. 814) non-exclusive equipment interchange agreements between common carriers by water.

**DATE:** Effective November 28, 1980

**SUPPLEMENTAL INFORMATION:**

On May 8, 1980, the Commission instituted this proceeding to exempt non-exclusive equipment interchange agreements from the approval requirements of section 15 of the Shipping Act, 1916, (45 F.R. 35368).

Section 35 of that Act (46 U.S.C. 833a) 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 requirements 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.

Equipment interchange agreements on file with the Commission generally fall within these categories:

- 1) container, chassis, and related equipment interchange agreements;
- 2) agreements involving the management of the equipment as well as the exchange of containers, chassis, and related equipment;
- 3) agreements covering only the repair and maintenance of containers, chassis, and related equipment; and
- 4) interchange of LASH/SEABEE barges.

These types of agreements are generally approved by the Commission.

Except as hereafter noted, commentators supported the rule on principle. Some commentators argued, however, that the advance filing of agreements for informational purposes substantially defeats the objectives of the proposal. They contend that the advance filing requirement is burdensome in terms of carriers' needs to act quickly to meet operational requirements as they occur.

One carrier urged that the exemption be expanded to include agreements between carriers and "other persons" subject to the Shipping Act to recognize the possible involvement of a terminal operator in routine equipment interchange operations. In addition, it was suggested that the format provision be deleted because it is optional except for the independent agent requirement which it believes is inappropriate, unnecessary, and commercially frustrating. This carrier would also include loaded, as well as empty containers, within the exemption.

Another carrier requests the Commission to continue full section 15 scrutiny over these agreements because the "art" of equipment interchange is presently unsettled due to changes in railroad procedures for repositioning equipment which may substantially increase costs to water carriers. Accordingly, it is recommended that the matter be postponed pending inquiry into the changed competitive circumstances brought about by railroad repositioning plan modifications and their impact upon ocean carriers.

A port authority opposed the exemption because of concerns that such agreements, if exempted, could provide a means of discriminating between ports, shippers, and classes of traffic or commodities by controlling the availability of equipment or by diverting equipment to larger ports, favored shippers, or higher revenue yielding cargo. As a minimum, the port authority requests assurances from the Commission that the anti-discriminatory remedies of sections 16, 17, and 22 of the Shipping Act will continue to be available.

Based upon the comments, the Commission has decided to exempt equipment interchange agreements, but without the advance filing, the independent agent, and format requirements.

With respect to the suggestions to include "other persons" within the scope of the exemption and to extend the exemption to loaded containers, the Commission will study those suggestions further since it cannot now gauge the impact of the proposals and since they were not noticed for comment.

The proposal to defer the rule is not persuasive. There is a demonstrable justification for the exemption now, and if conditions change as a result of railroad practices or other factors, the Commission can readily readdress the situation.

Concerns that the exemption may be used in a discriminatory manner will be met by specifically noting the continuing availability of the Shipping Act's anti-discrimination provisions. The action here affects



section 15 requirements only and all other provisions of the Act will remain fully applicable.

Finally, a clarifying change has been made to the existing definition of nonexclusive transshipment agreement to indicate that a through *route* and not a through *rate* is the substance of such an agreement. This exemption, as modified, will not substantially impair effective Commission regulation of common carrier practices, result in unjust discrimination, or be detrimental to commerce.

NOW, THEREFORE, pursuant to sections 15, 35, and 43 of the Shipping Act, 1916 (46 U.S.C. 814, 833a, and 841a) IT IS ORDERED, That effective upon publication in the *Federal Register*, Title 46, CFR Part 524 is revised to read as follows: No changes have been made to section 524.1. Former sections 524.3, 524.4, and 524.5 have been redesignated sections 524.4, 524.5, and 524.6 respectively. The section title of former 524.3 (now 524.4) has been revised as indicated below.

**PART 524 - Exemption of Certain Agreements from the Requirements of Section 15, Shipping Act, 1916**

sec.

524.1 Statement of policy and purpose

524.2 Definitions

524.3 Exemption of agreements

524.4 Conditions for exemption of transshipment agreements

524.5 Form of connecting carrier agreements

524.6 Termination of approved transshipment agreements

524.7 Optional Section 15 approval

§524.1 Statement of policy and purpose

(same)

§524.2 Definitions

(a) A nonexclusive transshipment agreement for the purpose of this Part is an agreement between a carrier serving a port of origin and a carrier serving a port of destination to establish a through route between such ports via an intermediate port at which the cargo is transferred, which agreement does not prohibit either carrier from entering into similar agreements with other carriers.

(b) Nonexclusive equipment interchange agreement is an agreement between two or more common carriers by water for the exchange of empty containers, chassis, empty LASH/SEABEE barges, and related equipment which agreement does not prohibit a carrier from entering into similar agreements with other carriers, and which provides only for transportation of the equipment as required, payment, management of the logistics of transferring, handling, and positioning equip-

ment, use, repair and maintenance, damages, and liability incidental to the interchange of equipment, and no other subject.

**§524.3 Exemption of agreements**

Agreements defined in section 524.2 shall be exempt from the provisions of section 15; provided, in the case of a nonexclusive transshipment agreement, the conditions contained in section 524.4 and the form requirements of 524.5 are met.

**§524.4 Conditions for exemption of transshipment agreements (same as present §524.3)**

**§524.5 Form of connecting carrier agreements (same as present §524.4)**

**§524.6 Termination of approved transshipment agreements (same as present §524.5)**

**§524.7 *Optional section 15 approval.*** Notwithstanding the provisions of this section, persons who desire approval of agreements otherwise exempt under this Part may petition the Commission for section 15 determination in accordance with Part 522.

By the Commission.

(S) FRANCIS C. HURNEY  
*Secretary*

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 79-94****ALL-FREIGHT PACKERS & FORWARDERS, INC.  
INDEPENDENT OCEAN FREIGHT FORWARDER  
LICENSE APPLICATION**

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**ORDER DENYING PETITION FOR RECONSIDERATION***November 25, 1980*

On August 26, 1980 the Commission issued an Order in this proceeding adopting the Initial Decision of Administrative Law Judge Joseph N. Ingolia, holding that All-Freight Packers & Forwarders, Inc., was fit, willing and able to carry on the business of freight forwarding, but assessing a civil penalty of \$5,000.00 for unlicensed forwarding activities.

All-Freight has now filed a petition pursuant to Rule 261 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.261) seeking reconsideration of the Commission's Order Adopting Initial Decision. The Commission's Bureau of Hearing Counsel has filed a reply in opposition to the petition.

In its Petition, All-Freight states that it does not disagree with the findings of the Commission concerning the violations of section 44 or the fitness of the firm to carry on the business of freight forwarding, but seeks a reduction of the \$5,000 civil penalty assessed against it. All-Freight contends that the Commission should have given greater weight to the loss of revenue sustained by the firm, estimated to be \$31,874.00, due to its inability to carry on forwarding activities during the course of this proceeding. This loss is allegedly severe in light of the modest size of the firm.<sup>1</sup> All-Freight concludes that this potential revenue loss is a more than sufficient penalty to deter freight forwarders from engaging in the violations of section 44 and the Commission's regulations.

Hearing Counsel replies that the financial data submitted with the Petition could have been submitted at earlier stages of the proceeding, and that, in any event, the instant Petition for Reconsideration merely restates arguments previously considered and rejected in this proceeding.

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<sup>1</sup> All-Freight submitted a financial statement indicating net income of \$34,845.15 for the last ten-month period.

The Commission agrees with Hearing Counsel that All-Freight's underlying contentions have previously been addressed and found to be insufficient to warrant reduction of the civil penalty imposed by the Presiding Officer. Nothing offered in the present Petition persuades us to alter that determination.

**THEREFORE, IT IS ORDERED,** That the Petition for Reconsideration of All-Freight Packers & Forwarders, Inc. is denied.

By the Commission.

(S) FRANCIS C. HURNEY  
*Secretary*

**FEDERAL MARITIME COMMISSION**

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**INFORMAL DOCKET NO. 681(F)**  
**SANRIO COMPANY, LTD.**

v.

**MAERSK LINE**

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**ORDER OF REPARATION**

*November 25, 1980*

On September 5, 1980 the Commission issued an Order Adopting Initial Decision in this proceeding holding that the Presiding Officer had correctly determined that certain shipments transported by Maersk Line for Sanrio Company, Ltd., had been misrated and denying the Exceptions of the Trans-Pacific Freight Conference of Japan-Korea to the Initial Decision. The Commission also affirmed the finding of the Presiding Officer that the parties to the proceeding had not submitted sufficient documentation with which the precise amount of reparation due Complainant could be calculated, and ordered Complainant\* to submit a reparations statement pursuant to Rule 252 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.252).

Complainant has now filed a reparations statement which has been certified as correct by Respondent. Based upon this documentation the Commission has been able to compute the reparations due at \$3,237.37 plus interest at 12% per annum from the date of payment of the incorrect charges.

**THEREFORE, IT IS ORDERED,** That Maersk Line pay Sanrio Company, Ltd., reparations in the amount of \$3,237.37 plus interest at 12% per annum from the date of payment of the incorrect charges, and,

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

By the Commission.

**(S) FRANCIS C. HURNEY**  
*Secretary*

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\* The last ordering paragraph of the September 5, 1980 Order inadvertently directed the consignee, Sanrio, Inc., to submit a reparations' statement. However, as the correct Complainant filed the reparations statement this error was without consequence.

**FEDERAL MARITIME COMMISSION**

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**SPECIAL DOCKET NO. 701****APPLICATION OF TRANS FREIGHT LINES, INC.,  
TO BENEFIT SOUTHERN PACIFIC MARINE TRANSPORT**

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**ORDER OF ADOPTION***December 9, 1980*

On September 23, 1980, the Commission undertook to review the Initial Decision of Administrative Law Judge Seymour Glanzer in the above-captioned matter. This decision granted the special docket application of Trans Freight Lines, Inc., as to two of the three intermodal shipments for which relief had been requested. The application for the third shipment was dismissed on the grounds that Trans Freight Lines' tariff had not covered transportation between Richmond, California and Bremerhaven, Germany at the time of shipment.

The Commission has examined the record assembled by the Administrative Law Judge and materials on file with the Office of Tariffs, and has concluded that Trans Freight Lines, Inc., Eastbound Joint Container Tariff No. 301, I.C.C. No. 301, F.M.C. No. 8 was too incomplete on September 3, 1979 to form a proper basis for special docket relief. Moreover, Trans Freight's essentially untariffed operations on or about this time appear to violate sections 18(b)(1), (2) and (3) of the Shipping Act, 1916 (46 U.S.C. 817(a), (b) and (c)) and may be an appropriate subject for civil penalty claims.

**THEREFORE, IT IS ORDERED,** That the Initial Decision served August 21, 1980 in this proceeding is adopted by the Commission and made a part of this Order;<sup>1</sup>and

**IT IS FURTHER ORDERED,** That this proceeding is terminated.

By the Commission.<sup>2</sup>

(S) FRANCIS C. HURNEY  
*Secretary*

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<sup>1</sup> The Initial Decision recommended that further inquiry be made into the routings used by Trans Freight Line, Inc., for intermodal shipments from West Coast destinations to Europe. The Commission has referred this matter to the Bureau of Investigation and Enforcement to take appropriate action with respect to any violations of section 18(b) which may have occurred.

<sup>2</sup> Commissioner Peter N. Teige, dissenting and issuing a separate opinion. Vice Chairman Leslie Kanuk concurs in Commissioner Teige's dissent.

*Dissenting Opinion of Commissioner Peter N. Teige.*

I dissent. I recognize that the majority's decision to affirm the Initial Decision of the Administrative Law Judge and deny the carrier permission to waive collection of freight charges for one of the three shipments covered by its application, will have no practical effect on the shipper since the carrier will be unable to lawfully collect the charges it sought to waive. Nevertheless, I disagree with the majority's overly technical conclusion that the carrier's application must be denied because its tariff was too incomplete (as to description of routings) on September 3, 1979, the time of the disputed shipment. The tariff did, however, despite its deficiencies, state as a practical matter the total charges applicable to this through movement. In addition, the corrective tariff amendment filed by Trans Freight on September 10, 1979 stated the exact per container rate agreed upon by Trans Freight and SPMT. This amendment meets the requirement of Section 18(b)(3) of the Act that the new tariff "set forth the rate" and is sufficiently clear to enable us to measure the relief to be given the shipper. The failure of the original tariff and the new tariff filing to technically meet all of the requirements of Section 18(b)(1) should not prevent relief under the provisions of Section 18(b)(3), so long as it is clear from all the circumstances that the rates specified originally and as corrected by the new tariff filing were to be applied to the cargo shipped.

## FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 701

### APPLICATION OF TRANS FREIGHT LINES, INC. FOR THE BENEFIT OF SOUTHERN PACIFIC MARINE TRANSPORT

Application to waive a portion of freight charges dismissed, in part, and granted, in part.

*John F. Spangle* for applicant Trans Freight Lines, Inc.

#### INITIAL DECISION<sup>1</sup> OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

*Adopted December 9, 1980*

By application filed January 15, 1980, Trans Freight Lines, Inc. (TFL), seeks permission to waive collection of portions of freight charges claimed to be due it from Southern Pacific Marine Transport (SPMT) in connection with three shipments of canned goods which TFL carried from Savannah, Georgia, to the discharge ports of Bremerhaven, Federal Republic of Germany (FRG), Rotterdam, The Netherlands, and Bristol, England.

All of the shipments were carried in intermodal service on the same vessel and all originated at rail carriers terminals on the West Coast. Two of the shipments were carried aboard the *Visurgis*, Voyage No. 3, which sailed from Savannah on September 3, 1979. One shipment was carried on Voyage No. 4, which sailed from Savannah on October 1, 1979.<sup>2</sup>

The aggregate amount of the freight charges sought to be waived is \$90,864.15.

The proceeding was first assigned to Administrative Law Judge Stanley M. Levy and was reassigned to me on March 4, 1980, upon Judge Levy's retirement.

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<sup>1</sup> This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

<sup>2</sup> The application incorrectly states that the dates of shipment (sailing) were "8/5/79," "8/17/79," and "9/13/79." It is surmised that those dates were selected because they appear within the four corners of an "On Board;" stamp on the bills of lading issued by TFL. However, under the Commission's Regulations governing special docket applications, 46 CFR 502.92, the date of shipment which is the date that starts the jurisdictional timetable for special docket relief (see *Discussion, The Fourth Proviso, infra*), is considered to be the actual date of sailing. The date of issuance of an on board bill of lading is no longer deemed to be the date of shipment. See Docket No. 78-12, *Rules of Practice and Procedure; the Simplification of the Rules Governing Special Docket Applications for Permission to Refund or Waive Portions of Freight Charges*, 43 F.R. 18572, May 1, 1978, Final Rules, 43 F.R. 38578, August 29, 1978.



Pursuant to Judge Levy's and my requests the application was supplemented by the filing of additional documentation.

#### FACTS

After it decided to institute an intermodal service, TFL issued an intermodal tariff on June 1, 1979. The tariff was filed with the Commission and became effective on July 15, 1979.<sup>3</sup> Section 4 of the tariff contains the class and commodity rates for shipments from the West Coast to Northern Europe. Northern Europe is divided into four rate groups under three column headings. (Groups 2 and 3 are combined.) Because TFL was not entirely certain about the market, when it issued the new tariff it listed only about 25 commodity items in Section 4. Each of those commodities carried rates lower than Section 4's class rate for general cargo.<sup>4</sup> The general cargo (Cargo N.O.S. Not Dangerous) rate from July 15, 1979, to and including the dates of the three shipments was \$300.00 W/M<sup>5</sup> to all four destination rate groups.<sup>6</sup> During that same time period, as pertinent, the tariff also provided for a bunker surcharge and a currency adjustment factor.<sup>7</sup>

On July 30, 1979, following negotiations for a commodity rate lower than the Cargo N.O.S. rate, Mr. T. P. McNamara, Vice President, West Coast, Alltrans International, Inc., TFL's agent, and Mr. J. D. Burnett, Vice President and General Manager of SPMT, agreed upon an all inclusive rate (including the bunker surcharge and currency adjustment factor) of \$1,470.00 per 20 foot container for canned goods on movements from Los Angeles and Oakland/Richmond, California, and Portland, Oregon/Seattle, Washington, to United Kingdom and North Europe ports on a Container Yard to Container Yard basis. When Mr. McNamara transmitted the terms of the agreement to TFL's office in Secaucus, New Jersey, he requested that the tariff matter reflecting those terms be published quickly because the traffic was ready to move.<sup>8</sup> Upon receipt of that request, instructions were given to a TFL Tariff Compiler to publish the rates agreed upon. Due to a clerical error, the Tariff Compiler failed to carry out those instructions prior to the dates of shipment.<sup>9</sup>

<sup>3</sup> When the original tariff pages were filed, the tariff was entitled Trans Freight Lines, Inc., East-bound Joint Container Tariff No. 301, I.C.C. No. 301, F.M.C. No. 8. The same tariff now bears the I.C.C. identification number I.C.C. TFEI No. 301.

<sup>4</sup> See affidavit (statement) of TFL's Pricing Manager, South Atlantic, attached to his letter to me, dated April 14, 1980.

<sup>5</sup> W=Weight of 1000 kilos; M=Measurement of one cubic meter; W/M means W or M whichever produces the greater revenue.

<sup>6</sup> TFL's Tariff, original through 6th revised p. 362.

<sup>7</sup> *Id.*, original and 1st revised p. 7. The tariff abbreviation for bunker surcharge is "BSC" and the abbreviation for currency adjustment factor is "CAF."

<sup>8</sup> See Mr. McNamara's and Mr. Burnett's affidavits attached to TFL's letter to me, dated April 22, 1980.

<sup>9</sup> See affidavit (statement) of the Tariff Compiler attached to TFL's letter to me, dated April 14, 1980.

When the error was discovered, TFL filed a corrective tariff, effective September 10, 1979, containing the agreed rate.<sup>10</sup> But, due to another clerical error, the correction appeared only in the column for Rate Groups 2 and 3. Rate Groups 2 and 3 covered the particular Northern European discharge ports but not the United Kingdom discharge port involved in this proceeding.<sup>11</sup> When the second error was discovered, another corrective tariff covering Rate Group 1, United Kingdom destinations, was filed, effective October 4, 1979.<sup>12</sup>

In the meantime, that is, between July 30, 1979 and October 4, 1979, the three individual shipments were placed in intermodal service for delivery to destination, as follows:

1. Shipment No. 1, shown in the application as shipment (a), was a movement of canned peaches weighing 180,306 kilograms and measuring 237.89 cubic meters, shipped in ten 20 foot House to House Containers<sup>13</sup> by SPMT<sup>14</sup> to a consignee in the FRG. The shipment was received at Richmond, presumably on August 5, 1979, when the on board bill of lading was issued, and was carried by rail from there to Savannah where it was loaded on the *Visurgis*, Voyage No. 3, and discharged at Bremerhaven, FRG, for delivery in Hamburg, FRG. The bill of lading does not disclose the identity of the rail carrier receiving the shipment at Richmond, but TFL's letter to me, dated June 20, 1980, attached as Appendix I, states that the cargo moved "via ATSF [The Atchison Topeka & Santa Fe Railway Company, a rail carrier participating in the Tariff in accordance with concurrence FC2 No. 122]\* in Richmond." Pandair Freight Inc., F.M.C. License No. 1514, is shown as the freight forwarder. The shipment was rated as Cargo N.O.S. on a measurement basis and a bunker surcharge and currency adjustment factor were applied. Total charges amounted to \$86,056.71. At the agreed rate and, if other tariff provisions permitted, the charges on this shipment should have been \$14,700.

2. Shipment No. 2, shown in the application as shipment (b), was a movement of canned tuna weighing 16,329 kilograms and measuring 23.79 cubic meters, shipped in one 20 foot House to House Container by SPMT to a consignee in Rotterdam. The shipment was received at

<sup>10</sup> TFL's Tariff, 6th revised p. 362.

<sup>11</sup> *Id.*, original through 2nd revised p. 11.

<sup>12</sup> *Id.*, 11th revised p. 362.

<sup>13</sup> Pursuant to Rule 23 of the TFL Tariff, original p. 36, House to House and Container Yard to Container Yard are interchangeable terms; a Container Yard (CY) is a facility operated by the water or participating rail or motor carrier for the receipt of loaded containers.

<sup>14</sup> SPMT is a non vessel operating common carrier (NVOCC) which publishes a tariff applicable to shipments of general merchandise between specified ports in the United States, on the one hand, and, on the other hand, specified ports in specified foreign countries. The origin and destination ports involved in this proceeding are within the scope of SPMT's Tariff, Local Freight Tariff No. 3, F.M.C. No. 3, original pp. 7, 8.

\*See n. 36 following Conclusion and Order, *infra*.

Los Angeles, presumably on August 17, 1979, and was carried by rail from the Union Pacific (UP - a participating rail carrier) rail terminal to Savannah where it was loaded on the *Visurgis*, Voyage No. 3, and discharged at Rotterdam. The shipment was rated as Cargo N.O.S. on a measurement basis and a bunker surcharge and currency adjustment factor were applied. Total charges amounted to \$8,606.04. At the agreed rate, and other tariff provisions permitting, the charges for this shipment should have been \$1,470.00.

3. Shipment No. 3, shown in the application as shipment (c), was a movement of canned salmon weighing 35,997 kilograms and measuring 45.30 cubic meters, shipped in two 20 foot House to House Containers by SPMT to a consignee in London, England. The shipment was received at Portland, presumably on September 13, 1979, and was carried by rail from the UP rail terminal to Savannah where it was loaded on the *Visurgis*, Voyage No. 4, and discharged at Bristol for delivery at Felixstowe, England. The shipment was rated as Cargo N.O.S. on a measurement basis and a bunker surcharge and currency adjustment factor were applied. Total charges amounted to \$15,311.40. At the agreed rate, and other tariff provisions permitting, the charges for this shipment should have been \$2,940.00.

SPMT did not pay the charges as billed. It remitted \$19,110.00, the amount it should have been charged for the three shipments had the clerical errors not occurred, other provisions of the Tariff permitting. Under the circumstances, TFL asks for a waiver of \$71,356.71 for Shipment No. 1; a waiver of \$7,136.04 for Shipment No. 2; and a waiver of \$12,371.40 for Shipment No. 3.

Other provisions of the Tariff which are pertinent to the issues in this proceeding are as follows:

1. The Scope of the Tariff, insofar as these shipments are concerned, is set forth in Section 4 of Rule 1.<sup>15</sup> As material, it provides that the rates in the Tariff apply from "Rail Carriers Terminals" in "Los Angeles, CA," "Portland, OR" and "Richmond, CA."<sup>16</sup>

2. The identification of the "Origin Rail Carrier Terminals" appears in Rule 100 of the Tariff.<sup>17</sup> At all pertinent times this rule read as follows:

Whenever the term "rail carrier's terminal(s)" is used, container or trailer on flat car service will be performed at each location by the following rail carrier(s).

<sup>15</sup> TFL's Tariff, 1st revised p. 11.

<sup>16</sup> The same provisions are iterated at the beginning of Section 4 of the Tariff, which, it will be recalled, contains the rates for joint intermodal shipments from the West Coast to Northern Europe. TFL's Tariff, original p. 361.

<sup>17</sup> TFL's Tariff, original p. 60. This page was not changed until August 5, 1960, when 1st revised p. 60 was filed.

TERMINALS	RAIL CARRIER	TYPE OF SERVICE	ADDRESS
LOS ANGELES, CA.	ATSF	CY	HOBART YARD, SHEILA & INDIANA ST. CITY OF COMMERCE, CA.
	SP	CY	N. MISSION RD.
	UP	CY	4341 WASHINGTON BLVD.
OAKLAND, CA.	ATSF	CY	40TH AND SAN PARLO
	SP	CY	1410 MIDDLE HARBOR RD.
	WP	CY	1777 MIDDLE HARBOR RD.
PORTLAND, OR.	BN	CY	3930 N.W. YEON
	UP	CY	2745 N.W. INTERSTATE AVE.
SACRAMENTO, CA.	SP	CY	ATLANTIC BETWEEN YOSEMITE AND BERRY, ROSEVILLE, CA.
	WP	CY	3500 - 24TH ST.
SEATTLE, WA.	BN	CY	12400 - 51ST PLACE SOUTH
	UP	CY	ARGO YARD, 4TH SOUTH AND DAWSON STREET
STOCKTON, CA.	ATSF	CY	FOOT OF DIAMOND ST.
	SP	CY	1010 E. MARKET ST.
	WP	CY	833 E. 8TH ST.
SAN FRANCISCO	ATSF	CY	74 MISSION ROCK

Richmond, California, is not listed under the column heading "Terminals." Manifestly, too, the table does not identify any rail carrier, type of service or address at Richmond. It was not until August 5, 1980, that Richmond was listed, as follows:

TERMINALS	RAIL CARRIER	TYPE OF SERVICE	ADDRESS
[C] <sup>18</sup> RICHMOND, CA.	ATSF	CY	861 WHARF STREET

3. Similarly, at all pertinent times, neither TFL nor any carrier participating in the Tariff held out to perform a transportation service over a through route originating at Richmond, California. Rule 107 of the Tariff lists the service offered by the participating rail carriers from West Coast ports and the Rail-Water Interchange Point in Savannah.

<sup>18</sup> [C] means "Change in Wording which results in neither an increase or a Reduction." See Symbols and Reference Marks, TFL's Tariff, original p. 3.

As pertinent to the carriage of 20 foot containers, until November 1, 1979, Rule 107 provided, as follows:<sup>19</sup>

**PARTICIPATING RAIL CARRIER'S SERVICE AND DIVISION OF REVENUE**

- A. Participating Rail Carrier's service and Division of Revenue between rail carrier's terminal listed below in Paragraph B & Rail-Water Interchange Point in Charleston, SC or Jacksonville, FL or Savannah, GA for 40' Containers or 20' Containers applies via the following Route Nos. as shown in Section 5.
- B. Rail Carriers Division of Revenue Per Container or Trailer

Rail Carrier's Terminals	Route Nos.	Division per Container or Trailer <sup>20</sup>	Division Per 20 cft <sup>20</sup>	Division Per 2,240 lbs <sup>20</sup>	No. of 20' Containers
Los Angeles, CA )					
Oakland, CA )					
San Diego, CA )					
Stockton, CA )	107	\$701.00	\$25.49	\$60.96	1 - 40
Seattle, WA )	107	\$659.00	\$23.96	\$57.30	41 & over
Tacoma, WA )					

It was not until May 7, 1980, that Richmond appeared under the column heading "Rail Carriers Terminals" in Rule 107.<sup>21</sup>

4. Section 5 of the Tariff is the segment of the Tariff which describes the routing of all movements from participating overland carriers' terminals to the interchange terminal.<sup>22</sup> As seen, Rule 107 identifies the route number for movements from West Coast rail terminals through the interchange point of Savannah as Route No. 107. But at all times relevant to this proceeding, Section 5 made no reference to a Route No. 107. There was, however, a Section 5 reference to a Route No. 140, which does contain a routing of movements from West Coast rail terminals to Savannah.<sup>23</sup> Among other things, Route No. 140 shows Richmond as a rail carrier terminal and ATSF as the originating rail carrier. Until March 16, 1980, however, there was no routing provision showing UP as an originating rail carrier at either Los Angeles and Portland or any other West Coast port under Route 140. By a tariff

<sup>19</sup> TFL's Tariff, original p. 65.

<sup>20</sup> Reference to notes to Rule 107 deleted.

<sup>21</sup> TFL's Tariff, 3rd revised p. 65.

<sup>22</sup> The interchange terminal is defined as "the point of interchange between participating rail carrier and water carrier." TFL's Tariff, original through 2nd revised p. 364.

<sup>23</sup> Effective July 24, 1980, the information shown previously under Route No. 140 appeared under Route No. 107. TFL's Tariff, 3rd revised p. 364.

filing, which became effective March 16, 1980, Union Pacific was added to Route No. 140 as an originating rail carrier.<sup>24</sup>

TFL carried no other shipments of the same or similar commodities from West Coast origin ports to Northern European destinations from July 30, 1979 through October 3, 1979.

#### THE GOVERNING STATUTE

The Commission's authority to permit carriers to refund a portion of freight charges collected from shippers or to waive the collection of a portion of freight charges 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 is derived from the provisions of section 18(b)(3), 46 U.S.C. 817(b)(3).<sup>25</sup> After stating the requirement that common carriers by water in foreign commerce or conference of such carriers charge only the rates and charges specified in tariffs on file with the Commission, section 18(b)(3) provides, as pertinent:

*Provided, however,* That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers 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 by water in foreign commerce or conference of such carriers had, 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: *Provided further,* That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application; *And provided further,* That application for refund of waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

<sup>24</sup> TFL's Tariff, 2nd revised p. 364.

<sup>25</sup> The Commission's regulations implementing section 18(b)(3) appear in Rule 92(a), Rules of Practice and Procedure. See n. 2, *supra*.

### DISCUSSION

The discussion which follows will be divided into two parts. The first part will consist of an analysis of the merits of the application concerning all three shipments *on the assumption* that the filing of 6th and 11th revised pp. 362 corrected the inadvertent error of failing to file rates which the carrier and shipper had agreed upon prior to the shipments and *that other provisions of the tariff permit special docket relief to be granted*. The second part will explain why, in my judgment, Shipment No. 1 does not qualify for special docket relief.

"In considering an application for waiver, the Commission is obliged to determine whether the criteria established by the four provisos of section 18(b)(3) have been satisfied." *U.S. Department of Agriculture v. Waterman Steamship Corporation*, 20 F.M.C. 644, 647 (1978).

### PART I

#### THE FIRST PROVISO

The first proviso contains two requirements. It must be shown that the error qualifies for remediable action and that granting the relief requested will not result in discrimination among shippers. Both requirements have been met.

The evidence demonstrates that after agreeing to publish a lower rate, TFL failed to do so because of inadvertent clerical error. In circumstances in which the carrier's intent to publish a lower rate has been communicated to the shipper and the shipper is then charged more than he understood the rate to be, special docket relief is warranted and has been authorized. *U.S. Department of Agriculture v. Waterman Steamship Corporation, supra; Union Carbide Corporation v. Gulf European Freight Association on Behalf of Sea-Land Service, Inc.*, 18 SRR 1675 (1979), administratively final per FMC notice served March 26, 1979.

During the relevant time period<sup>26</sup> there were no shipments of the same or similar commodity. Thus, approval of the application is not likely to result in discrimination among shippers. However, as an added precaution, the order, which follows, contains additional safeguards in the event there were other shippers similarly situated.

#### THE SECOND PROVISO

The corrective or conforming tariff pages (6th and 11th revised pp. 362) were filed and became effective September 10, 1979, and October 4, 1979, respectively. Those pages set forth the agreed rate and were filed before the filing of the application for tariff relief. These new tariff

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<sup>26</sup> The relevant time period for the purpose of prevention of discrimination is the period from the date of agreement to publish a reduced rate to the date of filing the conforming tariff. *Boise Cascade Corp. v. Sea-Land Service, Inc.*, 18 SRR 1041, 1047 (1978), administratively final per FMC Notice served November 13, 1978. See also *Application of Yamashita-Shinnihon Line for the Benefit of Nisso-Iwai American Corporation*, 22 F.M.C. 674 (1980).

pages set forth the rates on which waiver is based and were timely filed. This meets the requirements of the second proviso. Cf. *Munoz y Cabrero v. Sea-Land Service, Inc.*, 20 F.M.C. 152 (1977).

### THE THIRD PROVISIO

This application was filed pursuant to the revised Commission Rules governing special docket applications. Under the revised rules, the filing of the application meets the requirements of the third proviso.<sup>27</sup>

### THE FOURTH PROVISIO

The fourth proviso requires that the application be filed within one hundred eighty days from the date of shipment. The shipments were made on September 3, 1979, and October 1, 1979. The application was filed on January 15, 1980. I find that the application was filed within one hundred eighty days of the shipment. This satisfies the requirements of the fourth proviso.

## PART II

Shipment No. 1 does not qualify for special docket relief, by way of waiver, because TFL did not have an effective tariff on file showing rates and charges for through transportation from Richmond to foreign ports as required by section 18(b)(1) of the Shipping Act, 1916, 46 U.S.C. 817(b)(1)<sup>28</sup> and the Commission's Regulations implementing that statute, 46 CFR Part 536.

It is evident that TFL intended that its new intermodal tariff contain rates and charges for a through transportation service from Richmond, but it failed to fashion a tariff to fit. The infirmity lies in the failure of the tariff to hold out the performance of a through transportation

<sup>27</sup> Rule 92(a)(4), 46 CFR 502.92(a)(4), provides:

By filing, the applicant(s) agrees that

(1) if permission is granted by the Commission

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

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

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

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

<sup>28</sup> Section 18(b)(1) provides in pertinent part:

From and after ninety days following enactment hereof every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement.



service from Richmond to a foreign port and the failure, therefore, "to plainly show the places between which freight will be carried."

"Holding out is important not only because of the significance historically given to it," *Interstate Commerce Commission v. AAA Car Drivers Exchange, Inc.*, 340 F. 2d 820, 825 (2 Cir. 1965), but because of the stress placed upon it by the Commission in its Regulations governing intermodal tariffs containing through rates and through routes in the foreign commerce of the United States. In those regulations the Commission has defined a "participating carrier" in an intermodal tariff as "Any carrier holding out to perform a transportation service over a through route."<sup>29</sup>

It is true that Rule 1, Section 4 shows that the scope of the tariff is from particular West Coast ports, including Richmond, to particular foreign destinations, including Bremerhaven. But this hardly can be construed as the requisite holding out contemplated by the Commission's Regulations. Indeed, the Tariff itself confirms this conclusion.

Sandwiched between a page entitled "Participating Rail and Motor Carriers"<sup>30</sup> and Tariff Rule 1,<sup>31</sup> showing the scope of the Tariff, there is an untitled page reciting that:<sup>32</sup>

This Section contains General Rules and Regulations Applying to intermodal transportation of commodities moved herein. For specific provisions applying to Rail Carriers' participation herein, see Rules 100 to 111.

The unmistakable meaning of those words is that, unless Rules 100 through 111 show a specified transportation service offered by a particular rail carrier, the tariff does not hold out that such service is offered. For example, if Western Pacific Railroad Company (WP -- a participating rail carrier) is not shown in Rule 100 as an offerer of a CY service from a San Francisco terminal location (and at a glance it may be seen that it is not so listed), manifestly there is no holding out of such service over a through route by TFL in participation with WP from San Francisco, even though (as Rule 100 also reveals) TFL does hold out a container yard service from San Francisco in participation with ATSF. Thus, because ATSF is not shown in Rule 100 to offer a CY service from its Richmond terminal location and because no provision is made elsewhere in Rules 100 through 111 for such service (or even for division of revenue), the tariff can scarcely be considered to hold out or to authorize the performance of a transportation service over a through route from Richmond to any foreign port. Nothing said herein concerning the failure of the tariff to hold out the service should

<sup>29</sup> 46 CFR 536.8.

<sup>30</sup> TFL's Tariff, p. 6.

<sup>31</sup> *Id.* Rule 1 begins at p. 10 and continues on p. 11.

<sup>32</sup> *Id.*, original p. 9.

be construed to constitute a finding that TFL did not otherwise undertake to provide such common carrier service.

I am mindful that the Routing Section of the Tariff does show what purports to be a routing from ATSF's terminal in Richmond to the interchange point of Savannah. But this routing, even if correctly numbered to show its nexus with Rule 107,<sup>33</sup> does nothing to alter the fact that the Tariff's Rules, which the Tariff user is directed to consult to ascertain the service offered, do not hold out an intermodal service from the ATSF terminal at Richmond. Moreover, the routing does not hold out the particular service provided by TFL to SPMT -- a CY service.

Two other matters remain to be considered in regard to shipment No. 1. In Appendix I TFL suggests that the failure to show an ATSF service at Richmond "should not result in discrimination against the shipper" and that such failure "could be stated as California points since same divisions of revenue payable to the rail carrier exist from all California points and therefore by common points."

Turning to the latter suggestion first, the short answer is that while the Tariff could have stated the division of revenues as "California points," the fact is that it did not.

The suggestion concerning discrimination, which is taken to mean that if the application is denied then a discrimination might result, is simply not well taken. The application states that there were no other shipments of canned goods during the relevant time period. In the light of TFL's entire presentation, this must be construed to mean that there were no other shipments of canned goods (except, of course, Shipment No. 2) from any West Coast port to Bremerhaven or any other Rate Group 2 or 3 discharge port. Under the circumstances a determination that Shipment No. 1 does not qualify for special docket relief by way of waiver could not result in discrimination amongst shippers.

Moreover, the dismissal of the application, insofar as Shipment No. 1 is concerned, is not likely to result in harm to SPMT. The holding in connection with Shipment No. 1 is that there was no effective tariff on file at the time of shipment authorizing through transportation of

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<sup>33</sup> Whatever consequences the errors in the Routing Section, Section 5, of the Tariff may have, those errors are not deemed material to any of the issues in this proceeding. Thus, the failure to show a Route 107 in Section 5 at any pertinent time and the failure to include UP terminals in Route 140 until March 16, 1980, will not bar granting relief for Shipment Nos. 2 and 3. March 16, 1980 was within 180 days of the date of shipment of Shipment No. 3, but more than 180 days after the date of shipment of Shipment No. 2. Nevertheless, if the failure to include UP terminals had been held to bar relief, that result probably would have applied to both shipments because the second proviso requires that a corrective tariff be filed before the special docket application is filed and the Commission has suggested that if supplemental corrections are filed after the application is filed, a new application within the 180-day time period is necessary. See *Application of Maersk Line Agency for the Benefit of Nomura (America) Corporation*, 22 F.M.C. 249, 250 n.8 (1979). Here, of course, no such new application was timely filed.

canned goods from a railroad terminal in Richmond to a foreign discharge port via the interchange point of Savannah. The failure to have an effective tariff on file at the time of shipment has not been corrected in accordance with the four provisos of section 18(b)(3) and the Special Docket Rules, 46 CFR 502.92.<sup>34</sup> Thus, the original condition still prevails, that is: -- there is no tariff authorization for the movement. Consequently, that portion of the application applicable to Shipment No. 1 is not susceptible to handling in this proceeding and must be dismissed. But the order which follows does not require TFL to collect the balance of freight charges,<sup>35</sup> because TFL "may not collect charges based on an untariffed rate," Docket No. 77-13, *First International Development Corporation v. Ships' Overseas Service Inc.*, Report served July 17, 1980, slip opinion p. 12. The upshot is that with regard to Shipment No. 1, vis-a-vis SPMT, this decision leaves TFL in the same position it was found before the filing of the application.

Finally, the question, not addressed in this proceeding, whether TFL transported property in foreign commerce without a tariff on file in violation of section 18(b)(1) of the Shipping Act, 1916, is referred to the appropriate office of the Commission's staff for investigation.

#### CONCLUSION AND ORDER

The application for permission to waive collection of a portion of freight charges on Shipment No. 1 is dismissed.

The application for permission to waive collection of a portion of freight charges for Shipment Nos. 2 and 3 is granted. It is ordered:

1. Trans Freight Lines, Inc., shall waive collection of freight charges in the aggregate amount of \$19,507.44 due it from Southern Pacific Marine Transport in connection with two shipments of Canned Goods, Commodity Code No. 053.0001, p. 362 of TFL's Tariff No. F.M.C. 8, transported from Los Angeles, California, to Rotterdam, The Netherlands, and from Portland, Oregon, to Bristol, England, on September 3, 1980, and October 1, 1980, respectively.

2. Trans Freight Lines, Inc., shall publish and file the following notice at the appropriate page in the tariff described in paragraph 1 above and at the page in the tariff where Cargo N.O.S. is shown, if different:

Notice is hereby given as required by the decision in Special Docket No. 701, that effective July 30, 1979, and continuing

<sup>34</sup> Inasmuch as Tariff Rules 65 and 60 were not changed until May 7, 1980, and August 5, 1980, respectively, the corrections were not timely filed for consideration in this proceeding.

<sup>35</sup> See, e.g., *McCrary Stores v. Sea-Land Service, Inc.*, 18 SRR 911, Initial Decision served August 31, 1978, administratively final, Notice served October 12, 1978; *A.E. Staley Mfg. Co., Decatur, Illinois v. Mamenic Line*, 20 FMC 385, 642 (1978); *Application of Sea-Land Service, Inc. for the benefit of Panasonic Co. Division of Matsushita Electric Corp.*, 19 SRR 757, Initial Decision served September 4, 1979, administratively final, Notice served October 17, 1979.

through September 9, 1979, inclusive, the rate on Canned Goods, Commodity Code No. 053.0001, p. 362 of TFL's Tariff No. F.M.C. 8, for the purposes of refund or waiver of freight charges is \$1,470.00 per twenty (20) foot container in container yard to container yard service to discharge ports in Rate Groups 1, 2 and 3, such rate not subject to CAF or BFS but such rate subject to all other applicable rules, regulations, terms and conditions of the said rate and this tariff.

3. Trans Freight Lines, Inc., shall determine whether an adjustment in brokerage due freight forwarders is required in the light of this decision and shall take such measures as are necessary to effectuate such adjustments.

4. The waiver shall not affect the land portion of the through rate.

5. Waiver of the charges and refund shall be effectuated within thirty days of service of notice by the Commission authorizing the same and Trans Freight Lines, Inc., shall within five days thereafter (a) notify the Commission of the date and manner of effectuation of the waiver and refund and (b) file with the Commission an affidavit of compliance with paragraphs 1, 2, 3, 4 and 5(a) of this order.

(S) SEYMOUR GLANZER<sup>36</sup>  
*Administrative Law Judge*

Washington, D. C.  
August 21, 1980

Editor's Note: Appendix I is included in the official docket file for this proceeding.

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<sup>36</sup> After the foregoing Initial Decision was completed and ready to be printed, I received a letter from TFL containing a duplicate of ATSF's concurrence. The concurrence certifies that ATSF asserts and concurs in all tariffs and supplements thereto filed by TFL in which ATSF is shown as a participant (limited to TFL's Tariffs ICC TFEI 301 and 302) "but only to the extent that such tariffs apply." Thus, there is nothing in the concurrence to warrant different conclusions than set forth in the text, above.

# FEDERAL MARITIME COMMISSION

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SPECIAL DOCKET NO. 741

SEATRIN INTERNATIONAL, S.A. TO BENEFIT  
FLORISTS' TRANSWORLD DELIVERY ASSOCIATION

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## ORDER ADOPTING INITIAL DECISION

*December 12, 1980*

On October 29, 1980, the Commission determined to review the Initial Decision in the above-captioned proceeding on September 26, 1980 in which Administrative Law Judge William Beasley Harris denied Seatrain International, S.A., permission to refund freight charges collected on eight containers of ceramic flower pots transported between Lisbon, Portugal and Oakland, California. Examination of the record reveals that Seatrain's application was incomplete and was therefore appropriately denied.

The Presiding Officer was concerned with inconsistencies between the U.S. Customs Declarations, Bills of Lading and tariff materials submitted in support of the application and wrote to Seatrain requesting clarification of the intermodal routing involved. When Seatrain failed to furnish tariff materials demonstrating the applicability of Tariff No. FMC No. 137 to the Lisbon, Le Havre, Galveston, Oakland route used to transport the eight containers in question, the application was dismissed.

It is the responsibility of the applicant and not the presiding officer to clearly demonstrate the tariff provisions in effect on the date of sailing and the necessary correlation between the bargained for rate and the corrected tariff pages. Although it would defeat the basic shipper protection purposes of P.L. 90-298 to demand exacting explanations of every tariff rule affecting a special docket shipment, the tariff basis for intermodal routings used should be demonstrated with reasonable clarity before an application is granted.

**THEREFORE, IT IS ORDERED,** That the Initial Decision served September 26, 1980 in this proceeding is adopted by the Commission and incorporated into this Order; and

IT IS FURTHER ORDERED, That this proceeding is terminated.

By the Commission.\*

(S) FRANCIS C. HURNEY  
*Secretary*

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\* Vice Chairman Leslie Kanuk dissenting and issuing a separate opinion. Commissioner Peter N. Teige dissenting and issuing a separate opinion.

SEATRAN INTERNATIONAL, S.A. TO BENEFIT FLORISTS' 437  
TRANSWORLD DELIVERY

DISSENTING OPINIONS

DISSENTING OPINION OF COMMISSIONER PETER N. TEIGE

I dissent. Recently, in Special Docket No. 701, *Trans Freight Lines Inc. to Benefit Southern Pacific Marine Transport*, I argued that the failure of the carrier's tariff to meet all the requirements of Section 18(b)(1) of the Shipping Act should not prevent the Commission from granting special docket relief under Section 18(b)(3), so long as the original and corrective tariffs state the charges applicable to the shipments with clarity sufficient to allow the Commission to measure the relief to be given to the shipper. My review of the record of this case leads me to the same conclusion. Seatrain's application and supporting exhibits show that its original and corrective tariffs clearly stated the charges to the Florists' Transworld Delivery Association for the movement of these shipments of flower pots. That being the case, Seatrain's application should have been granted, particularly since, unlike Special Docket No. 701, the shipper here has paid the freight and will therefore suffer financial detriment as a result of the majority's decision. The question whether Seatrain violated Section 18(b)(1) by failing to include in its tariff authority to route cargo from Portugal to France prior to loading, can be examined in a separate investigation.

VICE CHAIRMAN LESLIE KANUK, DISSENTING

I cannot agree with the majority's conclusion that the Initial Decision should be affirmed. I believe that the case should be referred back to the Administrative Law Judge for the purpose of having a decision reached as to whether the application was filed within the 180-day time limit.

The conclusion reached in the Initial Decision is that the application should be denied because there is insufficient evidence of record to determine whether it was filed in a timely fashion under the Commission's rules. The pertinent rule requires that an application for refund or waiver be filed within 180 days from the date of shipment. The date of shipment is defined as the date the vessel sails from the port at which the cargo was loaded. 46 CFR 502.92(a)(3).

The cargo in question was loaded at Le Havre, France, and there is evidence of record regarding sailing dates from Le Havre. Thus, contrary to the conclusion reached in the Initial Decision, there is information which permits a determination as to whether the application was timely filed. The concern expressed in the Initial Decision regarding the necessity for having proof of sailing dates from Lisbon is unfounded, since there were no sailings from Lisbon. Thus, Lisbon is irrelevant for the purpose of determining whether there was a timely filing.

Once a determination has been made concerning timeliness of filing, appropriate disposition of the application should follow.

## FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 741

### APPLICATION OF SEATRIN INTERNATIONAL, S.A. FOR <sup>1</sup> THE BENEFIT OF FLORISTS' TRANSWORLD DELIVERY ASSOCIATION

Permission denied to refund a \$32,455.39 portion of aggregate freight charges of \$58,880.72 collected.

#### INITIAL DECISION<sup>2</sup> OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

*Adopted December 12, 1980*

This is a special docket application under section 18(b)(3) of the Shipping Act, 1916, as amended, and Rule 92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92. The application contains a certification that the application was mailed at Oakland, California, August 13, 1980, to the Secretary of this Commission. Under Rule 92(a)(3), the August 13, 1980, date is the filing date of this application.

#### DISCUSSION

"The application for refund or waiver must be filed with the Commission within 180 days from the date of shipment. . . . Date of shipment shall mean the date of sailing of the vessel from the port at which the cargo was loaded." (*Ibid.*)

The August 27, 1980, letter referred to in the footnote above, also stated:

Please supply the date of sailing and proof thereof for the vessels *Bremen V/22* and *Italy V/42*, respectively, from Lisbon. B/L 3000352/5 of Seatrain, as you noted, is undated, but it accounts for two 40' Containers said to contain "Ceram-

<sup>1</sup> In an August 27, 1980, letter to Seatrain International, S.A., the Presiding Administrative Law Judge wrote, *inter alia*, "The information supplied in the application indicates payment for carriage of the freight was made by Harper Robinson and Company. However, there is no explanation why any refund should be made to Florists' Transworld Delivery Association rather than to Harper Robinson and Company."

In a reply letter signed by Carolyn J. Miller, Finance-Accounting, dated September 12, 1980, post-marked Weehawken, N.J., September 15, 1980 (received September 18, 1980), Seatrain International, S.A., stated, *inter alia*, "I spoke with Jim Carrier, Harper Robinson & Co., San Francisco, California who stated they acted as the local representative for F.T.D. He advised me that F.T.D. reimbursed them all monies that were paid to Seatrain on behalf of F.T.D. He also stated they have no claim in this case and requested they not be involved. If you have any questions you may reach him at 415-983-9600 during the day."

<sup>2</sup> This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).



SEATRIN INTERNATIONAL, S.A. TO BENEFIT FLORISTS' 439  
TRANSWORLD DELIVERY

ic Posy Pail Floral Containers" being aboard the *Bremen*. B/L 3000362/1 dated Lisbon, February 13, 1980, accounts for six 40' Containers and one 20' Container of the commodity "Ceramic Posy Pail Floral Containers" being aboard the *Italy*. These are the nine containers in the shipments involved in this proceeding. . . .

It is respectfully suggested you get this information to the undersigned promptly, along with any other a review by you of the application may suggest should be sent.

In its September 12, 1980, reply, referred to above, Seatrain International, S.A. wrote:

I have attached the copies of Seatrain International S.A. sailing schedules for January showing that the *Bremen 22* was scheduled to sail from Le Havre on February 9th and the February schedule showing the *Italy 42* was scheduled to sail from Le Havre on February 21st. The cargo originated in Lisbon but was not physically loaded onto the vessel in Lisbon. The cargo was loaded onto the vessel at our port of call in Le Havre. We did not have Lisbon as a port of call for the vessels. Our tariff did allow us to give Lisbon as an origin bill of lading port through to Oakland, California. I may also refer you to my exhibits A, B and C in my original application to you. These exhibits are Customs Service Cargo Declaration documents and do show the sailing dates."

Exhibits A, B and C are: A--B/L No. 3000352/5 for the *Bremen V22*, loading 4-40' containers ceramic posy pail floral containers at Le Havre for Galveston and Oakland, date of sailing 2-19-80; B--B/L No. 3000362/1 for the *Italy V42*, loading 4-40' containers ceramic posy pail floral containers at Le Havre for Houston and Oakland, date of sailing 2-25-80; and C--B/L No. 3000362/1 for the *Saratoga V/22* loading 2—40' containers, 1—20' container ceramic posy pail floral containers at Le Havre for Houston and Oakland, date of sailing 3-8-80.

Seatrain B/L 3000352/5, Exhibit D, undated, shows two 40' Containers-ceramic posy pail floral containers for the *Bremen V/22* loaded at Lisbon for Galveston and Oakland. Seatrain B/L 3000362/1, Exhibit E, dated at Lisbon February 13, 1980, shows 6-40' Containers and 1-20' Container-ceramic posy pail floral containers for the *Italy V42* loaded at Lisbon for Houston and Oakland.

There is no date, or other information as to any of the cargo leaving Lisbon. The tariff involved is Seatrain International, S.A., Westbound Continental Europe/U.S. Pacific Coast Joint Container Freight Tariff 314 ICC STLV 314 (formerly ICC No. 44) FMC No. 137, and is from Portugal not France. Thus there is no proof of the date of sailing from the port of Lisbon, nor any citation of the part of the tariff which allows the carrier to give as an origin bill of lading port, or what permits Le Havre, France, to be listed at which the Lisbon cargo was

loaded. The critical date is 180 days prior to August 13, 1980, the date this application was filed, to permit a proper determination as to whether this application was filed timely in regard to cargo leaving Portugal not France.

The last paragraph of the September 12, 1980, letter from Seatrain says, "If you have any further questions regarding this case please contact Mr. Harvey Flitter, Seatrain Lines Inc., Port Seatrain, Weehawken, New Jersey 07087. I am forwarding my entire file to Mr. Flitter who is the Vice President of Pricing and Regulatory Affairs." Under date of September 16, 1980, Mr. Flitter wrote:

Please refer to the last paragraph of our Oakland, California office's letter of September 12 and direct all future communications pertaining to the subject matter to my attention at the following address:

Seatrain Lines, Inc.  
Container Division  
Port Seatrain  
Weehawken, New Jersey 07087

Thank you for your cooperation.

The Presiding Administrative Law Judge has by his letter of August 27, 1980, provided Seatrain with opportunity to review its application and supply information to make it more complete. Seatrain has not supplied the information that permits a proper determination as to whether this application was filed timely, and the Presiding Administrative Law Judge should not be required to point out again the need for certain information or to tell an applicant what else may be needed after previously having communicated with the applicant. Therefore, because of the inadequacy of information and explanation, the Presiding Administrative Law Judge *finds* and *concludes* the application must be denied.

Wherefore, it is *ordered*:

- (A) The application is denied.
- (B) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS  
*Administrative Law Judge*

Washington, D, C.  
September 26, 1980

# FEDERAL MARITIME COMMISSION

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DOCKET NOS. 78-15, 78-17, 78-18 AND 78-19  
UNITED STATES LINES, INC. ET AL.

v.

MARYLAND PORT ADMINISTRATION

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## ORDER ADOPTING INITIAL DECISION

*December 15, 1980*

This proceeding is before the Commission on the Exceptions of Complainant United States Lines, Inc. and Respondent Maryland Port Administration (MPA) to the Initial Decision of Chief Administrative Law Judge John E. Cograve, which held that three of MPA's terminal tariff provisions violated section 17 of the Shipping Act, 1916 (46 U.S.C. section 816) but not section 16 (46 U.S.C. section 815).

### BACKGROUND

The proceeding arose from an accident occurring at the Dundalk Marine Terminal at the Port of Baltimore on March 21, 1976. On that date, two ships, *S.S. American Legend* and *S.S. Albert Maersk*, owned and operated by U.S. Lines and A/S D/S Svendborg and D/S af 1912 A/S, respectively, were berthed at the terminal and were in the process of loading and unloading containers with the use of four rented MPA-owned container cranes. A strong wind propelled the four cranes down the pier; two were blown into the water and the other two each struck one of the two ships. All four cranes and both vessels were damaged.

In February, 1977, MPA brought suit in the United States District Court for the District of Maryland to recover for damages to its cranes. Named as defendants were the two vessel owners - U.S. Lines and Svendborg - and the two stevedores hired to load or unload each of the ships on the day in question - ITO Corporation of Baltimore, and John T. Clark & Son of Maryland, Inc.

One of MPA's grounds for recovery was that three of its terminal tariff provisions exculpate it from liability arising from its furnishing the cranes. The Court, in ruling on motions for summary judgment, concluded that the Federal Maritime Commission should have the first opportunity to rule on the validity of the tariff provisions in question. The Court noted:

Accordingly, this Court will not at this time decide questions concerning the validity and construction of the contested tariff provisions . . . . I do not conclude, as has been suggested, that

the Court in this case is absolutely bound by any rulings of the FMC. What the Court wants is the FMC's interpretation of these provisions. The Court will then decide the legal questions presented under the particular facts of this case. Therefore, those defendants who wish to press these questions are instructed to file appropriate pleading with the FMC. *Maryland Port Administration v. S.S. American Legend*, 453 F.Supp. 584 (D.C. Md. 1979).

U.S. Lines, Svendborg, ITO and Clark then filed the instant complaints with the Commission, alleging that the tariff provisions subjected them to undue and unreasonable prejudice or disadvantage, in violation of section 16 First, and constituted unjust or unreasonable regulations or practices relating to or connected with the receiving, handling, storing or delivering of property in violation of section 17. The Commission's Bureau of Hearing Counsel and the California Association of Port Authorities intervened.

The tariff provisions in issue are as follows:

**Section VII, LIABILITY, Paragraph (2):**

The Terminal Operator accepts no responsibility for damages or accidents occurring when its equipment and/or operator or employees are furnished to perform work for others.

**Section VII, LIABILITY, Paragraph (3):**

All persons to whom berths, wharves, transit sheds, mechanical equipment or other facilities have been assigned shall be responsible and liable to the terminal operator for any damage occurring to such property during their tenancy, occupancy and/or use without regard to whom shall cause the damage.

**Section VIII, MISCELLANEOUS CHARGES, Paragraph (4) B4:**

The terminal assumes no liability for claims, losses, or expenses by reason of property damage, personal injury or death which may result from the use of the crane, except that caused by structural or mechanical failure and not occasioned by an act or omission on the part of the party renting the crane.

The Presiding Officer concluded that the tariff provisions were unreasonable to the extent they relieved MPA from liability for its own negligence, and that they were, therefore, violative of section 17. He found, however, that Complainants failed to carry their burden of establishing that the tariff provisions were unreasonably prejudicial or disadvantageous in violation of section 16 First.

**EXCEPTIONS AND POSITIONS OF THE PARTIES**

MPA excepts to the Presiding Officer's conclusion that its tariff violates section 17, and argues that this conclusion was based upon a series of erroneous findings and the failure to make other, appropriate findings. MPA contends that its insurance premiums reflect the exist-

ence of the exculpatory tariff provisions, and that the savings resulting from the exculpatory clauses are passed on to its users because MPA's rates to its users are based upon analysis of its operating costs. This "rate relationship" between the exculpatory clauses and the rates charged, MPA argues, justifies those provisions under *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, 360 U.S. 411 (1959). Thus, MPA excepts to the Presiding Officer's conclusions that MPA's rates and charges are dictated by competitive necessity and that any savings realized by the port inure to the port's and not the users' benefit.

MPA also excepts to the Presiding Officer's failure to rule on its proposed findings of fact relating to the State of Maryland's costs in subsidizing the port and its users' ability to benefit from those facilities without the necessity of making capital investments. MPA argues that these economic benefits, derived from the use of the port facilities, constitute a *quid pro quo* which justifies the exculpatory clauses.

MPA alleges that the Presiding Officer erred by considering irrelevant MPA's requested findings of fact determining that both steamship lines and stevedores are "users" of MPA's container cranes. Such a determination is relevant to this proceeding, MPA argues, and is supported by the record. According to MPA, such findings would be consistent with the Commission's decision in *West Gulf Maritime Association v. Port of Houston Authority*, 22 F.M.C. 420, 560 (1980), in which it was determined that vessel agents were properly considered users under the tariffs in issue in that proceeding.

Similarly, MPA objects to the Presiding Officer's conclusion that MPA's proposed findings of fact dealing with control over the loading and unloading operations during use of MPA facilities and equipment were not relevant to the issues in this proceeding. The Presiding Officer, MPA contends, could have considered the tariff provisions in light of the evidence MPA presented that the users have control over the cranes during the time the cranes are most subject to damage. MPA contends that the general rule against exculpatory provisions - expressed in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), by the United States Supreme Court, and applied to public terminals by the Commission in *West Gulf Maritime Association v. City of Galveston*, (West Gulf) 22 F.M.C. 101 (1979), 22 F.M.C. 401 (1980) and *Lucidi v. Stockton Port District*, 22 F.M.C. 19 (1979) - is inapplicable to MPA, because MPA is not a public utility in a monopolistic situation. MPA states that reliance on *West Gulf* and *Lucidi* is not consistent with the ruling in *Southwestern Sugar*.

MPA also excepts to the Presiding Officer's failure to determine that Complainants are able but unwilling to develop their own facilities in Baltimore. MPA argues that the imposition of the exculpatory tariff items is reasonable because Complainants have chosen to benefit from

use of MPA's facilities. MPA also excepts to the Presiding Officer's granting of U.S. Lines' Motion to Quash the deposition of a U.S. Lines official. This deposition, MPA contends, would have established that U.S. Lines felt that it was profitable to operate in the Port of Baltimore without choosing to risk its own capital by developing its own container facilities. MPA contends that the Presiding Officer agreed that the information sought by MPA was relevant in that it would prove that MPA was not in a monopoly situation, but that the Presiding Officer nevertheless granted U.S. Lines' motion.<sup>1</sup>

U.S. Lines also filed an Exception, and argues that the Presiding Officer erred in finding that MPA did not violate section 16. U.S. Lines claims that MPA has applied the tariff provisions in issue inconsistently and erratically, and as proof, offers that MPA's damage claim letters normally do not make reference to the exculpatory clauses in its tariff; that in litigation, MPA's complaints filed in court do not cite the tariff as a ground for recovery; that settlements of such claims have been for relatively small amounts; and that MPA's claims for crane damage have usually been directed to stevedores and not to the steamship lines. This demonstrates, according to U.S. Lines, the "benefit or preference bestowed by the MPA upon those whom it chose to favor" in litigation.<sup>2</sup>

#### DISCUSSION AND CONCLUSIONS

The Commission is satisfied that the Presiding Officer properly defined the purpose and scope of this proceeding, and that his rulings on the Shipping Act questions raised by the tariff provisions in issue are well founded by the record and are supported by Commission precedent. For the reasons set forth below, the Commission finds that the Exceptions are without merit, and the Commission adopts the Initial Decision as its own.

Many of MPA's exceptions are grounded on its position that the Presiding Officer improperly limited the scope of the proceeding and refused to make findings on relevant matters. The Commission disagrees. The purpose of this proceeding is to determine the validity under the Shipping Act of three terminal tariff provisions, not to determine culpability for the crane accident. That issue was properly reserved by the district court in Maryland. The matter of who maintains control over the cranes is relevant to an estimate of which parties are theoretically more likely to be responsible and, therefore, liable for damage to the cranes. The issue before the Commission, however, is

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<sup>1</sup> Complainants and Hearing Counsel filed Replies to MPA's Exceptions, and generally support the Initial Decision's finding that the tariff provisions violate section 17.

<sup>2</sup> Of the remaining Complainants, Svendborg has belatedly "adopted" U.S. Lines' section 16 exception; Clark is silent on the section 16 issue; and ITO has indicated its "general agreement with Judge Cogrove's decision." Hearing Counsel and MPA state that the Initial Decision correctly concluded that there was no violation of section 16.

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the reasonableness of the exculpatory language. It is irrelevant whether a port-caused or a user-caused accident is the more likely; the Presiding Officer concluded, and the Commission agrees, that to the extent the provisions exculpate the port from liability for its own negligence, they are unreasonable.

Nor is a determination of who is a "user" of the facilities useful to the interpretation of MPA's tariff provisions. The provisions in issue refer not to "users," but rather to "persons to whom . . . facilities have been assigned," "the party renting the crane," and "others" [vis-a-vis the "Terminal Operator"]. It is by no means unclear to whom these provisions apply, and their interpretation does not require a definition of the term "user." In *West Gulf*, on the other hand, the Commission ruled on the definition of "user" because the tariffs in issue used that term in assigning and disclaiming liability. One of the tariff items challenged in that proceeding, in fact, was entitled "USER, DEFINITION OF." 22 F.M.C. at 102.

The Presiding Officer's failure to make findings advancing MPA's theory that Complainants' enjoyment of economic gains justifies the tariff, was not erroneous. There is no legal precedent or logical premise for the notion that otherwise unreasonable tariff provisions are permissible if a user subjects itself to them and is making a profit in spite of their existence. Moreover, the validity of the tariff must be adjudged as applied to any user, not merely on the basis of these particular parties' financial circumstances.

Similarly, the Presiding Officer's quashing of the U.S. Lines official's deposition was premised on his opinion that the deposition would unnecessarily broaden the scope of the proceeding. MPA's argument that the Presiding Officer agreed that the information sought was relevant is clearly based on a misreading of his Order. MPA quoted out of context a portion of the Order in which the Presiding Officer was setting forth MPA's position on the deposition issue, a position he later rejected. The Commission concurs that the information sought in the deposition is not relevant, and concludes, therefore, that the Presiding Officer's rulings on the peripheral issues raised by MPA are consistent with the specific and limited purpose of this proceeding.

MPA's arguments regarding Commission and court precedent also fail, due to a strained interpretation of the cases cited. In *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), the Supreme Court enunciated the principle that release-from-negligence clauses are invalid as a matter of law in both common carrier and contract carrier relationships. The Court explained the justification 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.

The Commission applied that general principle in the *West Gulf* and *Lucidi* cases, finding disclaimers of responsibility and indemnification requirements in two terminal tariffs to be unreasonable, in violation of section 17.

MPA's arguments that *Bisso* does not apply to the instant situation, and its suggestions that *West Gulf* and *Lucidi* were erroneously decided, are not convincing. Although *Bisso* is not controlling on Shipping Act questions, the Commission cited that decision as a gauge for reasonableness in ruling on the lawfulness of tariff provisions in *West Gulf* and *Lucidi* and applied its rationale to the indemnification issues. See also, Order on Reconsideration, *West Gulf*, 22 F.M.C. 401 (1980). MPA's attempts to distinguish itself from the towboat owner in *Bisso* or the terminal operators in *West Gulf* and *Lucidi* promote differences without distinctions. A public terminal operator such as MPA is clearly in a position such that exculpatory clauses in its tariff create an unreasonable hardship upon those who would be consequently liable for the port's own negligence. See also, *Truck and Lighter Loading and Unloading Practices at New York Harbor*, 9 F.M.C. 505 (1966).

The exception to the *Bisso* rule suggested in *Southwestern Sugar* does not justify MPA's exculpatory provisions. MPA's argument that it has established a "rate relationship" between its supposedly reduced insurance costs due to the exculpatory provisions, and the rates charged to users, is not supported by the record. Although there is some evidence that MPA's insurance costs reflect the tariff's exculpatory language, there is no evidence that MPA's rates for the use of its facilities would be any higher absent those provisions. The record indicates that MPA's rate structure reflects what the traffic will bear, subject to the influence of what its competitor ports are charging. MPA has not shown that its rates reflect savings derived from the existence of the exculpatory clauses, and therefore the *Southwestern Sugar* exception to the *Bisso* principle has not been shown to be applicable to MPA's tariff.

In conclusion, MPA has failed to justify the exclusion of its tariff from the application of the Commission's rulings that exculpatory tariffs of terminal operators are unreasonable to the extent they relieve the terminal operators from liability for their own negligence. MPA's exceptions will, therefore, be denied.

The Commission also concludes that the Presiding Officer correctly resolved the section 16 issue. MPA's strategy in asserting, defending and settling damage claims does not provide a reliable indication that MPA has enforced its tariff in an "inconsistent" manner, nor have Complainants demonstrated how others have benefitted from MPA's alleged preference or how Complainants have suffered prejudice. Moreover, even if MPA had been shown to have preferred others in its enforcement of its tariff, it does not appear that an appropriate remedy



**UNITED STATES LINES, INC. ET AL. V. MARYLAND PORT 447  
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would be to order stricken from the tariff the selectively enforced provisions. U.S. Lines' exception will also be denied.<sup>3</sup>

**THEREFORE, IT IS ORDERED,** That the Exceptions of United States Lines, Inc. and Maryland Port Administration 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 Maryland Port Administration amend and refile within 30 days its tariff section VII, Paragraphs (2) and (3) and section VIII Paragraph (4)B4 to conform to this decision within 30 days; and

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

By the Commission.

**(S) FRANCIS C. HURNEY**  
*Secretary*

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<sup>3</sup> Any exceptions not specifically addressed have nevertheless been fully reviewed and considered, and found to be without merit.

# FEDERAL MARITIME COMMISSION

NOS. 78-15, 78-17, 78-18, AND 78-19

UNITED STATES LINES, INC., ET AL.

v.

MARYLAND PORT ADMINISTRATION

Sections VII(2), VII(3) and VIII(4)B4 of the Maryland Port Administration's Terminal Services Tariff No. 3 (FMC 4) found to be unjust and unreasonable in violation of section 17 of the Shipping Act, 1916.

The Maryland Port Administration found not to have violated section 16 of the Shipping Act, 1916.

*Richard E. Hull, M. Hamilton Whitman, Jr., Kieron F. Quinn and Russell T. Weil* for complainant, United States Lines, Inc.

*R. Roger Drechsler and J. Paul Mullins* for complainant, John T. Clark & Son of Maryland, Inc.

*Donald A. Krach* for complainant I.T.O. Corporation of Baltimore.

*David W. Skeen and Bert I. Weinstein* for complainants, A/S D/S Svendborg and D/S af 1912.

*Robert L. Ferguson, Jr., Robert R. Harrison, III, Scott Livingston and Frederick G. Savage* for respondent Maryland Port Administration.

*Burt Pines, Jack L. Wells and Frank Wagner* for intervenor, California Association of Port Authorities.

*Aaron W. Reese and Polly Haight Frawley*, as Hearing Counsel.

## INITIAL DECISION<sup>1</sup> OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

*Adopted December 15, 1980*

These cases arise out of a major accident which occurred at the Dundalk Marine Terminal in the Port of Baltimore on March 21, 1976. Briefly, it appears that on that date two container ships, the *SS American Legend* and the *SS Albert Maersk*, were berthed or in the process of being berthed in adjacent slips at the Dundalk facility and were being unloaded or about to be unloaded through the use of two container cranes owned by the Maryland Port Administration. At about 1:15 p.m., two cranes assigned to the *SS Albert Maersk* were blown down the pier, one crane striking the *Albert Maersk* and the other striking the

<sup>1</sup> 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)

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*American Legend*. There was substantial damage to the two ships and to the two cranes that struck the ships and the total loss of the two cranes that rolled into the water.

In February 1977 the Maryland Port Administration (MPA) filed suit in the United States District Court for the District of Maryland. In its amended complaint, MPA named as defendants (1) the *American Legend*, in rem; (2) United States Lines, the owner of the *American Legend*; (3) ITO Corporation of Baltimore, the stevedore hired by U.S. Lines on the day of the accident; (4) the *Albert Maersk*, in rem; (5) A/S D/S Svendborg and D/S af 1912 A/S (Svendborg), the owners of the *Albert Maersk*; (6) Maersk Line Agency, the ship's agent for the *Albert Maersk*; and (7) John T. Clark & Son of Maryland, Inc., the stevedore hired to unload the *Albert Maersk* on the day of the accident.

The filing of the complaint led to a series of counterclaims, cross claims, and third-party claims and at least one motion for summary judgment by each of the parties.

Count 1 of the complaint before the District Court sought recovery under a theory of contract based on certain MPA tariff provisions which MPA argued in a motion for summary judgment exculpated MPA from any and all liability arising out of its furnishing of terminal facilities. The defendants in the District Court argued that the tariff provisions were void as against public policy. MPA then countered by raising the question of primary jurisdiction contending that any challenge to the contested tariff provisions must be made before the Commission in the first instance.

In *Maryland Port Administration v. SS American Legend*, 453 F. Supp., 584 (1979), Judge Harvey concluded that the Commission should have the first opportunity of determining the validity and reasonableness of the tariff provisions in question, and went on to say:

Accordingly, this Court will not at this time decide questions concerning the validity and construction of the contested tariff provisions. . . . I do not conclude, as has been suggested, that the Court in this case is absolutely bound by any rulings of the FMC. What the Court wants is the FMC's interpretation of these provisions. The Court will then decide the legal questions presented under the particular facts of this case. Therefore, those defendants who wish to press these questions are instructed to file appropriate pleading with the FMC.

U.S. Lines, Svendborg, ITO and Clark each filed complaints against MPA alleging that Section VII, paragraph (2), and Section VIII, paragraph (4)B4 of MPA's Terminal Services Tariff No. 3 (FMC No. 4), effective November 13, 1975, subjected complainants to undue and unreasonable prejudice or disadvantage, in violation of section 16 First of the Shipping Act, 1916, and constituted unjust or unreasonable regulations or practices relating to or connected with, the receiving,

handling, storing or delivering of property in violation of section 17 of the Shipping Act.

### THE STIPULATION

The parties to this proceeding have entered into the following stipulation:

1. Maryland Port Administration [hereinafter MPA] is an agency of the State of Maryland which owns the port terminal facilities at Dundalk Marine Terminal in the Port of Baltimore. These facilities include Berths 11 and 12 which are designed for handling of containerized cargo. Four IHI, Ltd., manufactured container cranes are located at Berths 11 and 12. The attached drawing No. PF-1-11/170 "Existing Facility Plan" (Exhibit 1) of Maryland Port Administration Dundalk Marine Terminal shows the location of Berths 11 and 12 and container cranes 9, 10, 11 and 12. Berths 11 and 12 are adjacent piers running approximately east and west. Container cranes run parallel to the berth space on rails. Cranes 9 and 10 are located at Berth 11. Cranes 11 and 12 are located at Berth 12.
2. This case arises out of an accident that occurred at Dundalk Marine Terminal on March 21, 1976. On that date, the SS ALBERT MAERSK, owned and operated by A/S D/S Svendborg and D/S of 1912 A/S (hereinafter Svendborg), was docked at Berth No. 11, and at the time of the accident, was in the process of loading and unloading containers through the use of two MPA container cranes 9 and 10. At the time of the accident, the SS AMERICAN LEGEND, owned and operated by United States Lines, Inc., was either berthed, or in the process of being berthed, at adjacent Berth No. 12 and preparations were underway to begin operating cranes numbers 11 and 12, for the purpose of loading or discharging containers from the AMERICAN LEGEND.
3. The SS ALBERT MAERSK docked at approximately 6:00 a.m. on March 21, 1976 and was scheduled to begin loading and discharging containerized cargo at 8:00 a.m. At approximately 7:00 a.m., MPA employees began to untie and start up cranes 9 and 10 at Berth 11 so they would be available for loading and discharging the ALBERT MAERSK beginning at 8:00 a.m. General agents for Svendborg, Moller Steamship Co., had contracted with John T. Clark & Son of Maryland, Inc., as stevedore to load and discharge the ALBERT MAERSK. A copy of that contract is attached hereto as Exhibit 2. Two ILA crane operators were employed by Clark to operate cranes 9 and 10.
4. United States Lines had contracted with I.T.O Corporation of Baltimore as stevedore to load and discharge the SS AMERICAN LEGEND. A copy of that contract is attached as Exhibit 3. Two ILA crane operators were employed by I.T.O. to operate cranes 11 and 12; ITO employee William

Jarriel to operate crane no. 11 and ITO employee Melvin Jones to operate crane no. 12. The SS AMERICAN LEGEND was scheduled to arrive and dock at Berth 12 at 1:00 p.m. At approximately 12:00 p.m. employees of the Maryland Port Administration began untying and starting up cranes 11 and 12. At the time of the accident, Melvin Jones was in the operator's cab of crane no. 12. William Jarriel had not yet boarded crane no. 11. MPA employees Wayne Bridges and Chang Park were aboard cranes 11 and 12 respectively. Their exact position at the time of the accident is in dispute. At the time of the accident, I.T.O. personnel had boarded the vessel and were either unlashng or preparing to unlash containers, although neither crane no. 11 nor 12 had discharged any containers. To date, MPA has not billed I.T.O. for the use of the container cranes on March 21, 1976.

5. At Dundalk Marine Terminal there are seven container cranes and four Whirley cranes owned by MPA and used for loading and discharging vessels. The operation of container cranes while loading and discharging is by ILA personnel who are not MPA employees. The operation of the Whirley cranes while loading and discharging is by MPA crane operators, who are not ILA members.

6. Normally MPA employees untie and start up the container cranes, position the crane adjacent to the vessel and lower the crane boom over the hatch where cargo operations are expected to begin.

7. At approximately 1:15 p.m. on March 21, 1976, cranes numbers 11 and 12 were blown down the pier, off the end of the pier and into the water by a high wind. At about the same time, cranes 9 and 10 were also blown down the pier. Crane no. 10, struck the mast of the AMERICAN LEGEND and crane no. 9 struck the superstructure of the ALBERT MAERSK. Both vessels and the four cranes sustained physical damage.

8. The stevedoring gangs working the SS ALBERT MAERSK had taken a break for lunch between 12:00 and 1:00 p.m. These two gangs had started working the vessel again at 1:00 p.m.

9. Although the SS AMERICAN LEGEND was scheduled to berth at 1:00 p.m., it was a few minutes late. During berthing, four tugs were assisting the AMERICAN LEGEND. At about 1:07 p.m., the vessel was in position adjacent to Berth No. 12 where it was to be finally located. By the time of the occurrence, the gangway was down, all of the mooring lines were out and all but one of the lines were secure to the pier.

10. The Maryland Port Administration is an agency and instrumentality of the State of Maryland, created in 1956 by enactment of the Maryland State Legislature.

11. The Maryland Port Administration owns and maintains Dundalk Marine Terminal and several other pier and terminal facilities in Baltimore.

12. Dundalk Marine Terminal was, on March 21, 1976, the only public container terminal facility in Baltimore. The only other container terminal facility in Baltimore on March 21, 1976, was located at the Sea Land Terminal. It is privately owned by Canton Company and is privately operated by Sea-Land Service, Inc.

13. The history of MPA Limitation of Liability Provisions and Crane Rental Rates 1962-1976 applicable to Dundalk Marine Terminal is attached hereto as Exhibit 4.

14. The Maryland Port Administration filed with the Federal Maritime Commission a document entitled Terminal Services Tarrif [sic] No. 3 effective November 13, 1975. The three tariff provisions under challenge in these proceedings are as follows:

Section VII, LIABILITY, Paragraph (2) reads as follows:

The Terminal Operator accepts no responsibility for damages or accidents occurring when its equipment and/or operator or employees are furnished to perform work for others.

Section VII, LIABILITY, Paragraph (3) contains the following provisions:

All persons to whom berths, wharves, transit sheds, mechanical equipment or other facilities have been assigned shall be responsible and liable to the terminal operator for any damage occurring to such property during their tenancy, occupancy and/or use without regard to whom shall cause the damage.

[In] Section VIII of the Tariff, entitled MISCELLANEOUS CHARGES, Paragraph (4) B4, there is the following provision with regard to liability for the use of the container cranes:

The terminal assumes no liability for claims, losses, or expenses by reason of property damage, personal injury or death which may result from the use of the crane, except that caused by structural or mechanical failure and not occasioned by an act or omission on the part of the party renting the crane.

15. Terminal Service Tariffs applicable to MPA facilities between 1962 and 1976 are filed herewith as Exhibit 5. Those tariffs comprise the following:

- (a) MPA Terminal Services Tariff No. 3, FMC-T No. 4 and revisions thereto issued September 15, 1975, effective: October 15, 1975 (postponed to November 13, 1975).

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- (b) MPA Terminal Services Tariff No. 2, FMC-T No. 3 and revisions thereto issued October 1, 1974, effective: October 15, 1974.
- (c) MPA Terminal Services Tariff No. 1A, FMC-T No. 2 and revisions thereto, issued October 25, 1972, effective: November 1, 1972.
- (d) Maryland Port Authority Terminal Services Tariff No. 1, FMC-T No. 1 and revisions thereto, issued February 1, 1971, effective: February 5, 1971.
- (e) Baltimore Marine Terminal Association Terminal Services Tariff No. 1, FMC Agreement No. T 1941, FMC-T No. 1 and revisions thereto, issued January 1, 1967, effective February 1, 1967.
- (f) Maryland Port Authority Terminal Services Tariff No. 1, FMC-T No. 1 and revisions thereto, issued January 25, 1962, effective: February 1, 1962.

16. On March 21, 1976, the Maryland Port Administration was insured against legal liability to third parties with primary insurance in the amount of \$500,000.00 for bodily injury and \$200,000.00 for property damage, with excess insurance available up to an amount of \$50,000,000.00 and was insured against property damage to the container cranes at issue in the amount of \$7,920,000.00.

A. MPA's container cranes were insured against physical damage on March 21, 1976, under the following policies:

COMPANY	POLICY NUMBER	COVERAGE	DEDUCTIBLE	EFFECTIVE DATE
Commercial Union Insurance Co.	U-281819	All risk	1% of the loss or \$1000, whichever is the greater amount	11/25/75
Federal Insurance Company	6291503	All risk	Same	11/25/74
United States Fire and Guaranty	SP-161622	All risk	Same	11/25/74
Maryland Prop-Casualty	CM-09911167	All risk	Same	11/25/75

B. MPA was insured against liability for injury and damage to other persons on March 21, 1976 under the following policies:

COMPANY	POLICY NUMBER	COVERAGE	DEDUCTIBLE	EFFECTIVE DATE
Hartford Accident and Indemnity Company	30C625312E	General Liability	None	1/1/76
North River Ins. Co.	X53500	Excess Liability	Underlying Limits	1/1/74
Lloyds	75120904	Same	Same	1/1/76
	75120904A	Same	Same	1/1/76
	75120904B	Same	Same	1/1/76
	77010212	Same	Same	1/1/76
	75120904C	Same	Same	1/1/76
	75120904D	Same	Same	1/1/76
Admiral Ins. Co.	6CX0446	Same	Same	1/1/76
Royal Globe Ins. Co.	H203705	Terminal Operators Liability	\$10,000	4/1/75

17. The dates of acquisition, completion of installation, beginning of operation, purchase price and value for property damage insurance purposes for each container crane at DMT is listed on Exhibit 8.

18. Ronald G. Shock is and for the last ten years has been Staff Executive Assistant with the Maryland Port Administration and for that period of time has acted in the capacity of insurance manager for the Maryland Port Administration, with responsibility within MPA for placement of insurance and supervision of the insurance and claims program with respect to third-party liabilities and property damage on MPA equipment and facilities.

19. The MPA does not directly negotiate its insurance with insurers or brokers. As part of his duties, Mr. Shock drafts specifications for insurance coverage and forwards them to the State Treasurer for submission to insurance agents and brokers for bid. Specifications drafted by Mr. Shock for MPA's comprehensive general liability insurance for the period January 1, 1976 to January 1, 1979, are attached hereto as Exhibit 8B.

20. Mr. Shock has never sought nor been quoted alternate premium rates which would reflect the presence or absence of any of the tariff provisions set out in paragraph 14 herein.

21. No insurance company which insured MPA's container cranes against physical damage or against liability to third persons for the period including March 21, 1976, provided the MPA with financial data concerning insurance savings, if any, resulting from the tariff provisions at issue.

22. Mr. Shock in ten years as insurance manager of the MPA, has never (on request or on his own initiative) made a study or report of the effect of the tariff provisions set out in paragraph



14 herein or their predecessors upon the premiums charged by the MPA's liability insurers in respect of the MPA's liability to third parties and he knows of no such study or report made by any other person or entity.

23. Mr. Shock in ten years as insurance manager of the MPA, has never (on request or on his own initiative) made a study or report of the effect of the tariff provisions set out in paragraph 14 herein or their predecessors upon the premiums charges [sic] by the MPA's property damage insurers in respect of damage to the MPA's container cranes and he knows of no such study or report made by any other person or entity.

24. Mr. Shock did not draft and did not assist in drafting the limitation provision contained in Section VIII(4) B4 of the tariff referred to in paragraph 14 herein, when the first container crane was installed in approximately 1969.

25. Svendborg vessels have been operated in containerized service in the Port of Baltimore since 1974 by Svendborg's general agent, Moller Steamship Co. and Maersk Line Agency who received a copy of MPA Terminal Services Tariff No. 2 and were on MPA's mailing list of tariff subscribers for changes and tariff reissues thereafter.

26. Since the first receipt of MPA's tariff, neither Svendborg nor its agents have made any comments or complaint concerning the liability provisions now found in Sections VII(2), VII(3) and VIII(4) B4 of MPA Tariff No. 3.

27. ITO Corporation of Baltimore and its predecessor Jarka Corporation of Baltimore, has been doing business as a stevedore in the Port of Baltimore since approximately 1925, and as a terminal operator since the early 1960's. During the time that it has operated in Baltimore, it has received copies of MPA tariffs and changes.

28. United States Lines has been operating its vessels in the Port of Baltimore since before 1962 and U.S. Lines received a copy of MPA's Terminal Services Tariff and has received copies of each tariff change and newly issued tariffs since that time.

29. Since its first receipt of MPA's tariff, neither U.S. Lines nor its agents have made any comments or complaints concerning the liability provisions now found in Sections VII(2), VII(3) and VIII(4) B4 of MPA Tariff No. 3.

30. Each stevedoring company operating at Dundalk Marine Terminal works for more than one ocean carrier.

31. In the documents produced by the MPA in response to U.S. Lines' Request for Production (as modified by the Stipulation between U.S. Lines, Svendborg and the MPA regarding that Request filed on or about September 26, 1978), MPA has not produced any internal communications or memoranda, interoffice memoranda, interagency memoranda or communi-

cation with any other state or federal agency . . . which contains references to (a) the rental rate for container cranes, or (b) wharfage charges, or (c) dockage charges, and which specifically refer in any way to the three tariff provisions set out in paragraph 14 above.

In addition to the facts stipulated above, the parties offer over two hundred proposed findings of fact. A good many of these proposed findings are not contested and some are merely restatements of matters covered in the stipulation. At least two parties to the proceeding consider the additional proposals irrelevant to the precise issues presented by these cases.

As Hearing Counsel state:

The voluminous record in this proceeding, and the far-reaching approach of Respondent Maryland Port Administration (MPA) on brief, tend to obscure the limited and uncomplicated issues raised by Complainants. . . .

The questions presented are the validity of the challenged tariff provisions under sections 16 and 17 of the Shipping Act, 1916.<sup>2</sup> Moreover, there is a specific context in which these tariff provisions are to be considered. As noted earlier, MPA in part based its court suit against the defendants (the four complainants in these cases) on the ground that MPA's tariff relieved it of all liability arising out of its furnishing terminal facilities. It was in this context that the Court, under the doctrine of primary jurisdiction, gave the complainants here an opportunity to obtain from the Commission its interpretation of the tariff provisions. The Commission is not called upon to determine the cause of the damages suffered by the respective parties as a result of the incident at Dundalk; nor is the Commission called upon to establish the culpability of any of the parties, for as Judge Harvey said:

What the Court wants is the FMC's interpretation of these provisions. The Court will then determine the legal questions under the particular facts of this case.

Virtually all of the additional proposed findings that are contested go to the question of whose "negligence" caused the incident at Dundalk--a question which the District Court has reserved to itself. While I have found nothing in the law of primary jurisdiction which would preclude an attempt by me or the Commission to resolve this question, I view such an attempt as an unwarranted encroachment on territory clearly reserved by the Court to itself.<sup>3</sup> The doctrine of primary jurisdiction

<sup>2</sup> On complaint Clark and ITO level the broadside charge that the tariff provisions violate sections "814 through 817" of the Act. On brief, however, the arguments are restricted to sections 16 and 17.

<sup>3</sup> This is the precise approach taken by the Commission in *I. Charles Lucid v. Stockton Port District*, 22 F.M.C. 19 (1979).

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was established to allow an administrative agency such as the Commission to bring to bear its expertise on questions which the agency is better equipped to answer than are the courts. The question of the ultimate liability for the incident at Dundalk is not such a question. Accordingly, except for a few findings made later which are relevant to a particular argument made by one of the parties, all of the other proposed findings have been considered and found either not relevant to the issues properly before me, redundant to the facts stipulated, or not established by the record in these proceedings.

DISCUSSION AND CONCLUSIONS

MPA's basic position is that once a "user" accepts an "assignment" by MPA of a container crane, a contract is formed and that contract incorporates the rates, charges and conditions of MPA's terminal services tariff--including, of course, the exculpatory clauses at issue here. It is MPA's contention that "as a general rule," such exculpatory clauses are valid "as a matter of law"; that the burden is on complainant to prove that "special circumstances exist to qualify for an exception to the general rule"; and that complainants have failed to sustain that burden.

Except for a somewhat belated attempt to distinguish the cases in its Reply Brief, MPA's argument virtually ignores the relevant precedent which establishes the exception to MPA's "general rule." A review of this precedent will allow the issues presented here to be viewed in their proper light. First, however, MPA's contentions with respect to the individual tariff provisions in issue will be dealt with.

Section VII, paragraph 3, of the tariff provides:

All persons to whom berths, wharves, transit sheds, mechanical equipment or other facilities have been assigned shall be responsible and liable to the Terminal Operator for any damage occurring to such property during their tenancy, occupancy and/or use *without regard to whom shall cause the damage.* (Emphasis added.)

It is this provision which, in part at least, affords the basis of MPA's claim for damages against complainants in the District Court. Simply stated, it is the position of MPA that any person to whom it has assigned berths, wharves, transit sheds, mechanical equipment or other facilities is absolutely liable for any loss of or damage to the assigned facilities while so assigned, without regard to fault, even if the user is not at fault in any respect, or should the loss or damage be caused in whole or in part by MPA itself.

In the District Court action U.S. Lines, Inc., and Svendborg (complainants in these cases) are seeking to recover for damage to their respective vessels resulting from the same incident in which it is alleged that the property of MPA was lost or damaged. MPA, as a defense to

these actions, contends it has no liability pursuant to the provisions of Section VII, paragraph 2, and Section VIII, paragraph (4)B4, of its tariff which provide:

Section VII, paragraph 2:

The Terminal Operator will not be liable for any delay, loss or damage arising from strikes of any persons in their employ or in the service of others nor for any causes arising therefrom, nor any causes unavoidable or beyond its control. *The Terminal Operator accepts no responsibility for damages or accidents occurring when its equipment and/or operators or employees are furnished to perform work for others.* (Emphasis added.)

Section VIII, paragraph (4)B4:

The Terminal assumes no liability for claims, losses, costs or expenses by reason of property damage, personal injury or death which may result from the use of the crane, except that caused by structural or mechanical failure and not occasioned by an act or omission on the part of the party renting the crane.

MPA contends that a user of its facilities may not recover for, and that MPA is not responsible for, property damage, personal injury or death even if such property damage, personal injury, or death is caused in whole or in part by MPA.

While it is true that parties are generally free to contract as they wish, imposing burdens and conferring benefits as they decide, indemnity and exculpatory clauses will not be sustained by the courts where the parties are not on equal footing in the bargaining process, or if one of the parties is charged with the public interest. 15 *Williston on Contracts*, §1751 (3rd Ed. 1972).<sup>4</sup>

The Commission and the Courts have recognized the vital role of terminal operators in the stream of transportation and the importance of terminals to interstate and foreign commerce. In *The Boston Shipping Association, Inc. v. Port of Boston*, 10 F.M.C. 409, 414 (1967), *collateral appeal denied sub nom. Port of Boston Marine Terminal Assoc. v. Rederi Transatlantic*, 400 U.S. 62 (1970), the Commission stated: "Terminal operators form an intermediate link between carriers and the shippers or consignees."

In *American Export-Isbrandtsen Lines, Inc. v. FMC*, 444 F. 2d 824, at 829, the Court discussed the Commission's duties as to terminals, stating:

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<sup>4</sup> For a number of instances in which businesses were found affected as public interest, see *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963); *Boston & Maine R. Co. v. Piper*, 236 U.S. 439 (1918); *Denver Consolidated Elec. Co. v. Lawrence*, 73 P. 39 (1903); *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 351 F. 2d 253 (9th Cir. 1965) *cert. denied*, 383 U.S. 936 (1966).

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Because of the vital importance of these terminals to interstate and foreign commerce, Congress in the Shipping Act of 1916 provided for their regulation by the Federal Maritime Commission and authorized it to promulgate and enforce just and reasonable regulations and practices related to or connected with the receiving, handling, storing, or delivering of property at harbor terminal facilities. . . . The power thus conferred is . . . to be used for the purpose of facilitating the free flow of commerce by guaranteeing an efficient terminal system.

In construing the role of marine terminals in the transportation of goods in interstate and foreign commerce, the Commission and Courts have imputed to them the status of public utilities. In *Investigation of Free Time Practices - Port of San Diego*, 9 F.M.C. 525, 547 (1966), the Commission stated:

In a very real sense of the term, terminals are public utilities. While not always specifically franchised, they nevertheless are engaged in the business of regularly supplying the public with a service which is of public consequence and need and which carries with it the duty to serve the public and treat all persons alike. This is the essence of the public utility concept.

In *American Export-Isbrandtsen Lines, Inc. v. FMC*, *supra* at 828, the Court stated:

The law for centuries has recognized that public wharves, piers, and marine terminals are affected with a public interest. [Footnote omitted.] These terminals stand athwart the path of trade. . . . Efficiency of the manpower, ships and vehicles is dependent upon the prompt handling of such cargo and determines whether the flow of interstate and foreign commerce is obstructed or facilitated. The public interest in their efficient operation is unquestioned.

However, these cases notwithstanding, MPA argues the MPA is not a common carrier or a public utility. This is because MPA says it does not provide a public service; rather it is a State agency that provides facilities so that private companies may conduct their business. These facilities according to MPA are so provided for the "secondary" effect on commerce and growth of the port.<sup>5</sup> In providing these facilities, MPA says it must protect the public interest in the facilities while they are being used by a limited number of private companies.

Aside from the inconsistency inherent in MPA's statement, just how this argument overcomes the clear holdings in the *San Diego* and *Export Isbrandtsen* cases, *supra*, is not apparent from the argument itself and is not explained in any other way. The Port of Baltimore and its

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<sup>5</sup> The argument that the terminal facilities are provided primarily as an aid to private business and only secondarily because of their economic benefit to the State of Maryland is dealt with below.

terminals is a public utility within the meaning of the *San Diego* and *Export Isbrandtsen* cases, *supra*. Moreover, in *West Gulf Maritime Association v. The City of Galveston* 22 F.M.C. 101, 103 (1979), *West Gulf*, the Commission, after declaring the Port of Galveston a public utility, went on to say: "It is well established that exculpatory clauses are invalid as a matter of law in common carrier and public utility relationships." In that case the Commission found a terminal's exculpatory clause to be unreasonable in violation of section 17. However, MPA contends that the *West Gulf* decision can be distinguished from these cases and should not be applied here.

MPA would distinguish *West Gulf* on the grounds (1) the Port of Galveston's tariff applied to the entire port facility, including the cargo areas and back-up facilities that are assigned on a long-term basis; (2) port employees at the Port of Galveston unloaded and stored the cargo; (3) the Galveston provisions in issue were only proposed and had not been in effect for a long period of years; and (4) there was no quid pro quo benefit conferred upon users in consideration of the tariff liability provisions. Except for the last, these are distinctions without differences.

It, of course, makes no difference whether the tariff provision applies to all or just a part of a terminal's facilities when the question is that tariff's validity under section 17 of the Act. If it did, the Commission could be rendered powerless by the simple expedient of tailoring clauses so that they apply only to selected portions of the facilities, a result clearly not contemplated by Congress.

It would appear that in its second attempt at distinguishing *West Gulf*, MPA is trying to set up some kind of estoppel against the complainants and the Commission, i.e., since complainants have for a number of years "consented" to the exculpatory clauses, they are precluded from challenging them now, and the Commission cannot find them invalid.<sup>6</sup> Whatever applicability such a theory may have in the realm of purely private contract, it has none here where the Commission has a continuing duty to ensure those subject to its jurisdiction under section 17 "establish, observe, and enforce just and reasonable regulations. . . ." The right to challenge those regulations before the Commission cannot be barred by some vaguely expressed theory of consent or estoppel.

Thirdly, MPA would distinguish *West Gulf* on the ground that their Port of Galveston employees loaded and stored the cargo. This distinction begs the question. As already noted, the questions of who was in control of what equipment and who if anyone was negligent in the incident at Dundalk have been reserved by the Court. The issue here is

<sup>6</sup> It is by no means clear from the record that the actions of complainants constituted "consent" to the exculpatory provisions of the tariff.

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whether the provisions which MPA itself contends relieve it of liability even for *its own negligence* are valid.

Finally, MPA argues that there was no quid pro quo in *West Gulf*. MPA contends that there is a "benefit conferred upon users" for their assumption "of the risk of loss or damage to MPA's facilities." MPA claims that it has shown that its tariff rates and insurance rates are related and that MPA computes its rates with the expectation that the tariff liability provisions will apply. In order to deal with this contention, some exposition of the so-called "rate relationship" is necessary.

In *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, 360 U.S. 411 (1959), the Supreme Court declined to extend automatically the rule in *Bisso v. Inland Waterways Corp.*<sup>7</sup> to a tariff "filed with and subject to the pervasive regulatory authority of an expert body" (the Interstate Commerce Commission). Instead, the Supreme Court allowed the Interstate Commerce Commission the first opportunity to rule on the legality of a tariff exculpatory clause. In doing so, the Court suggested that perhaps the towing rates in question reflected savings to the users of the facilities which were derived from savings on insurance premiums through the application of the exculpatory clause. This came to be known as the rate relationship.

MPA was afforded an opportunity to bring its tariff provisions within the *Southwestern Sugar* case by showing a relationship between the rates charged users of the facilities and the exculpatory clauses in the tariff. On the second day of the hearing, Judge Levy, quite properly in view of the nature of the evidence, entered summary judgment ruling that the proffered evidence did not approach the requisite rate relationship even if all the proffered facts were true.<sup>8</sup> Nevertheless, MPA still argues that "its tariff rates and insurance rates are related."<sup>9</sup> The record, however, shows just the opposite. That the rates and charges of MPA are dictated by competitive necessity is clearly established by the following excerpt from the verified testimony of W. Gregory Halpin, Port Administrator, found in Exhibit 37.

Charges and assessments in the Port of Baltimore today are in keeping with those which are generally assessed by other port agencies throughout the United States. (Para. 34.)

Today, Baltimore is a strongly competitive port which has made significant inroads to cargo formerly handled through the port of New York. (Para. 35.)

The Port is healthy and competitive despite increasingly strong competitive assaults and efforts by other ports. Balti-

<sup>7</sup> In *Bisso*, 349 U.S. 85 (1955), the Supreme Court invalidated a contract which relieved the owner of a towboat of liability for its own negligence.

<sup>8</sup> MPA never specifically challenges Judge Levy's ruling.

<sup>9</sup> This relationship theory is expanded in its attempt to distinguish yet another Commission decision which complainants and Hearing Counsel argue applies here and is thus dealt with yet again *infra*.

more's chief competitors have been and remain the Ports of New York, Philadelphia and Norfolk. (Para. 35.)

. . . the Maryland Port Administration was the logical organization to lead in the promotion of the Port and to organize the competitive programs that would attract cargo to the Port of Baltimore. (Para. 36.)

The Administration shall attempt to recover the highest possible return of public investment in port facilities *consistent with maintaining the competitive position of the port*. Where there shall be a conflict between these two objectives, the competitive position of the port shall prevail. (Emphasis added.) (Para. 75.)

The Maryland Port Administration, then, trying to achieve a return on its investment looks at other competitive ports and the rates which they have established. This is done to make certain that Maryland Port Administration does not improperly affect the competitive position of the Port of Baltimore. (Para. 77.)

At the present time, some 16 container lines serve Dundalk Marine Terminal. Only by having a common pool of cranes, sheds, storage space and berths can these users be accommodated and can the port remain competitive. (Para. 83.)

Clearly, then, MPA's rate structure is pegged to what the traffic will bear in order to maximize return on investment, subject, however, to the controlling consideration that its rates and charges must be competitive. Any savings realized by the port in its fixed costs inure to the benefit of the port, not to the users of the facilities. Furthermore, as stipulated by MPA, it has never sought nor been quoted alternate insurance premium rates which would reflect the absence of any of the exculpatory clauses. Nor has any company which insured MPA's container cranes against physical damage or against liability of third persons for the period including March 21, 1976, provided MPA with financial data concerning insurance savings, if any, resulting from the tariff provisions in issue. Indeed, the record is devoid of evidence of and MPA does not say just how its tariff rates and insurance rates are related. MPA has failed to distinguish the *West Gulf* case.

As noted, there is yet another Commission case which MPA would distinguish in order to not have it applied in these cases--*I. Charles Lucidi v. Stockton Port District*, 22 F.M.C. 20 (1979), (initial decision served June 8, 1979).<sup>10</sup> In *Lucidi* the Commission found that Item 85 in Stockton's Terminal Tariff No. 4 constituted an unreasonable regulation under section 17 of the Shipping Act, 1916. Item 85 provided:

The Port of Stockton shall not be responsible for any injury to freight on or in its facilities, by fire, leakage, evaporation,

<sup>10</sup> The Initial Decision became the decision of the Commission. 22 F.M.C. at 19.



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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 Commission concluded that to the extent that the provisions of Item 85 exclude the Port from liability from damage to property caused in whole or in part by fault of the Port, and without a *quid pro quo*<sup>11</sup> of any kind, such provisions are unjust and unreasonable in violation of section 17 of the Act. The Commission went on to conclude that the provisions of Item 85 were 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 business.

MPA argues that it is clear from the decision in *Lucidi* that the Port of Stockton not only failed to present evidence of rate relationship but did not even contend that there were other benefits conferred upon the users of the Port of Stockton in exchange for the exculpatory provisions in issue there. MPA argues that the users of its facilities do have benefits bestowed upon them which render the exculpatory provisions of its tariff valid. The benefits are said by MPA to be the following:

The Maryland Port Administration expended huge sums of public tax dollars to develop a modern container facility at Dundalk Marine Terminal. The Complainants and all users of the MPA's facilities received the direct benefits having large capital investments made in terminal facilities and equipment that they needed in order to operate in the Port of Baltimore, without having to make that capital investment themselves, nor do they have to maintain that equipment and terminal facilities in a constant state of readiness. The users of the equipment and facilities benefit directly from the investment in them through the charges which they are able to impose on the cargo which they handle. While in some years the charges assessed by the Maryland Port Administration for the use of its facilities may cover operational costs, the tremendous capital investment made by the Port Administration still leaves it with a deficit to the State Department of Transportation of \$112,000,000.00. (Ex. 34, p. 6.) The facts are the MPA facilities that are governed by its tariff are at the complete disposal of the user from the time that the equipment or berth facilities are assigned to the user. The evidence in this case shows that

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<sup>11</sup> The *quid pro quo* referred to is the establishment of a "role relationship" of the kind discussed above in connection with the *West Gulf* case.

if not in every case, certainly in the vast majority of cases damage to MPA equipment or berth facilities, or damage as a result of the user of that equipment or berth facilities has occurred while being operated by or for the direct benefit of the user to which the facilities were assigned. In exchange for all of these benefits, the Port Administration requires the user to operate the equipment and use the facilities with reasonable care, and to assume the risk of loss or damage to them for the very short periods of actual use. This is a risk which users can easily insure if they so desire.

The economic argument made by the MPA, simply stated, is that because the MPA has invested substantial amounts in the facilities at Dundalk Marine Terminal, users of those facilities should be absolutely liable to the MPA for any damage, even damage caused by the MPA itself. This argument appears to be grounded on the premise that the investment by the MPA benefits the users and the users should therefore acknowledge absolute liability to the MPA. In making this argument, the MPA has conveniently ignored the fact that the MPA was established and its facilities were brought into being in order to benefit the economy of the state of Maryland. The massive economic impact of the port facilities upon the state belies any attempt by the MPA to argue that the benefits of its investment accrue only, or even primarily, to entities which actually operate at or use the port facilities. Furthermore, although the MPA attempts to paint a sorry picture of its financial condition, it should be kept in mind that the MPA was not created to make money itself and further that the port facilities do in fact generate substantial operating revenue which the MPA turns over to the state Department of Transportation.

The policy and intent of the General Assembly of Maryland with regard to port facilities and commerce are set forth in Section 6-102 of the Transportation Article of the Annotated Code of Maryland (1977), which formerly appeared as Article 62B, Section 1, of the Annotated Code prior to revision. The declarations of legislative intent and policy contained in that section include the following:

(b) *Ports and harbors are valuable State assets.* -- The ports and harbors of this State are assets of value to the entire State. The residents of all parts of this State benefit directly from the waterborne commerce that they attract and service. Any improvement to these ports and harbors that increases their export and import commerce will benefit the people of the entire State.

(c) *Increase of commerce.* -- (1) The purpose of this title is to increase the waterborne commerce of the ports in this State and, by doing so, benefit the people of this State.

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Pursuant to this legislative policy, the MPA was given the power to acquire, construct and operate facilities and installations to support commercial activity in the port.

W. Gregory Halpin, the Maryland Port Administrator, testified to the economic impact of the port facilities at length and that testimony demonstrates that far from being made for the benefit of users of the Port, the investment was made to produce jobs and revenue for the State. For example, Mr. Halpin stated:

I would - Dundalk Terminal represents a tremendous generator of economy, jobs, and so forth. It has also been a, my opinion - I think that is shared by anyone else - has been a major factor in maintaining the competitive posture of this port as we went into the container period. Therefore, it is certainly - it, as such, deserves a lot of credit for what it's done; not MPA, but the terminal. But you can't, you can't take that figure and put it on top of the 0 figure. I don't see how you can.

Yes, it generates four, I would say - I guess you could say it generates somewhere in the neighborhood of a hundred and twenty million dollars worth of economic impact every year - maybe more. When you put in the multiplier factors, because it handles four million tons, you can multiply that by thirty, forty dollars per ton. (*Id.*, p. 21.)

The MPA itself published in May 1975 a special report entitled "The Economic Impact . . . of the Port of Baltimore on the Maryland Economy." (Exhibit 161.) This report was based on the University of Maryland report for 1973 which Mr. Halpin mentioned in his testimony and a brief review of the figures contained in this special report shows the substantial economic benefit which the Port of Baltimore, including the facilities invested in by the MPA, brings to the State. The graphic representation on page 2 of the report shows that the total economic impact of the Port of Baltimore on the Maryland economy in the year 1973 came to the enormous figure of \$2,537,500,000, or 2.5 billion dollars. This amount represented nearly 10 percent of the overall gross state product (GSP) (Exhibit 161, p. 4). The Port was found to be responsible for more than \$317 million in taxes which went to the state and local governments of Maryland and to be the ultimate source of nearly 170,000 jobs throughout the state. (*Id.*, p. 3.) Adjusted for inflation, a real annual growth rate of 3.18 percent was found for the period 1966 through 1973. (*Id.*, p. 6.)

In light of the policy statements and economic impact figures which the MPA itself has provided, it is difficult to see how the MPA can reasonably argue that the economic benefit of the investment at the Port accrues solely or primarily to the entities which use and operate the actual Port facilities to such an extent that those users should be held responsible for any damage occurring to those facilities, no matter

how caused. That argument might conceivably have had some weight if the MPA could show a policy of carefully and finely calculating rates to the users in order to barely cover operating expenses and avoid charging users of facilities more than is absolutely necessary. The reality of the situation, however, is just the opposite: the MPA calculates its rates based on what the market will bear, by charging users of the Port as much as it possibly can without charging so much that it jeopardizes its competitive position viz-a-viz other ports in other states.

Again Mr. Halpin's testimony is illustrative. According to him, "It is the objective of this Agency to generate the highest possible return on the public investment in Port facilities consistent with maintaining the competitive position of the Port" (Exhibit 155, p. 1) and, of course, to put as much money as possible into the state treasury.

It is clear from the record that the MPA is not some sort of eleemosynary institution created to benefit carriers, stevedores, and other users of the facilities. Moreover, the fact that the MPA constructed its facilities because no private interest was willing to do so is irrelevant to the question of the presence or absence of a *quid pro quo* for the imposition of the exculpatory clauses.

Clearly then, under the precedents of the *West Gulf* and *Lucidi* cases, the MPA's tariff provisions here in question constitute unjust and unreasonable regulations under section 17. However, MPA offers yet another argument which it contends renders its exculpatory clauses valid. It is based upon the contention that complainants have misread *West Gulf* and *Lucidi* as well as the Supreme Court's decision in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955). MPA claims that the complainants' arguments are based upon the proposition that *Bisso*, *West Gulf* and *Lucidi* "create a presumption that exculpatory clauses are invalid." This, according to MPA, "simply is not a valid reading of these cases or the authorities upon which these cases are based."

In *Bisso*, the Supreme Court struck down a contract exempting a tow boat owner from liability for its own negligence. In doing so, the Court found its precedent in towage cases including *The Steamer Syracuse*, 79 U.S. 167 (1871), and *The Wash Gray*, 227 U.S. 66 (1928), but the Court characterized the rule accepted and reaffirmed by it as:

. . . merely a particular application to the towage business of a general rule long used by the Courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships.

According to the Court:

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. . . . The dangers of modern

machines make it all the more necessary that negligence be discouraged. And increased maritime traffic of today makes it not less but more important that vessels in American ports be able to obtain towage free of monopolistic compulsions.

MPA concentrates mainly on the second reason cited by the Court and argues that it is not in a position to drive a "hard bargain."<sup>12</sup> Again MPA's argument is bottomed on the proposition that the complainants were not interested in investing capital and developing their own container facilities. To avoid the risk of misinterpreting MPA's argument I have indulged in the somewhat lengthy quote set out below:

There has been no evidence offered that the Maryland Port Administration in any way hindered these Complainants or any other users in the Port of Baltimore from developing their own facilities. In fact, it is the Port Administration's legislative mandate to encourage private developers to develop their own facilities in the Port of Baltimore. Perhaps the best encouragement that the Port Administration gives to private developers is through the Port Administration's Trade Development office. The Port Administration expends large sums of money through the Trade Development office which has offices all over the world and whose sole function is to promote the Port of Baltimore and encourage shippers to ship their cargo through the Port of Baltimore. (Tr. 738.) This operation inures to the benefit of all operators in the Port of Baltimore, whether they use Dundalk Marine Terminal or whether they operate their own facilities. The intent of the Trade Development office is to encourage cargo to use the Port of Baltimore. The Complainants readily admit that as a matter of economics they prefer to use the Port Administration's facilities no matter what the cost rather than to develop their own facilities in the Port of Baltimore. Others have taken the view that they would rather develop and/or operate their own facilities in the Port of Baltimore. Two prime examples of private operators utilizing their own facilities, are Sealand which owns and operates a facility in the Port of Baltimore, and Atlantic and Gulf Stevedores which operates the South Locust Point Marine Terminal on a long term lease with the Maryland Port Administration.

The Complainants' assertions of unequal bargaining position and MPA's monopoly of container handling facilities in the Port of Baltimore are artificial, and they are largely a product of their own corporate decision-making process which caused them to fully decide to accept the benefits conferred by the

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<sup>12</sup> MPA goes to some lengths to show that other courts have restricted *Bisso* to towage contracts. This argument ignores the Commission's decisions in *West Gulf* and *Lucidi*, perhaps because MPA feels it had distinguished those cases.

Maryland Port Administration's investment in port facilities rather than developing or leasing their own facilities.

If this argument were accepted, no cartel could be accused of monopoly because it could always say that the accuser was free to start his own business. As one of the complainants says, on the basis of this argument, "electric power companies do not occupy monopoly positions because any user of electricity is free to buy his own windmill." MPA cites no authority to support its "freedom of choice" argument and I have found none. It is irrelevant how the MPA arrived at its present position, and that it is in a position to drive a "hard bargain" is clear from the record.

The only container facilities available to complainants at Dundalk are those owned by MPA. By its own admission, any user of those facilities is subject to the provisions of the applicable MPA tariff--a tariff which is promulgated by MPA. Although MPA urges that complainants are free to go to other ports if they do not like the terms offered by MPA, one can easily imagine MPA's reaction were complainants to do this.<sup>13</sup> The argument of MPA is without merit. That MPA is in a position to drive a hard bargain is established by the record here.

On the basis of the foregoing, I conclude that to the extent that section VII paragraph (3), section VIII paragraph (4)b4, and section VII paragraph (2) would relieve the MPA of liability for damage from its own fault or negligence, they constitute unjust and unreasonable regulations under section 17 of the Shipping Act, 1916.

In its reply brief, MPA, for the first time suggested an "alternative interpretation."<sup>14</sup> As a prelude to its alternative interpretation, MPA proposes two alternative findings of fact:

1. If the Federal Maritime Commission does not accept the Maryland Port Administration's proposed finding of fact No. 16, the Maryland Port Administration requests the following alternative finding of fact: A crane is assigned to a steamship line and a stevedore for loading or discharging the vessel. The tariff applies as soon as the assignment begins. The assignment begins as soon as the crane has been positioned by the Maryland Port Administration and the boom has been lowered. (Exhibit 154, pgs. 15-16, T. 622).

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<sup>13</sup> MPA's contention ignores its own statements concerning the reason for constructing the facilities. They were constructed to attract cargo to the Port of Baltimore and if the cargo is there, the carriers will call. All of this was with the aim of increasing jobs and revenues. MPA cannot now be heard to suggest that having achieved this goal, their superior bargaining position is irrelevant because complainants could have constructed their own facilities.

<sup>14</sup> Since the "alternative interpretation" was offered for the first time on a reply brief to which the other parties had no opportunity to respond, I allowed the filing of supplemental briefs.

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2. From the time that the assignment is made, the stevedore and steamship lines have actual control of the container crane. (Exhibit 21, Nos. 2-9).

Originally, MPA's position on when an "assignment" occurred was found in its proposed finding No. 16:

A crane is assigned to a steamship line and a stevedore for loading or discharging a vessel. The tariff applies as soon as the assignment begins. The assignment begins with the startup of the crane and its removal from the tie-down position. (Transcript pages 632-634; Exhibit 37, pp. 24-25.)

According to MPA this new interpretation of the term "assignment" is supported by the fact that once the boom is lowered the crane is completely available to users to begin the loading and unloading process and from that point actual control is in the hands of the users. While MPA is considerably less than clear as to just which of the three provisions the new interpretation would apply, it would appear that MPA would have it go to all three. Thus, MPA argues that it is not unreasonable for it to exculpate itself from liability to third parties once the cranes are turned over to the users. This argument apparently applies to section VIII(b)(4) and VII(2) because MPA offers a specific alternative to interpretation for VII(3) which MPA now argues the Commission can read as applying only when there is no negligence on the part of MPA or when there is concurrent negligence on the part of the users. It may be that MPA is attempting to prove too much.

In *Matson Navigation Company v. Port Authority of Guam*, 20 F.M.C. 505, 511-12 (1978), the Commission laid down the principles for the construction of tariffs:

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.

Section VII(3) provides:

All persons to whom berths, wharves, transit sheds, mechanical equipment or other facilities have been assigned shall be responsible and liable to the terminal operator for any damage occurring to any such property during their tenancy/occupancy or use *without regard to whom shall cause the damage.* (Emphasis added.)

The phrase "without regard to whom shall cause the damage" is "clear and unambiguous" and "no extrinsic evidence" such as who has control of the equipment "may be used vary its 'plain meaning'." *Matson Navigation Co. v. Port Authority of Guam, supra.* Moreover, complainants contest MPA's alternative interpretation of the term assignment and as Hearing Counsel suspects ". . . the question of whose cranes are assigned to whom and when an assignment takes place may be a factor in the actions pending in the District Court." Hearing Counsel urges, and for the reasons already stated I agree, those questions should be left to the Court.

MPA's alternative interpretation is equally invalid when applied to sections VII(2) and VIII(4)B4. Those two sections do not even contain the word "assignment" and their application is in no way dependent upon when an "assignment" takes place.

Section VII(2) reads:

The Terminal Operator accepts no responsibility for damages or accidents occurring when its equipment and/or operator or employees are furnished to perform work for others.

Section VIII(4)B4 provides:

The terminal assumes no liability for claims, losses, or expenses by reason of property damage, personal injury or death which may result from the use of the crane, except that caused by mechanical failure and not occasioned by an act or omission on the part of the party renting the crane.

These provisions are not conditioned upon the absence of negligence on the part of MPA and to "interpret" them to be so conditioned would be to rewrite the provisions. The provisions are clear. By their plain meaning they relieve MPA of liability for its own negligence and no amount of extrinsic evidence can be used to alter the language of the provisions or to add words not in them. Initially I suggested that MPA may be trying to prove too much. By that I meant, if MPA would, by an "interpretation" of the exculpatory clauses, work such a drastic alteration in the apparent meaning MPA can only be admitting that the provisions are fatally ambiguous and invalid under section 17 for that reason. However, the language of the provisions in question is not susceptible to the interpretation suggested by MPA and even if it were



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to the extent that they would still relieve MPA for liability for its own negligence they would remain invalid.<sup>15</sup>

Complainants also argue that enforcement of the tariff provisions against them in these cases would constitute a violation of section 16 First of the Act which declares it unlawful for other persons 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. . . .

While some variations on the theme are offered there are three basic grounds offered for this allegation: (1) Over the years in specific cases MPA has not been consistent in its reliance on the tariff provisions; (2) In claims involving damage to MPA equipment including container cranes and spreaders, MPA has failed to follow a consistent pattern as to what party is the user of the equipment for purposes of seeking to make that party liable for damage; and (3) Despite the presence of the tariff provisions purporting to grant absolute immunity from liability or to make other parties absolutely liable for damages, the MPA has compromised and settled numerous claims.

Each complainant seems to see a slightly different form of prejudice arising from these asserted actions of MPA. U. S. Lines citing a number of cases in which the Commission has imposed upon terminals what U.S. Lines calls the "highest duty to serve the public equally and impartially," it goes on to argue that it would grossly violate the "absolute equality and impartiality provisions of section 16 First to permit the MPA to rely upon its tariff provisions to impose a \$6,000,000 judgment against U.S. Lines and to excuse its liability in the counter-claim against it by U.S. Lines."

Clark views the alleged actions as resulting in "the fact that the MPA by the tariff provisions has given itself an unfair advantage" which violates Section 16 First.

Svendborg, among other things, says that because in other instances MPA did not consider the shipowner to be user of equipment it is prejudicial to Svendborg for MPA to do so in these cases. In short, it is Svendborg's position that to the extent that other shipowners have not

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<sup>15</sup> An example of why questions of who was negligent are best left to the Court is provided by the argument of U.S. Lines that MPA's new interpretation is invalid because it is "unable to impose liability upon assignees in situations of comparative negligence." U.S. Lines views the MPA interpretation as imposing full liability upon the assignee even if MPA is 90% at fault and the assignee only 10%. Tort questions of comparative negligence and the like are not within the peculiar expertise of the Commission.

been sued as "users" in crane damage cases in the past, those shipowners have been given an undue and unreasonable preference.<sup>16</sup>

Aside from the cases cited to show a terminal operator's duty to treat similarly situated persons equally, complainants refer to no authority which treats the question of section 16's applicability to charges that a terminal's "inconsistency" in handling claims and lawsuits.<sup>17</sup> However, two of the arguments can be dismissed at the outset.

The argument is made that MPA has preferred itself through the exculpatory clauses in its tariff; however, the Commission has expressly found that section 16 does not apply to self-preferences. *Anglo Canadian Ship. Co. Ltd. v. Mitsui S.S. Co.*, 4 F.M.B. 535 (1955). Next it is contended that MPA by settling some claims for less than the full amount has failed to apply the exculpatory provisions uniformly or consistently. Apparently the argument is that since the tariff frees MPA from all liability for damage to its facilities, it cannot settle a claim for anything less than the full amount. MPA calls this position "ludicrous," and it certainly isn't far from it. Apparently, complainants would have MPA go to trial on a claim even if it cost more to litigate the claim than the total claim was worth even though the other party was willing to reach a reasonable settlement in the matter. The law does not demand such an absurd result. One cannot help but wonder what the complainants' reaction would be if the MPA offered to open settlement negotiations in their cases.

Complainants also assert that MPA has been capricious in its reliance on the exculpatory clause when asserting or defending against claims. This charge is based in part on some letters written over the years by one Ronald Shock who was for approximately 12 years involved in the handling of claims for MPA. These letters, it is argued, demonstrate the failure of MPA to establish proper policies and guidelines and that this lack of guidance within the MPA and between the MPA and its insurers and legal representatives has resulted in "concrete violations of the duty to treat all users of the facility in an equal, fair and even handed fashion." To buttress the argument a number of instances of berth damage are cited, some in which the "notice letter" made no reference to the tariff and some involving litigation in which the complainants made no reference to the tariff.

By now the difficulties inherent in these charges should be apparent. The absence of any reference to the tariff in a letter noticing a claim does not mean that MPA would not invoke the tariff should it become necessary to do so at some later stage. The failure to specifically cite the tariff in a complaint would of course depend upon the nature of the

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<sup>16</sup> ITO concentrates on its position as a "non-user" also.

<sup>17</sup> A similar allegation was made in *I. Charles Lucidi v. Stockton Port District*, *supra*, but the charge was dismissed for lack of evidence. No discussion of the applicability of the section was had.

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incident forming the gravamen of the complaint--it could be that damage to a berth occurred in such a way that there could have been no question of MPA's negligence and thus no need to raise the exculpatory clauses or the pleadings may have been so broadly drafted as to allow the exculpatory clauses to be offered in defense or as part of the claim. <sup>18</sup>

It is obvious that any finding of a section 16 First violation on the grounds argued by complainants requires among other things the second guessing or a critique of the work of counsel representing MPA. It certainly requires more evidence than is to be found in this record. But a more significant difficulty presents itself, a difficulty which is inherent in the intended purpose of section 16 itself.

Section 16 was intended to prohibit the disturbance of existing commercial relationships through the granting by carriers or other persons subject to the Act of arbitrary preferences or advantages to one person but not the other. Thus, in the vast bulk of cases, the question presented was whether a particular rate allowed one shipper a competitive advantage over another shipper in a common market place.<sup>19</sup> Normally the cases required a competitive relationship between the allegedly preferred shipper and the allegedly prejudiced shipper. However, there is another line of cases in which a competitive relationship between the parties is not necessary to a finding of a violation of section 16. See, e.g., *Investigation of Free Time Practices--Port of San Diego*, 9 F.M.C. 525, 546 (1966); *New York Foreign Freight F. & B. Assn v. FMC*, 337 F. 2d 289 (1964). In these and other like cases the alleged preference or prejudice involved rates or charges which were not dependent upon the particular commodity shipped.<sup>20</sup> However, even if a competitive relationship is not necessary, a complainant must show that the alleged prejudice has in some quantifiable way worked not only to his disadvantage but resulted in a positive advantage to another identifiable interest. See, e.g., *Phila. Ocean Traffic Bureau v. Export SS Corp.*, 1 U.S.M.C. 538 (1936); *Household Goods, supra*. Here each of the complainants relies only upon the assertion that they have been prejudiced while others whom they assert have not had the exculpatory clauses

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<sup>18</sup> In a complaint and answer attached to its brief, U.S. Lines makes much of the fact that MPA did not specifically raise the tariff provisions as a defense against a claim for damage caused by a crane dropping a "pontoon" on a container. MPA does assert that the incident was entirely due to the negligence of others and raises as an "affirmative" defense a "breach of contract" by another party to the suit. Whether or not this defense would allow MPA to raise the exculpatory clauses is of course a matter for the Judge of the District Court. However, in this day of liberal construction of pleadings such a result would not appear probable.

<sup>19</sup> See *North Atlantic Med. Frght. Conf. - Rates on Household Goods*, 11 F.M.C. 202 (1967), for a review of cases arising under section 16.

<sup>20</sup> In the *New York* case, *supra*, the Court said "Transportation or wharfage charges are dependent upon the particular commodity involved; the cost for shipping or storing bananas bears no relationship to the fees levied for heavy industrial equipment." (337 F 2d at 299.)

invoked against them have been preferred. The only monetary figure alluded to is the \$6,000,000.00 asserted involved in the District Court suit. But there is simply nothing in the record which allows any comparison between this preliminary figure and the extent to which those allegedly preferred were benefited if they were benefited at all. Again the evidence of record fails to sustain the allegation.

Moreover, there is a problem in the relief requested by the complainants, i.e., that the exculpatory clauses be found in violation of section 16 and therefore "null and void." Put another way complainants would have the Commission forbid the MPA to apply the exculpatory clauses against them. Complainants have in actuality confused two separate issues. On the one hand there is the question of the validity of the tariff provisions themselves. On the other there is the question of the manner in which the MPA has applied the provisions to users of its facilities. If we can assume for the moment that the provisions in question are valid the inappropriateness of the relief requested becomes apparent.

A terminal tariff, once it is published and filed with the Commission, fixes the terms, conditions, rates and charges applicable to users of the terminal facilities; and as complainants themselves argue, they must be applied to everyone using the terminal. The fact that they may not have been applied to some in the past cannot as a matter of law work to prevent their application in the present or the future. By law the terminal is bound to apply them. If a terminal's past practices in applying the provisions of its tariffs violate section 16 of the Act the remedy is not a prohibition against the present or future application of otherwise valid provisions.

Finally, there remains the contention that MPA's failure to be consistent in its determination as to who is the user of its equipment has resulted in a violation of section 16 First. The argument here can best be summed up in the words of U.S. Lines which after summarizing the "evidence" in the record states:

If all this evidence shows any pattern, that pattern is in the fact that the MPA has tended to hold the stevedore liable as the assignee and user under Section VII(3) of the tariff for damages to container cranes. Yet MPA in this proceeding claims the right to pursue both stevedores and ocean carriers as assignees and users of container cranes pursuant to the tariff.

This, says U.S. Lines, is a "transparent attempt" to apply the "draconian" provisions of the tariff against the "deep pockets" of the carrier "because of the large dollar amounts" at issue. And this attempt clearly shows why this practice should be declared to be in violation of section 16 First of the Shipping Act.

MPA says, and there is evidence in the record to show, that it has always considered both the carrier and the stevedore as users of the

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cranes. However, MPA says because most of the carriers had arrangements with their stevedores under which the stevedores paid MPA's charges under the tariff, it simply billed the stevedores for all charges arising under the tariff. The record does not establish that MPA has violated section 16 of the Act in this regard. Since these terms are inextricably interwoven with questions of control and negligence they belong properly in the District Court.

ULTIMATE CONCLUSIONS

Sections VII(2), VII(3) and VIII(4)B4 are unjust and unreasonable regulations and are violative of section 17 of the Shipping Act, 1916. MPA has not violated section 16 First of the Shipping Act, 1916.

(S) JOHN E. COGRAVE  
*Administrative Law Judge*

Washington, D. C.  
August 11, 1980

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-68****U.S. CARGO OVER CANADA - PETITION FOR DECLARATORY  
ORDER**

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**DISCONTINUANCE OF PROCEEDING***December 19, 1980*

This proceeding was instituted by the filing of a petition by Sea-Land Service, Inc. seeking the issuance of a declaratory order by the Commission with respect to the movement of United States cargoes through Canadian ports. A number of replies were received in response to the notice of filing of the petition.

Sea-Land has now withdrawn the petition stating, in pertinent part that it would not ". . . be in the best public interest to press . . . for such an order on anything less than the most complete record possible." The withdrawal is made without prejudice to the right of Sea-Land to further petition the Commission.

In light of the foregoing, this proceeding is discontinued.

(S) FRANCIS C. HURNEY  
*Secretary*

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 78-6

ADEL INTERNATIONAL DEVELOPMENT, INC.

v.

PUERTO RICO MARITIME SHIPPING AUTHORITY  
AND STAR LINES, INC.

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## ORDER ADOPTING INITIAL DECISION

*December 30, 1980*

This proceeding is before the Commission on the Exceptions of Adel International Development, Inc., to Chief Administrative Law Judge John E. Cogrove's Initial Decision dismissing its complaint. The complaint alleged that Puerto Rico Maritime Shipping Authority and its agent, Star Lines, Inc., violated sections 16, 17, 18(b)(3) and 18(b)(5) of the Shipping Act, 1916 (46 U.S.C. 815, 816, 817(b)(3) and 817(b)(5)) with regard to a shipment of 20 mobile homes from Baltimore to Dammam, Saudi Arabia on a PRMSA vessel.

### BACKGROUND

J.S. Connor, Inc., a freight forwarder acting on behalf of Adel, and Star Lines, Inc., PRMSA's booking agent, negotiated a rate for the shipment of mobile homes for the lump sum amount of \$240,000.<sup>1</sup> The agreement was confirmed in writing on a "Conline Booking" Liner Booking Note, dated November 22, 1976. The Conline note describes 20 mobile homes at "abt 133,330 cft," to be transported for \$12,000 each, or \$240,000 "lump sum/berth terms." The contract also states: "cargo on wheels for benefit of carrier and cubic to be based on without wheeled measurement." At this time, no PRMSA tariff covering mobile homes was on file with the Federal Maritime Commission.

On December 17, 1976, the Star Lines booking agent who entered into the Conline agreement arranged the filing of a PRMSA tariff covering mobile homes, at the rate of \$1.80 cft. This calculates to approximately \$240,000<sup>2</sup> when applied to the 133,330 cubic foot measurement of the homes *without* wheels and hitches. On December 21, 1976, the vessel sailed with Adel's shipment aboard.

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<sup>1</sup> PRMSA at this time had operated in the Baltimore/Persian Gulf trade. PRMSA's Mid-East service terminated in May of 1977.

<sup>2</sup> The exact calculation is \$239,994, or \$6 less than the lump-sum amount.

In January, 1977, PRMSA billed Adel \$345,600 for the shipment, at which point Adel, through Connor, protested that there had been an agreement with Star Lines on a lump sum figure of \$240,000, and that the \$1.80 cft. tariff rate was to be applied to the cargo as if "knocked down," or without hitches and wheels. PRMSA, noting that under the terms of its filed tariff, the rate applies to the cargo *with* wheels and hitches, continued to press its claim for the \$105,600 difference between the \$240,000 which Adel has paid and the \$345,600 which is due pursuant to the tariff, and filed suit against Adel on September 13, 1977 in the U.S. District Court for the Northern District of Texas for the additional freight. Adel filed this complaint on March 30, 1978. On September 26, 1979, the court granted Adel's motion to stay the proceedings pending the Commission's decision in this proceeding.

The Initial Decision, served July 11, 1980, concluded that PRMSA violated no provisions of the Shipping Act and that its tariff rate must apply. The Presiding Officer dismissed Adel's contention that section 18(b)(3) bound PRMSA to file in its tariff the lump-sum rate negotiated by its agent. Nor did he accept Adel's contention that PRMSA's failure to file a special docket application for permission to apply retroactively the lump-sum rate violated section 18(b)(3). The Presiding Officer stated that there is no obligation for a carrier to seek a waiver of charges, and that even if PRMSA had filed a special docket application, it could not have met the statutory requirements.<sup>3</sup> He also determined that section 18(b)(3) does not give the Commission discretionary power to award equitable relief.

The Presiding Officer concluded that the record did not support a finding that Adel was in competition with any particular shipper of mobile homes which received a preference from PRMSA to the prejudice or disadvantage of Adel. Thus, he found that Adel had not proven a violation of section 16 of the Act. Similarly, he determined that Adel had not shown that PRMSA carried other shipments of mobile homes

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<sup>3</sup> Adel argues that Star Lines' filing of the \$1.80 cft. PRMSA tariff was based on a Star Lines employee's interpretation of PRMSA Tariff rule 17 which he had read to provide that measurement of the mobile homes would be calculated without including the wheels and hitches. That rule reads as follows:

*Special Conditions for Ro/Ro Cargo:* On completely set up Ro/Ro Units which are driven under their own power onto the vessel and on which the shipper could present units to the carrier in Semi-Knocked Down Condition, but elects, for carriers convenience, to present same units in a completely setup Ro/Ro condition, the Ocean Rate will be calculated on the Cubic measurement of the Semi-Knocked Down Condition. Such units will not be subject to special Lash Charge.

PRMSA contends that Rule 17 clearly does not apply to Adel's mobile homes, because they cannot be driven under their own power. Adel argues that even if PRMSA is correct in asserting that Rule 17 is inapplicable, then Star Lines' misinterpretation of the rule was the type of clerical or administrative error which would have been a proper ground for a special docket application. The Presiding Officer rejected this argument, noting that a misreading of a tariff is not a ground for a waiver under section 18(b)(3).



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under the same transportation circumstances and conditions as the shipment in issue and therefore failed to establish a violation of section 17 of the Act.

Finally, the Presiding Officer dismissed Adel's section 18(b)(5) claim because that section is prospective in nature, and is violated only if the carrier continues to charge unreasonable rates *after* the Commission has formally determined them to be unreasonable. He also found that Adel did not establish that PRMSA's tariff rate was so unreasonably high as to be detrimental to the commerce of the United States.

**EXCEPTIONS AND POSITIONS OF THE PARTIES**

Adel excepts to the Initial Decision on a number of grounds. It protests that the Presiding Officer did not "specifically" rule on its 83 proposed findings of facts. Adel states that although "perhaps it is true that an administrative decision need not rule upon each proposed finding if the rulings are evident from the findings and conclusions in the decision," the Initial Decision is "confusing and misleading."

Although Adel states that "there is, except for certain irrelevancies, no dispute over the essential facts," Adel goes on to raise 12 alleged instances of factual "omissions" or errors in the Initial Decision.<sup>4</sup> Adel also excepts to what it calls "a number of apparent irrelevancies" in the Initial Decision, and argues that the Presiding Officer did not explain how the discussion of these topics affects the ultimate conclusion.<sup>5</sup>

Adel's final exception, entitled "Legal Conclusions," states that the Presiding Officer's legal analysis contains three fatal flaws, in that he failed to recognize that: (1) Star Lines was PRMSA's exclusive agent; (2) when the Conline note was signed, PRMSA had no tariff item covering mobile homes; and (3) PRMSA was guilty of bad faith in not

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<sup>4</sup> The factual findings which the Presiding Officer allegedly did *not* make include the following:

- (1) certain facts about Star Lines and its relationship with PRMSA;
- (2) the background and history of Connor, Adel's freight forwarder;
- (3) the fact that PRMSA had heavy competition among carriers in the Mid-East trade;
- (4) a specific version of the negotiating process between PRMSA's and Adel's agents;
- (5) that there is a "custom and usage" that when a carrier enters a lump-sum contract with a shipper which does not conform to the tariff on file, it is the responsibility of the carrier to amend its tariff to conform to the contract;
- (6) that Star Lines honestly attempted to file a tariff rate effectuating the lump-sum agreement; and
- (7) that PRMSA repudiated the Star Lines-Adel rate agreement.

Adel alleges that the Presiding Officer made "factual errors" in that:

- (1) he did not explain that the Conline note form was "commonly known" to Star Lines and Connor;
- (2) he did not find that Adel did not benefit from the wheels and hitches;
- (3) he found that the mobile homes were difficult to load;
- (4) he made what Adel acknowledges to be a typographical error in using the figure \$905,600 instead of \$105,600; and
- (5) he found that Adel would make a profit on the shipment at the tariff rate.

<sup>5</sup> Adel lists some examples of irrelevant topics as: "(1) who initiated the booking, (2) who insisted upon the wheels and hitches and (3) whether the Conline Note is widely used . . . ."

correcting Star Lines' "error" in filing the tariff at \$1.80 cft. Adel then summarizes its arguments that section 18(b)(3) was violated when PRMSA did not amend its tariff to correct Star Lines' "administrative error"; that 18(b)(3) authorizes the Commission to afford equitable relief; that PRMSA subjected Adel to a comparative disadvantage in violation of section 16 because PRMSA routinely honored other shippers' booking contracts; that PRMSA subjected Adel to unreasonable prejudice by not filing a "corrector" reflecting the Conline note rate; that Adel was discriminated against in violation of section 17 in that PRMSA has shipped other shippers' mobile homes for less than that charged Adel; and that PRMSA's tariff rate was so unreasonably high as to violate section 18(b)(5).

In its Reply, PRMSA generally supports the Initial Decision in its entirety.

#### DISCUSSION AND CONCLUSIONS

The Commission finds that the Presiding Officer properly disposed of the issues raised in this proceeding and that his findings and conclusions are well-supported by the record. Accordingly, for the reasons set forth below, the Commission concludes that the Exceptions of Adel are without merit, and adopts the Initial Decision as its own.

Adel protests the Presiding Officer's failure to rule individually on each of its 83 proposed findings of facts. The Presiding Officer stated:

It is not necessary to make findings of fact upon all items of evidence submitted nor even necessarily to answer each and every contention made by the contestants to the hearing but rather to make findings which are sufficient to resolve the material issues. 23 F.M.C. at 484.

Because so many of the proposed findings of both parties were not relevant to the material issues, the Presiding Officer's findings did not address each proposed finding specifically. He also added:

Any proposed finding not made or discussed above, and not specifically dealt with below, [was] considered and found either to be argument, not supported by the evidence, or irrelevant to the issues. 23 F.M.C. at 494.

Adel has not shown how individual rulings on each proposed finding of fact would have affected the outcome of this proceeding. The Commission is satisfied that the Presiding Officer's manner of ruling on the findings of fact was appropriate, and Adel's exception on this point is, therefore, denied.

Although Adel itself states on several occasions that the parties agree on the critical facts, its exceptions primarily deal with factual matters, many of which involve issues which even Adel concedes are irrelevant to the outcome of this proceeding. Several of the factual errors allegedly made by the Presiding Officer - e.g., his failure to find that the homes

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were difficult to load, and his failure to "find" certain facts illustrating Connor's history and expertise - are of as uncertain consequence as those matters acknowledged to be "irrelevant" by Adel. Other alleged errors - e.g., the failure to find that Star Lines was PRMSA's agent and that PRMSA refused to enforce the Conline agreement - were matters which, if not specifically noted as a finding of fact, were clearly acknowledged and relied upon by the Presiding Officer.

Adel excepts to findings of fact which do not support its version of matters such as which of the parties initiated the negotiations over this booking; whether the Star Lines employee who computed the tariff rate had attempted to approximate the lump-sum amount; and whether the Conline booking form was commonly used. The relevance of these factual disputes turns on Adel's theory of recovery on "equity" grounds. Adel cites *United States v. Columbia S.S. Co., Inc.*, 17 F.M.C. 8 (1973) as authority for the proposition that the Commission has discretionary power to afford equitable relief under section 18(b)(3). The Commission finds that case to be inapposite, and Adel's argument unconvincing.

In *Columbia S.S. Co.*, the Commission found a section 18(b)(3) violation, but exercised its discretion under section 22 not to award reparations, because of the particular circumstances in the proceeding. This does not support Adel's contention that the Commission has discretion under section 18(b)(3) to award reparations on "equity" grounds independently of any findings of violations of the Shipping Act. It is only by finding violations of the Shipping Act that the Commission can award reparations. Thus, many of Adel's proposed facts, intended to establish PRMSA's "deliberate bad faith" or "unconscionable conduct," have not been shown to be relevant to Shipping Act considerations. The Commission concludes that there was no error by the Presiding Officer in his treatment of these factual matters. These matters may be relevant to a breach of contract action, but the Commission is not the proper forum for such claims.

The Presiding Officer is also correct in noting that section 18(b)(3) does not impose the obligation to file a special docket application.<sup>6</sup> In fact, for PRMSA *not* to have charged the rate in its tariff and to enforce instead the "Conline" note amount would have been a violation

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<sup>6</sup> Even had an application for waiver of tariff charges been filed, it is not apparent that PRMSA could have met the statutory requirements. Adel has not established that the \$1.80 cft. tariff rate was intended to effectuate the lump-sum amount of the Conline note; in fact, there is some evidence that Star Lines had no intention of effectuating that agreement. Star Lines' entry into the booking sheet sent to PRMSA was based on measurement ton, made no mention of the lump-sum rate or the Conline note, and would have resulted in charges of \$20,520 per mobile home - substantially more than both the Conline price and the tariff rate. Thus, the evidence fails to support Adel's contention that the filing of the tariff rate was a clerical or administrative error as prescribed in section 18(b)(3) as grounds for waiver of the tariff rate.

of section 18(b)(3).<sup>7</sup> The Commission agrees with the Presiding Officer that the facts of this proceeding do not reveal a violation of section 18(b)(3).

The Initial Decision is also correct in finding that the evidence does not indicate that Adel was in competition with any particular shipper of mobile homes which received a preference resulting in prejudice to Adel, nor that the services rendered to the various shippers of mobile homes to Dammam were identical in terms and conditions to those rendered to Adel. Thus, Adel has failed to prove its section 16 claim, as well as its allegation of a section 17 violation - there is no evidence that other shipments of mobile homes carried by PRMSA moved under the same transportation circumstances and conditions as Adel's shipment.

Finally, Adel's allegation that PRMSA violated section 18(b)(5) is unfounded. Adel has failed to establish that PRMSA's tariff rate was so unreasonably high as to be detrimental to the commerce of the United States. Moreover, regardless of Adel's failure of proof, it is doubtful that section 18(b)(5) could serve as the basis for reparation here. 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. *Federal Maritime Commission v. Caragher*, 364 F.2d 709 (2d Cir. 1966); *Valley Evaporating Co. v. Grace Line, Inc.*, 14 F.M.C. 16 (1970). Section 18(b)(5) does not afford a remedy with regard to rates which have not already been found to be violative of the Act, and which are no longer in effect.<sup>8</sup>

THEREFORE, IT IS ORDERED, That the Exceptions of Adel International Development, Inc. 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

<sup>7</sup> Moreover, the Conline note itself is confusing. The note specifies what to include in calculating the cubic measurement of the cargo, but it also prescribes a lump-sum amount of \$12,000 per unit. A plain interpretation of "lump-sum" suggests that the measurement of the cargo should be irrelevant.

<sup>8</sup> Adel also protests that the Presiding Officer's "attitude" was unacceptable, and suggests that he was biased against it and in favor of PRMSA. It does not appear, however, that Adel's rhetoric on this point is intended to constitute an exception. At any rate, the Commission finds no evidence of bias or predisposition toward the facts of the case on the part of the Presiding Officer.

\*Commissioner James V. Day did not participate.

FEDERAL MARITIME COMMISSION

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DOCKET NO. 78-6

ADEL INTERNATIONAL DEVELOPMENT, INC.

v.

PUERTO RICO MARITIME SHIPPING AUTHORITY AND  
STAR LINES, INC.

The obligation of a common carrier by water to charge the rates specified in its published and filed tariffs cannot be altered by a separate agreement between the carrier and the shipper or between their agents.

Complainant has failed to establish that respondent's rate on a shipment of mobile homes violated sections 16, 17, 18(b)(3) or 18(b)(6) of the Shipping Act, 1916.

The complaint is dismissed.

*Richard W. Kurrus, James N. Jacobi, Diane M. Willkens, and Margaret Chao, for complainant, Adel International Development, Inc.*

*Amy Loeserman Klein, Morris R. Garfinkle, Kathleen Mahon, and David P. Street for respondent Puerto Rico Maritime Shipping Authority.*

*John E. Sprizzo for respondent Star Lines, Inc.*

INITIAL DECISION<sup>1</sup> OF JOHN E. COGRAVE,  
ADMINISTRATIVE LAW JUDGE

*Adopted December 30, 1980*

This case arises out of the efforts of the Puerto Rico Maritime Shipping Authority (PRMSA) to collect \$105,600 in freight charges on a shipment of twenty mobile homes by Adel International, Inc., from Baltimore, Maryland, to Dammam Saudi Arabia, on PRMSA's vessel the *S.S. Puerto Rico* on December 22, 1976.

Before dealing with the merits of the case, a word on a specific request of Adel is necessary. Adel, on brief, offers a series of proposed findings of fact which it believes "to be the essential basic or constitutive findings of fact" and requests that "in accordance with section 8(b) of the Administrative Procedure Act . . . that the Initial Decision show: 'the ruling on each finding . . . presented.' "

If by this, Adel is requesting a specific discussion and ruling on each and every one of the 83 findings of fact proposed by it, the request goes far beyond the spirit, intent and purpose of section 8(b) of the APA (5 U.S.C. 557(b)). It is sufficient if an administrative decision

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<sup>1</sup> 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).

makes those findings sufficient to furnish the parties, the Commission and any reviewing court with a sufficiently clear basis for understanding the premises used in preparing the conclusions of law and applying them to the findings made. *Gilbertville Trucking Co. v. U.S.*, 196 F. Supp. 351 (D.C. Mass., 1961), *rev'd on other grounds*, 371 U.S. 115. It is not necessary to make findings of fact upon all items of evidence submitted nor even necessary to answer each and every contention made by the contestants to the hearing but rather to make findings which are sufficient to resolve the material issues. *Raye & Co. Transports v. U.S.*, 314 F. Supp. 1036 (D.C. Mo. 1970).

Not much imagination is needed to see how long this decision would be were it necessary to explain the rejection or adoption of each or a part of each of Adel's 83 proposed findings. For example, PRMSA in its Opening Brief devotes some 50 pages to a discussion of only a portion of the evidence. The request is denied. However, the differences between the findings of fact as proposed by each side do warrant some discussion before the actual findings of fact are made. To make the discussion meaningful, it is necessary to provide some narrative framework within which to view the areas of basic conflict. The narrative which follows is taken from the Prehearing Statement of Adel.

Petitioner, Adel International Development, Inc. ("Adel") is a corporation, incorporated in the State of Texas, with its principal place of business at 7616 LBJ Freeway, Suite 204, Dallas, Texas 75251. Adel is an exporter, and in that capacity is a shipper within the meaning of the Shipping Act of 1916, as amended, 46 U.S.C. Section 801 *et seq.* ("the Act"), and at all times relevant to this action was engaged in the business of exporting mobile homes to Saudi Arabia.

Respondent, Puerto Rico Maritime Shipping Authority ("PRMSA"), is a corporation and was engaged in the common carriage of goods by water, including limited operations in the foreign commerce of the United States between the ports of Baltimore and ports in the Persian Gulf at all times relevant to this controversy, and at all such times was subject to the provisions of the Act. PRMSA's address in the United States is that of its agent, Puerto Rico Marine Management, Inc. ("PRMMI"), 2700 Broening Hwy., Baltimore, Maryland.

Respondent, Star Lines, Inc. ("Star Lines"), is a corporation engaged as a shipping agent for ocean common carriers and is subject to the provisions of the Act. At all times with respect to this controversy, Star Lines acted as the exclusive booking agent for PRMSA. Star Lines' principal office is 25 Broadway, New York, New York 10014.

On November 18, 1976, pursuant to a request received from John Adel, T. Connor Spigelmire ("Spigelmire"), Manager of the Chartering Department of John S. Connor, Inc. ("Connor"), made several phone calls to carriers and agents to secure rates and conditions for the transportation of twenty (20) mobile homes to Dammam, Saudi Arabia.

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Specific price quotations were received from Central Gulf Lines, Inc. ("Central Gulf"), Star Lines, and Kuwait Boulder Shipping ("Kuwait Boulder") as follows: Central Gulf offered \$13,000/unit for a total charge of \$260,000, lump-sum, berth-term on a Ro/Ro vessel, the *S.S. Arizona*; Star Lanes offered \$12,000/unit for a total charge of \$240,000, lump-sum, berth-term on a Ro/Ro vessel, the *S.S. Puerto Rico*; Kuwait Boulder offered \$11,000 per unit, but this transportation would have involved less desirable carriage on a bulk carrier vessel.

All negotiating contacts between Spigelmire and Star Lines were with Mr. James Murray ("Murray"), an employee of Star Lines.

Both officials at Central Gulf and Murray of Star Lines made clear to Spigelmire that neither carrier was interested in this particular shipment unless the cargo was to be placed on wheels at Adel's expense.

The reason for insistence by the carrier that the units be on wheels were well understood to be:

1. To facilitate loading by the carrier;
2. To reduce the loading costs for the carriers;
3. To permit the carrier to adapt the cargo for shipment in a Ro/Ro vessel; and
4. Most importantly, to facilitate dispatch and unloading at the Port of Dammam.

In addition, severe congestion existed at the Port of Dammam, and Ro/Ro vessels were being given preferential berthing and discharging privileges.

On November 22, 1976, Spigelmire, acting as agent for Adel, entered into a contract with PRMSA, acting through its booking agent, Star Lines, wherein PRMSA agreed to ship via the *S.S. Puerto Rico*, on or about December 14, 1976, twenty (20) mobile homes, twelve (12) feet long by sixty (60) feet wide from Baltimore, Maryland to Dammam, Saudi Arabia, for a price of \$12,000 each, or a total of \$240,000 freight prepaid Baltimore.

The contract between PRMSA and Adel was confirmed by a written agreement called a "Conline Booking" Liner Booking Note, dated November 22, 1976. The booking note was assigned Contract No. 7 DAM 10 8 B and was executed by Star Lines as exclusive booking agents for PRMMI and John S. Connor, Inc., as agents via phone authority for Adel International.

At all times relevant to this controversy PRMSA's tariff on file with the FMC was one prepared and filed by Murray. After correctly computing the carriage of the mobile homes under the PRMSA tariff, Murray communicated his price quotation to PRMSA officials in Puerto Rico, whereupon the correctness of the tariff quotation was confirmed and their desire to accept the business was stated.

The booking with PRMSA was made on a berth-term, lump-sum basis.

At all times relevant herein, there has existed and now exists a custom and usage in the foreign oceanborne commerce of the United States of long-standing and wide acceptance to the effect that when a common carrier enters into a berth-term, lump-sum contract with shipper, and if at that time the carrier's tariff does not permit shipment in accordance with the contract, it is the responsibility of the carrier to file promptly with the Federal Maritime Commission an amendment to its tariff so as to cover the contract in question. This custom, usage and practice is so well accepted that it is not necessary that the parties negotiating such a contract even discuss the point.

As evidenced by a letter from W. E. Huresky of PRMMI to Dr. Yurom Almogy of Star Lines, PRMSA, through its agent PRMMI, knew as early as January 17, 1977, of the agreement between Murray and Spigelmire and that its tariff had not been specially amended for this shipment of mobile homes in accordance with Contract No. 7 DAM 10 8 B.

Notwithstanding the terms of the lump-sum agreement between Adel and PRMSA, and notwithstanding the obligation of PRMSA to file a special tariff request with the Federal Maritime Commission evidencing this agreement, PRMSA deliberately decided to violate its contractual obligation and to proceed with a claim for additional revenue against Adel.

PRMSA and its agent, PRMMI, were fully aware of the agreement between Star Lines and Connor well within the 180-day period for filing a special docket application with the Federal Maritime Commission under section 18(b)(3) of the Act. However, the decision was made by PRMSA and Star Lines to disavow the contractual agreement and to proceed with an attempt to collect the rate charges in accordance with the tariff on file with the Commission as applied to a with-wheels-and-hitches measurement.

During the negotiations between Murray and Spigelmire with respect to the shipment here involved, Murray advised Spigelmire that in light of the fact that the port of Dammam was giving preferential berths to vessels having roll-on/roll-off cargo at that time, and because of prior damage experience with cargo of this nature, PRMSA did not want the shipment of mobile homes unless it was to be a roll-on/roll-off shipment, that is, with wheels and hitches attached. It was at the carrier's insistence, and for its convenience, that the wheels and hitches remained on the mobile homes. The contract of affreightment, as evidenced by the Conline Booking Liner Booking Note, contains a statement which reads as follows: "Cargo on wheels for benefit of carrier and cubic to be based on without wheeled measurement."



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The cargo arrived in a timely fashion at the pier of Baltimore in December and was thereafter loaded aboard the *S.S. Puerto Rico*.

Sometime on or about January 27, 1977, John S. Connor, Inc. rendered a check to PRMMI, as agent for PRMSA, in the amount of \$228,000 as payment in full for freight as per the berth-term, lump-sum contract.

Rule 6 on the tariff provided that all freight rates would be based on the actual overall measurement of each freight unit and would be computed in accordance with "Tweeds' Accurate Cubic Tables"; and further that "in determining the cubical contents of any irregular piece or package, the three greatest dimensions shall be measured."

Rule 17 of the tariff superseded Rule 6 in measuring Ro/Ro cargo, and provided in pertinent part:

*Special Conditions for Ro/Ro Cargo:* On completely set up Ro/Ro Units which are driven under their own power onto the vessel and on which the shipper could present units to the carrier in Semi-Knocked Down Condition, but elects, for carriers convenience, to present same units in a completely setup Ro/Ro condition, the Ocean Rate will be calculated on the Cubic measurement of the Semi-Knocked Down Condition. Such units will not be subject to special Lash Charge.

The cubic measurement of the mobile homes, calculated without including the wheels and hitches in accordance with Rule 17, was 133,330 cubic feet.

On March 31, 1977, Spigelmire informed Brunelle by return letter that Connor's Chartering Department had negotiated a berth-term, lump-sum rate of \$240,000 with Star Lines, New York, as agent for the *S.S. Puerto Rico*, and that Brunelle's letter dated March 24, 1977, was in error concerning the freight calculations regarding the Bill of Lading. Spigelmire suggested that Brunelle should contact Mr. James Murray in New York, who had made the arrangement for PRMSA and disclaimed responsibility for filing tariffs concerning lump-sum negotiations.

Since the date of the shipment was December 21, 1976, the one hundred and eighty day time limitation contained in section 18(b)(3) of the Act for the filing by PRMSA of an application with the FMC to "waive the collection of the portion of the charges for the shipment wherever it appears that there is . . . 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 . . ." did not run until June of 1976.

On April 21, 1977, Brunelle by written correspondence informed Spigelmire for the first time that the subject rate based on the berth-term, lump-sum basis was never "published (validated)" in PRMSA's tariff and that as a result PRMSA was insisting on an additional payment in the alleged amount due of \$105,600.

The above represents Adel's version of the controversy prior to the hearing in this case. As the 83 "findings of fact" proposed by Adel on brief demonstrate, the evidence adduced at the hearing has not caused Adel to deviate from that version in any significant way. There are several crucial areas, however, where the evidence contradicts or at least casts more than considerable doubt on that version of the controversy. These are dealt with below.

### 1. THE INITIATION OF THE BOOKING

In his written direct testimony, John Adel stated:

On November 18 1976, I engaged freight forwarder John S. Connor, Inc. ("Connor") in Baltimore, Maryland, to arrange for the shipment of the twenty mobile homes to Saudi Arabia. I spoke with Mr. Timothy Spigelmire . . . head of the chartering department and indicated my desire to have the mobile homes shipped . . . as soon as possible under a competitive freight rate. Spigelmire indicated that he would make several inquiries concerning freight rates and get back to me.

The clear implication here is that Adel made the first overture to Connor; however, on cross-examination at the hearing, Mr. Adel was asked why, after arranging thirteen consecutive shipments with Mohegan as his forwarder, he called Spigelmire. He answered:

. . . I think John S. Connor came to us with a telex making this offer, knowing we had the cargo on the dock.

\* \* \* \* \*

I think that good merchandising, perhaps John S. Connor saw the merchandise at the docks in Baltimore and decided they would throw their hat in the ring. (Tr. 39.)

Mr. Spigelmire in his written direct testimony stated:

My involvement in this matter commenced on November 18, 1976, when Mr. John Adel, President of Adel, requested in a telephone call to me that our firm make arrangements for the shipment of twenty (20) mobile homes from the United States to Dammam, Saudi Arabia.

On cross-examination Mr. Spigelmire stated:

To the best of my recollection, and I could be in error, I believe that [Adel] made the call. But it certainly is not inconceivable at all that Mr. Ikramulla<sup>2</sup> brought this to my attention and I made the call to Mr. Adel as opposed to Mr. Adel making the call to me. (Tr. 272.)

<sup>2</sup> Mr. Ikramulla is an assistant to Mr. Spigelmire, and the record indicates that Mr. Jim Murray of Star Lines had discussed the mobile homes with Mr. Ikramullah in mid-November 1976.

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Other evidence of record suggests that contrary to the written direct testimony of Mr. Adel and Mr. Spigelmire, it was Connor who contacted Adel; and when that contact was made, Adel already had rate quotations from Central Gulf and Kuwait Boulder.

**2. THE CONTROVERSY OVER THE WHEELS AND HITCHES**

In his written direct testimony, Mr. Spigelmire stated:

From the outset of my discussions with . . . Central Gulf and Mr. Murray of Star Lines, they made it clear to me that neither carrier was interested in this particular shipment unless the cargo was to be placed on wheels at Adel's expense. The reasons for this insistence by the carriers that the units be on wheels were . . . (1) to facilitate loading by the carrier; (2) to reduce the loading costs for the carrier; (3) to permit the carrier to adapt the cargo for shipment in a Ro/Ro vessel; and (4) most importantly, to facilitate dispatch and unloading at Dammam where severe congestion existed and where Ro/Ro vessels were given preferential berthing and discharging privileges provided that the discharging cargo was on wheels. It was absolutely immaterial and unimportant [to Adel] how the cargo was loaded on or carried on the vessels; it was at the carrier's insistence that the wheels and hitches be provided at Adel's expense . . . .

The clear import of all this was that because of PRMSA's insistence that the units be on wheels, Adel was put to additional expense which it would not otherwise have incurred. However, Mr. Adel's testimony at the hearing paints a different picture. Mr. Adel, when questioned about the wheels and hitches, stated that on all the shipments in the record the mobile homes arrive at the port with the wheels and hitches attached; that he purchased the homes FOB at port; that "in most instances" he desired the homes to have the wheels and hitches attached; and that having the wheels and hitches attached "facilitates" Adel.<sup>3</sup> (Tr. 61-65.)

**3. THE CONLINE NOTE**

Mr. Spigelmire in his written direct testimony stated that the "Con-line Note" is a universally utilized form "of contract . . . constituting a binding commitment of both the shipper and the carrier that the cargo will be carried at precisely the rates, terms and conditions specified therein." However, at the hearing, a decidedly less clear picture of the

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<sup>3</sup> It is clear from the record that the homes are placed on wheels with the hitches attached in order that they may be hauled over-the-road from the factory to the port of destination. When asked ". . . how would these mobile homes have arrived at the port of loading from the manufacturing site without wheels and hitches. Mr. Adel answered, "They could have been put on a flatbed truck." When asked if he had ever seen this done, Mr. Adel said, "No."

function of the Conline Note was formed. Some of the salient facts developed were:

1. PRMSA did not know of the Conline Note until after this litigation began.
2. Mr. Huresky, then Director of PRMSA's Mid-East Operations, with eleven years' experience in the steamship industry, had never seen such a document used either in the Mid-East or elsewhere.
3. Mr. Adel did not know that a Conline Note had been used on this shipment until this litigation began.
4. That the primary purpose of a Conline Note was for use with tramp vessels.

Other inconsistencies in the testimony of Mr. Spigelmire lead inevitably to the conclusion that far from being the normal way to confirm a booking with a common carrier in the United States trades, the use of a Conline Note was unusual.

#### 4. THE NATURE OF THE AGREEMENT BETWEEN ADEL AND PRMSA

Mr. Spigelmire in his direct testimony characterizes the agreement between Star Lines and Connor as a "contract to ship at a lump sum rate of \$240,000 and measurement based on cubic less wheels." The inconsistency here is obvious -- if the rate is a "lump-sum" rate, the cubic measurement of the cargo is of no concern; it is irrelevant.

The Conline Note itself describes the shipment consisting of "20 REDMAN MOBILE HOMES ABT 325,000 lbs. abt 133,330 cft." Also under the heading "Description of goods," there is the notation "cargo on wheels for benefit of carrier and cubic to be based on without wheeled measurement." Under "Freight rate" there appears "\$12,000.00 ea., \$240,000.00 LUMP SUM/BERTH TERMS." Again the inconsistency is obvious. If the rate is \$12,000 per unit, the cube of the individual unit is unnecessary; and if the total "lump sum" is \$240,000, the overall cube of the 20 homes is also irrelevant.

On cross-examination, Mr. Spigelmire said that it was apparent that he and Mr. Murray had different ideas as to how the deal was to be worked out but that it would be worked out.

Mr. Murray was not called as a witness; however, his affidavit and deposition are in the record. Mr. Spigelmire's testimony that PRMSA knew about the agreement he and Mr. Murray had reached is based upon statements made to him by Murray that Murray had communicated the price quotation to PRMSA officials, who had confirmed the correctness of the tariff quotation and their desire to get the business. In his affidavit Murray states:

After entering into a verbal booking agreement with Connor, I returned to New York and entered the agreement on a book-

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ing sheet. The booking sheet always includes a statement of the agreed upon tariff rate. (Ex. 20, p. 3.)

The booking sheet, however, describes the shipment as "20 mobile homes" -- "Housetrainers," with each unit weighing "18,000 lbs." and measuring "8640" cubic feet. The dimensions of each unit are given as "60' X 12' X 12'," and the rate is quoted as "95.00 NSS." Mr. Huresky testified that from this booking sheet the shipment was "fairly good paying cargo." He says:

In fact the booking control sheet received from Star Lines for this shipment . . . clearly shows 20 mobile homes at 8,640 cu. ft. each with a rate of \$95.00 per measurement ton not subject to surcharges. The dimensions on the booking sheet are 60' X 12' X 12' which includes the dimensions of the wheels but not the hitches. From the booking sheet, the trailers would yield \$20,520 per unit (8,640 cu. ft. divided by 40 cu. ft. X \$95.00 per measurement ton). (Exhibit 23, p. 7.)

The booking sheet contains no reference to a lump-sum rate of \$240,000 or a unit rate of \$12,000. It contains no indication that the cubic was to be measured on a "without wheeled basis."

There are other equally troublesome inconsistencies in the evidence presented by Adel, but the above affords a representative sample of the difficulties presented by the record in this case. The findings of fact presented below are based upon my examination of the exhibits and my observation of the demeanor of the witnesses. Where inconsistencies exist, the inferences made are drawn from the entire record and represent my best judgement as to what the record establishes.

#### FINDINGS OF FACT

Adel was incorporated in Texas in 1976 and is an exporter in the foreign commerce of the United States engaged in the business of exporting mobile homes to Saudi Arabia.

J. S. Connor, Inc., was established in 1917. Connor performs freight forwarding services under FMC License No. 496. Connor also operates a Chartering Department with T. Connor Spigelmire as its manager. In addition, Spigelmire is the director of Connor's General Agency Department, which acts as general agents for marketing and managing ships.

The Puerto Rico Maritime Shipping Authority is a corporation and was engaged in the common carriage of goods by water and is subject to the Shipping Act of 1916. During the period here relevant, PRMSA operated a common carrier service from Baltimore to Dammam, Saudi Arabia. Puerto Rico Maritime Management, Inc. (PRMMI) is a Delaware corporation, is a subsidiary of PRMSA, and was during the relevant period the management company and agent in the United

States of PRMSA. One Walter Huresky was Director, Mid-East Operations, during the time in question.

PRMSA's sole venture into the foreign commerce of the United States was its service to the Persian Gulf from Baltimore, which began in January of 1976 and concluded in May of 1977. During this period, PRMSA used the short form bill of lading it had utilized in its operations in the offshore domestic trade. On one occasion, PRMSA used Marine Transport Service, Inc., bill of lading.

The relationship between PRMSA and PRMMI on the one hand and Star Lines on the other was somewhat less than harmonious. Mr. Huresky frequently experienced difficulty with the rate negotiation practices of Star Lines. While PRMSA made attempts to acquaint the shipping public with its difficulties with Star Lines in general and Jim Murray in particular, Mr. Spigelmire was well aware of the reputation of Star Lines. Mr. Spigelmire's use of the Conline Note in this instance was due in part to his lack of confidence that a "handshake" with Murray would have been sufficient to close the deal.

In mid-November, Jim Murray of Star Lines visited Connor soliciting cargo. It would appear that it was at this time the shipment in question was discussed. Mr. Spigelmire contacted Adel with Star Lines' offer of \$12,000 per unit for a total charge of \$240,000. Other quotations received by Adel were Central Gulf offering \$13,000 per unit and Kuwait Boulder offering \$11,000 per unit on a breakbulk vessel. During his negotiations with Spigelmire, Murray apparently represented PRMSA as being extremely desirous of obtaining this piece of business.

The Conline Note as executed by Spigelmire and Murray described the cargo of 20 Redman Mobile Homes weighing about 325,000 lbs. and measuring about 133,330 cubic feet. This measurement was without the wheels and hitches. The Conline Note contained the notation "cargo on wheels for benefit of carrier and cubic to be based on without wheeled measurement." The rate agreed to by Murray and Spigelmire and set out in the Conline Note was "\$12,000.00 ea., \$240,000.00 LUMP SUM/BERTH TERMS, FREIGHT PREPAID/BALTIMORE." Stowage was to be under deck.

The Conline Note used to confirm the verbal booking made by Conner with Star Lines is not widely or even frequently used in the U.S. liner trades. No totally adequate explanation of its use in this case appears in the record except for Spigelmire's apprehensions concerning Murray.

Although the Conline Note states that the mobile homes were on wheels "for benefit of [the] carrier," the record shows that the units were purchased FOB Baltimore with wheels and hitches already attached and that this "falligated" Adel's handling of the total transaction. There was no additional expense incurred by Adel by leaving the units on wheels for loading aboard the *S.S. Puerto Rico*. Moreover, it

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was not irrelevant to Adel that the homes had the wheels and hitches attached.

At the time the Conline Note was executed, PRMSA had no rate for mobiles to Dammam. After the verbal booking was entered into, Murray returned to New York and entered "the agreement" on a booking sheet. The actual entry made by Murray on the booking sheet was for 20 mobile homes measuring 8640 cubic feet each with a rate of \$95.00 per measurement ton which would have resulted in a per unit rate of \$20,520. The booking sheet entry made no reference of a per unit rate of \$12,000 or of a lump sum rate of \$240,000.

The rate ultimately filed for PRMSA by Trans World Tariff and Research Service, Inc., and on Murray's instruction, was \$1.80 per cubic foot. Based on a measurement of 133,330 cubic feet, the measurement of the homes without wheels and hitches, the total rate would have been \$239,666.

The homes were loaded aboard the *S.S. Puerto Rico* with some difficulty and the ship sailed on December 21, 1976. On December 30, 1976, Connor received an unrated receipt bill of lading for the shipment. There was nothing in this bill of lading to indicate that there was any misunderstanding over the rate applicable to the shipment.

In mid-January 1977, Spigelmire received a bill of lading on which the units were described as "motor homes" with a total freight charge of \$456,000. The bill was accompanied by a claim of an additional \$216,000. Adel later paid the \$240,000. Spigelmire telephoned PRMMI to advise them of the error and asked that a corrector be issued reflecting the \$240,000 rate.<sup>4</sup>

On January 17, 1977, Mr. Huresky, then PRMMI's Director of Mid-East Operations, wrote to Star Lines stating that until J.S. Connor had called that day, he was unaware of any agreement between Star Lines and Connor that the \$1.80 rate was to be applied to the mobile homes "as if they had been received knocked down," i.e., without wheels and hitches. Huresky said that no corrector would be issued until some further explanation was given by Star Lines.

Correspondence over the correct amount of freight to be applied to the shipment continued between the various parties until Adel on September 6, 1977, filed with the Commission a petition requesting the issuance of an order declaring that Adel was not obligated to pay the \$905,600 demanded by PRMSA. About a week later, on September 13, 1977, PRMSA brought suit against Adel in the U.S. District Court for the Northern District of Texas for the additional freight.

In its reply to Adel's petition for declaratory order, PRMSA sought its dismissal on the ground that the issues raised in the petition were

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<sup>4</sup> The claim was subsequently reduced to \$105,600 on the basis of the proper description and a 5 percent commission paid to Connor.

before the U.S. District Court and there was no need to decide them. Hearing Counsel in its reply took the position that the declaratory order should not issue because Adel was wrong on the merits. After the replies were in, Adel withdrew its petition and some six months later filed this complaint.

On August 24, 1978, I withheld ruling on a motion of PRMSA to dismiss this case and stayed further proceedings to allow the District Court (1) to rule on a motion of PRMSA's for summary judgment and (2) to rule on a motion by Adel that the Court stay its proceedings pending a decision by the Commission in this case. It was not until September 26, 1979, that the Court in two one-page orders ruled on the motions. The Court denied PRMSA's motion for summary judgment and granted Adel's motion that the Court proceedings be stayed pending the Commission's decision here.

Proceedings were resumed, hearing was held, and briefs have been filed.

Any proposed finding not made or discussed above, and not specifically dealt with below, were considered and found either to be argument, not supported by the evidence, or irrelevant to the issues.

#### DISCUSSION AND CONCLUSIONS

Adel charges PRMSA with violations of sections 18(b)(3), 18(b)(5), 17 and 16 of the Shipping Act, 1916. Basically, Adel states the specific actions of PRMSA which resulted in these violations as (1) PRMSA's failure to file the "special lump-sum, berth-term rate" and its failure to make "an application to file a corrected tariff, which it could have done within one hundred and eighty days from the date of shipment" constitutes a violation of section 18(b)(3) and (2) "PRMSA's *ex post facto* assessment of a total freight charge of \$17,280 per unit or \$345,600 lump-sum subjects Adel to undue and unreasonable prejudice . . . in violation of Section 16 of the Act, is an unjustly discriminatory and prejudicial rate in violation of Section 17 of the Act, and such rate is so unreasonably high as to be detrimental to the commerce of the United States." The arguments are dealt with below in the order they were presented by Adel on brief.

##### 1. THE SECTION 18(B)(3) VIOLATION

Adel's argument here would appear<sup>b</sup> to be grounded upon the basic premise that PRMSA is bound by the actions of its agent Murray.

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<sup>b</sup> Adel spends the first 10 or so pages of its argument on the law rehashing and summarizing its proposed findings of fact and spends a goodly amount of space dealing with PRMSA's "deceptive practices" -- the use of short form bill of lading when no long form existed -- which are simply irrelevant to the issues here. Indeed, the major portion of Adel's discussion of the "law" of the case is nothing more than a restatement of matters covered in its proposed findings.



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From this, Adel argues, it follows (1) that PRMSA was bound to file the rate quoted by Murray; or (2) failing that, it was PRMSA's duty to accept Murray's alleged interpretation of Rule 17 and base the \$1.80 rate on the mobile homes measured as if the wheels and hitches were not attached to the homes; or (3) failing both of these, it was PRMSA's obligation to file a Special Docket application for permission to retroactively apply the "lump-sum" rate. Any one of the above is said to constitute a violation of section 18(b)(3). Adel cites no legal authority in support of its theory.<sup>6</sup>

Setting aside for the moment the question of PRMSA's obligation to file a Special Docket application, Adel's case, if it is to have any validity at all, hinges on the meaning of Rule 17. This is so because Murray filed a rate of \$1.80 per cubic foot which when applied to the knocked-down measurement of the mobile homes would have resulted in total freight charges of about \$239,996, \$4.00 less than the \$240,000 quoted by Murray. Rule 17 provides:

*Special Conditions for Ro/Ro Cargo:* On completely set up Ro/Ro Units which are driven under their own power onto the vessel and on which the shipper could present units to the carrier in Semi-Knocked Down Condition, but elects, for carrier's convenience to present same units in a completely setup Ro/Ro condition, the Ocean Rate will be calculated on the Cubic measurement of the Semi-Knocked Down Condition. Such units shall not be subject to special Lash Charge.

Adel's argument for applying Rule 17 to the shipment in question is stated as follows:

It is undisputed that Murray applied Rule 17 to the Adel shipment when stating that the cubic would be based on a without wheels and hitches measurement. This was Murray's position from the time the Booking Contract was executed throughout the duration of the rate dispute . . . begun in January, 1977. PRMSA has offered no evidence to indicate that Murray did not apply Rule 17 in good faith, stating only that Murray's interpretation was erroneous. (Record references omitted.)

Adel's premise is that Murray as the preparer or drafter of the tariff was in the best position to know what its provisions were intended to mean;<sup>7</sup> but Murray's actions prior to his reliance on Rule 17 cast

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<sup>6</sup> All of the cases cited by Adel go only to (1) the proposition that a principal is bound by the acts of its agent; (2) the proposition that the Conline Note was a binding contract; (3) the standard for filing and obtaining Special Docket relief; and (4) the proposition that the Commission has the equitable power to afford relief in this case.

<sup>7</sup> However, a basic principle of tariff construction is that it is not what the writer intended but what the words actually say that controls.

considerable doubt on the "good faith" of Murray's interpretation of the Rule.

First, Murray quotes Connor a rate of \$12,000 per mobile home with a "lump-sum" of \$240,000. He then returns to New York and makes an entry on a booking sheet which is intended to inform PRMMI of the agreement made with Connor. However, the entry on the booking sheet shows a rate of \$95.00 per measurement ton which would have resulted in a rate of \$20,520 per mobile home. Finally, Murray instructs the tariff filing agent, Trans World Tariff and Research Service, Inc., to file a rate of \$1.80 per cubic foot.

It is only when asked by Mr. Huresky of PRMMI to explain the agreement for the \$240,000 total freight charge that Murray falls back on Rule 17.<sup>8</sup>

Murray's action can only lead one to conclude that for whatever reason, Murray foresaw a problem in getting PRMSA to accept the rate he had negotiated and set about to present PRMSA with a *fait accompli*. However, Murray's motives are irrelevant to the question of whether Rule 17 applies to Adel's shipment.

On its face the Rule applies only to "Ro/Ro units which are driven under their own power onto the vessel." In his written direct testimony, Mr. Spigelmiré stated:

The cargo arrived in a timely fashion at the Baltimore pier in December, having been placed on hitches and wheels at Adel's expense as required by the carrier. The cargo was loaded immediately. Since it was on wheels, it was easily rolled on board *powered by its attached cabs . . .* (Emphasis mine).<sup>9</sup>

The clear implication of Mr. Spigelmiré's statement is that the mobile homes moved on board the ship under their own power -- *their* attached cabs. Captain Taylor, who supervised the loading of the homes on the S.S. *Puerto Rico* testified that the mobile homes were moved aboard the ship by a "yard hustler" or "tractor trailer" which was hitched to a mobile home and the home was then pulled up the ramp into the hold. On cross-examination, the following colloquy took place between counsel for PRMSA and Mr. Spigelmiré:

- Q. Now when you go on and say "powered by its attached cabs," by cabs, you mean hustlers?
- A. By cabs, I mean a piece of equipment that is capable of pulling this type of cargo on and off a ship.

<sup>8</sup> Adel's only other reference in support of Murray's good faith is to the direct testimony of Spigelmiré where he states that in January 1977 "I telephoned PRMMI to explain that an incorrect calculation had been made and to ask that a corrector be issued reflecting a lump-sum rate of \$240,000 based on the without wheel measurement as negotiated . . . by their agent, Mr. Murray."

<sup>9</sup> Later on cross-examination, Mr. Spigelmiré admitted that he had not observed the loading and that he meant the homes were loaded "in the normal course of events," not "immediately."

Q. Commonly called hustlers?

A. Commonly called whatever you want to call them . . . . It could be done with a tractor.

Q. Why did you use the word its? In what sense were they its attached cabs?

A. They were not its. That was not meant to be possessive from the cargo point of view. It was only possessive when they were hooked up.

Q. Once they were hooked up, they were its cab?

A. That is correct.

Q. But the minute they split, it was over?

Q. That is correct.

Despite Mr. Spigelmire's strained use of the word "its," it is patently clear that the provisions of Rule 17 do not apply to Adel's mobile homes. The meaning of the phrase "units driven under their own power onto the vessel" is unambiguous. It requires that the equipment or engine be either an integral part of the unit or that it be an attached part that remains with the unit. It does not apply to a unit for which the power unit is supplied by either the carrier or the terminal. PRMSA's refusal to apply the Rule here is proper and does not constitute "a violation of section 18(b)(3)."

Although I stated earlier that I would take up the alleged violations in the order they were presented by Adel, this appears the best time to discuss the allegation that Rule 17 violates section 16 of the Act. Although Adel flatly asserts that PRMSA's interpretation of Rule 17 prefers Ro/Ro cargo and prejudices all other cargo such as Adel's mobile homes, there is no reference to the record or argument on brief to support the charge. The record shows that the Rule is for the carrier's convenience, and it exchanges a reduced rate in return for the elimination of the need to use the carrier's stevedoring power units. To take the case at hand, the mobile homes required the use of a yard hustler and a forklift truck to get the units aboard the ship and properly positioned in the hold. This may be contrasted with cargo such as bulldozers and road graders, for instance, which are relatively easily driven aboard the ship under their own power.

The record here does not establish that Rule 17 unduly prefers Ro/Ro cargo or unduly prejudices other cargo.

Adel says that "PRMSA was obligated to file a corrected tariff and to make a special docket application for waiver of additional charges under section 18(b)(3) of the Shipping Act . . . ." But aside from some cases which Adel says show that such an application by PRMSA would have obtained the permission to waive the charges, I am cited to no authority which stands for the proposition that PRMSA's failure to

file a special docket application constituted a violation of section 18(b)(3).

PRMSA counters Adel's "argument" by saying that the circumstances of this case "make it clear that PRMSA could not have obtained a waiver under the terms of the statute even had it attempted to do so." I am inclined to agree with PRMSA.

Section 18(b)(3) permits the Commission in its discretion to allow a carrier to waive the collection of a portion of the freight charges under narrowly circumscribed conditions "where there is an error of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff." The specific error which Adel alludes to as supporting its argument that this was a case for waiver is stated by Adel as follows:

Assuming for argument's sake, that PRMSA's interpretation of the tariff was correct and that Murray had made an error as Huresky contends, PRMSA was obligated to file a corrected tariff and to make a special docket application . . . .

The error Adel is referring to is Murray's interpretation of Rule 17 as applying to the mobile homes.<sup>10</sup> A misreading of the tariff is not a ground for a waiver under 18(b)(3). *Farr Co. v. Seatrain Lines*, 20 FMC 411, 663 (1978). See also, *Capital Trading Co., Inc. v. Sea-Land Service, Inc.*, 20 FMC 315 (1977), misquotation of rate; *Application of Sea-Land Service, Inc.*, 19 SRR 432 (1979), unauthorized representations made to shipper.

I can find no authority which imposes upon PRMSA under the facts of this case an obligation to file a special docket application; and my examination of the precedents leads me to conclude that even if PRMSA had filed such an application, it could not have met the statutory requirements.

Ultimately Adel's request for relief depends on a rather ill-defined conception of some equity power of the Commission, but before dealing with it, it is necessary to deal with that enormous body of law which Adel has studiously ignored throughout its argument.

In some ways the law embodied in section 18(b)(3) and statutes like it can be considered harsh and has in a number of cases worked hardship on those who have run afoul of it. But from the beginning, both the agencies and the courts have uniformly, consistently, and virtually without fail strictly construed and enforced the prohibition against collecting or charging rates different from those in its published and filed tariffs. A few excerpts from some representative opinions offer examples of the strictness of the prohibition.

<sup>10</sup> The record shows that there was no clerical or administrative error. Nor was there an inadvertent failure to file a new rate. Murray intended to and did file the rate of \$1.80 per cubic foot.

Once a tariff is established by the carrier and approved by the Federal Maritime Commission the tariff binds both the shipper and the carrier with the force of law. The statutory policy behind the strict enforcement of federally approved tariffs is so strong that the rate must be charged and paid regardless of mistake, inadvertence or contrary intention of the parties. *Gilbert Improved Hardwoods, Inc. v. 245 Packages of Guatambu Squares, More or Less*, 508 F.2d 116, 1120-21 (5th Cir. 1975) (citations omitted).

"Binding" contracts between the parties cannot work to alter the tariff rate. As the Supreme Court said in 1924:

The amount of the freight charges legally payable was determined by applying this tariff rate to the actual weight. Thus they were fixed by law. *No contract of the carrier could reduce the amount legally payable*, or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount from the person liable therefor. *Louisville & N.R Co. v. Central Iron & Co.*, 256 U.S. 59, 65 (1924). (Emphasis mine.)

Citations could easily be multiplied and, as an example, respondent PRMSA offers the following:

*See e.g., Dayton Coal & Iron Co. v. Cincinnati, New Orleans & Texas Pacific Ry.*, 239 U.S. 446 (1915); *Louisville & Nashville Ry. v. Maxwell*, 237 U.S. 94 (1915); *Louisville & Nashville Ry. v. Mottley*, 219 U.S. 467 (1911); *Texas & Pacific Ry. v. Mugg & Dryden*, 202 U.S. 242 (1906); *New York, New Haven & Hartford Ry. v. ICC*, 200 U.S. 361 (1906); *Gulf, Colorado & Santa Fe Ry. v. Hefley & Lewis*, 158 U.S. 98 (1895); *United States v. Associated Air Transport, Inc.*, 275 F.2d 827 (5th Cir. 1960); *United States v. Pan American Mail Line, Inc.*, 359 F. Supp. 728 (S.D.N.Y. 1972).

All of these cases stand four-square for the proposition that a carrier cannot charge compensation other than that in its published tariff.

It is against this background that Adel asserts that "PRMSA's actions demand that equity be done." Adel says:

PRMSA unilaterally and without notice overruled a reasonable tariff interpretation by Star Lines. PRMSA unilaterally determined that the agreed rate of \$240,000 lump-sum was insufficient in view of the total billed revenue for the voyage. And, PRMSA unilaterally decided not to publish a corrected tariff and seek a waiver application under Section 18(b)(3). These unilateral actions demand that equity be done.

What Adel seems to be arguing is that PRMSA's actions estop it from collecting the additional freight. However, the Courts have dealt with

this argument before. Estoppel cannot be invoked against a common carrier to avoid a tariff provision.

Neither the intentional or accidental misstatement of the applicable published rate will bind the carrier or the shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay . . . . It is clear that no act or omission of the carrier can estop or preclude it from enforcing payment of the full amount of the tariff charges . . . and equitable considerations may not serve to justify failure of the carrier to collect, or retention by the shipper of, any part of the lawful tariff charges . . . . *U.S. v. Associated Air Transport, Inc.*, 275 F.2d 827, 833 (5th Cir. 1972).

Even fraudulent misrepresentations by the carrier will not work estoppel. In *Feraco, Inc. v. Georgia Pacific Corp.*, 313 F. Supp. 66 (D. Del. 1970), a shipper sought to defend an action by the carrier for the balance of the rate due on the ground that the carrier had fraudulently induced it to ship with the carrier. The court cited with approval the following language from *Arctic Roofings, Inc. v. Travers*, 32 A.2d 559 (Del. Sup. Ct. 1943):

The Act being primarily for the public good, the principles of estoppel will not defeat the carrier's rights though he intentionally misquoted the scheduled rate to the shipper before the delivery of the goods for transportation and material losses were incurred thereby . . . . Nor can there [be] any real distinction between a mere unintentional representation and a fraudulent misrepresentation . . . .<sup>11</sup>

Adel, however, insists that the Commission has "equitable powers inherent under section 18(b)(3)" to "find that Adel has paid the entire freight rate for which it was responsible." For this proposition, Adel cites *United States v. Columbia S.S. Co., Inc.*, 17 FMC 8 (1973). In *Columbia*, the shipper, the General Services Administration, negotiated a rate on some unboxed trucks of \$1,150.50 per vehicle with Wall Shipping Company. However, due to a clerical error, the rate actually filed was \$1,000.00 per vehicle. The GSA paid the \$1,150.50 rate; however, some eight months later an audit discovered the error and some five months after the audit, the government filed a complaint with the Commission alleging a violation of 18(b)(3) and seeking reparation

<sup>11</sup> Again the citations can be multiplied, and again PRMSA offers a few:

See also *Southern Pacific Co. v. Miller Abattoir Co.*, 454 F.2d 357, 359-60 (3d cir. 1972); *Silent Sioux Corp. v. Chicago & North Western Ry.*, 262 F.2d 474, 475-76 (8th Cir. 1959); *Armour & Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 254 F.2d 719, 723-24 (7th Cir.), cert. denied 358 U.S. 840 (1958); *Bernstein Bros. Pipe & Machinery Co. v. Denver & R.G.W.R. Co.*, 193 F.2d 441, 444 (10th Cir. 1951); *Bull S.S. Lines v. Thompson*, 123 F.2d 934, 944 (5th Cir. 1941), cert. denied 315 U.S. 816 (1942); *Central Warehouse Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 20 F.2d 828 (8th Cir. 1927); *Prince Line Ltd. v. American Paper Exports, Inc.* 45 F.2d 242 (S.D.N.Y. 1930).

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of \$10,384.50. The Commission found that the carrier had violated section 18(b)(3) but failed to award reparation to the government. To Adel the facts of the *Columbia* case are remarkably similar to the facts of this case and "though finding that the respondent (the carrier) had charged and accepted payment of a rate other than the one on file, the Commission denied reparations."

Adel would have it that the "discretion" exercised by the Commission was that given it under section 18(b)(3). It was not; and there are crucial distinctions between what the Commission did in *Columbia* and what Adel is asking it to do here. The Commission was very careful to make it clear that the discretion it was exercising was that granted it by section 22 of the Act. It said at pages 9-10:

Complainant here prays that it be awarded reparation. Pursuant to section 22 of the Act, the Commission is authorized to award this avenue of relief, ". . . and may direct the payment . . . of full reparation to the complainant for the injury caused by . . . violation [of the Act]."

This avenue of relief provided by section 22, however, as clearly stated and maintained, is discretionary and permissive, and the mere fact that a violation of the Act has been found "does not in itself compel a grant of reparations." . . . In this case, and limited strictly to the peculiar facts of this case, it is our determination that an award of reparation is not warranted.

The first crucial distinction is that unlike *Columbia*, where the carrier charged a rate other than that on file, here PRMSA is attempting to collect the published and filed tariff rate.<sup>12</sup> It is obligated by section 18(b)(3) to do so. Secondly, there is no violation of section 18(b)(3) to be found here upon which to base the exercise of discretion under section 22 of the Act. Indeed, the Commission was quite explicit in dealing with the violation question; it said at page 10:

Our action does not, nor can it, excuse a party [the carrier] from any statutory penalties to which he may be subject, but simply indicates our disinclination to award reparation in light of the compelling facts of this case. (17 FMC at 10.)

PRMSA points out that were the Commission to order it to cease and desist from its collection of the published tariff rate, the Commission would be "compelling PRMSA to violate section 18(b)(3) and simultaneously subjecting it to statutory penalties." Considering the uninterupted construction of statutes like section 18(b)(3) beginning with the

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<sup>12</sup> It is always necessary, but at times difficult to keep in mind, the Congressional policy of protecting the shipping public by requiring strict adherence to the published tariff rates. Contracts, agreements, understandings or whatever cannot alter that rate. See pages 498-500 above.

Interstate Commerce Act well over fifty years ago, it is hard to disagree with PRMSA's logic.<sup>13</sup>

On the basis of the foregoing, I conclude that there has been no violation of section 18(b)(3) established on the record in the case.

## 2. THE SECTION 16 VIOLATION

As noted above, Adel in its complaint alleged that PRMSA's Rule 17 gave an undue and unreasonable preference or advantage to self-propelled Ro/Ro cargo and prejudiced cargo that was not self-propelled. Adel now appears to have shifted its ground. Adel now maintains that PRMSA has violated section 16 by (1) failing to honor its booking contract or to seek a waiver of freight charges; (2) refusing to issue a corrector; and (3) failing to make refunds of overpayments by other shippers on the same voyage.

Adel's argument on PRMSA's alleged violation is one of its least coherent statements. Adel seems reluctant to come to grips with the essential element of its charge against PRMSA. All of the acts or omissions of PRMSA cited by Adel had the same result -- the application of the \$1.80 per cubic foot rate to Adel's mobile homes; and unless that rate subjected Adel to undue prejudice or disadvantage, there has been no violation of section 16. But before dealing with that question, it is necessary to deal with Adel's assertion that it is unnecessary to show competition between Adel and any other shipper to establish a violation of section 16. Adel places its main reliance on the Commission's decision in *Valley Evaporating Co. v. Grace Line, Inc.*, 14 FMC 16 (1970) -- probably the most misconstrued case in the Commission's history.

The *Valley* case involved two shipments of dehydrated apples on which it was alleged that the rate charged violated section 16 of the Act. For six years prior to the two shipments, the Conference had maintained a specific commodity rate on dried fruit including dehydrated apples. Just prior to the two shipments, the rate was \$52 per long ton. It had reached that level by a process of gradual increases from a rate of \$44 established in 1962. Every year since 1962, complainant had shipped on a gradually increasing scale somewhere between 100 and 275 long tons of dehydrated apples.

In November 1967, the Conference agreed to further general rate increases to become effective in March and April of 1968. In compiling the new tariff, the Conference Secretary had prepared lists of commodities moving in sufficient quantities to warrant retention of specific commodity rates. The aim was to eliminate "paper rates" on non-moving commodities. Dehydrated apples had moved in sufficient quan-

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<sup>13</sup> As a practical matter, however, it is unlikely that PRMSA would be actually prosecuted for penalties. Nevertheless, a decision as requested by Adel would not only fly in the face of the overwhelming precedent, but it would condone a violation of the Act.



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tities to meet the Conference's criteria for the retention of a specific commodity rate. However, due to some "oversight," the dried fruit commodity rate was omitted and the two shipments of apples moved at an N.O.S. rate of \$88 per measurement ton -- more than triple the previous commodity rate. Complainant alleged that the rate violated section 16. Respondent defended against the charge by pointing out that complainant had failed to show the necessary "existing and effective competitive relationship between the prejudiced and preferred shipper." In dealing with the question of competition, the Commission began by saying:

. . . while an effective competitive relationship is a necessary part of liability under section 16 in situations where the allegedly preferential or prejudicial rates or charges are geared to transportation factors or the differing characteristics of commodities, it is not required where the carrier's obligation to render a particular service is "absolute" and not dependent upon such factors . . . (14 FMC at 21.) (Emphasis mine.)

The Commission went on to point out that in its effort to delete paper rates, the Conference applied only a single criterion, that the commodity move in sufficient volume to warrant retention of a commodity rate. On the use of the criterion, the Commission went on to say:

Having once established the "sufficient volume" criteria using whatever factors were warranted, respondents, in determining what commodity rates were to be discarded were then required to apply them in a totally fair and impartial manner. At this point the single question involved was whether a given commodity moved in sufficient volume or not. Questions as to the characteristics inherent in the particular commodity involved were irrelevant as were questions of whether the particular commodity competed with any other commodity. (14 FMC at 22.)

In support of its rationale in the *Valley* case, the Commission cited *New York Foreign Frgt F & B Ass'n v. Federal Maritime Commission*, 337 F.2d 289 (1964). Indulgence in a rather long quote from that opinion will show why the rationale of the *Valley* case does not apply here:

The forwarders argue that a Section 16 (First) violation is shown only when (1) two shippers are given unequal treatment, (2) the shippers are competitors, and (3) the preference to one or disadvantage to the other is the proximate cause of an injury; these prerequisites, they urge, are not supported by the Commission's record. We hold, however, that the substantial evidence that forwarders, in random fashion, charge shippers disguised markups of widely varying amounts, for no apparent reason, suffices to establish discrimination in violation of Section 16 (First). In urging that all three prerequisites must be met, the forwarders rely upon cases involving alleged dis-

crimination in transportation or wharfage charges. See, e.g., *Agreement 8765-Gulf/Mediterranean Trade*, 7 F.M.C. 295 (1963); *Wharfage Charges and Practices at Boston, Mass.*, 2 U.S.M.C. 245 (1940). We find those cases not apposite. Transportation or wharfage charges are dependent upon the particular commodity involved; the cost for shipping or storing bananas, for example, bears no relation to the fees levied for heavy industrial equipment. To find an unlawful discrimination in transportation charges thus quite properly requires a showing of competitive relationship between two shippers who are charged different prices. But forwarders render substantially the same service to all shippers in procuring insurance or arranging for cartage; the commodity being shipped has little or nothing to do with the reasonableness of the fee exacted for the forwarder's service. The very practice of charging shippers disguised markups of widely varying amounts on substantially identical services, without justification, seems to us to be prima facie discriminatory in a regulated industry.

At issue here is just such a "transportation charge" which the court found requires "a showing of [a] competitive relationship between two shippers who are charged different prices."

Adel, however, in the alternative "believes that a competitive relationship exists with other shippers which warrants a finding that PRMSA has subjected Adel to preferential or prejudicial rates and practices which are not justified by differences in competitive factors." As the only support for the existence of the necessary competitive relationship, Adel offers the following testimony of Mr. Adel:

Q. . . . How would a freight rate of \$17,280 per mobile home, how would that rate have affected the sale of these homes in Saudi Arabia?<sup>14</sup>

A. Well, it would have priced us out of the market and would not have allowed for a legitimate profit. We were at that time under severe pressure by overland transportation from Europe, and it was sold on the basis of square footage. They knew no other mentality except how many square feet can I get for X number of Re-Yal [sic]. And we were under severe, severe pressure from the Europeans. (Tr. 119-120.)

Adel then cites three other shipments of mobile homes on two voyages of the *S.S. Puerto Rico*, one in May 1976 and one in June 1976, that it alleges moved at lower rates and goes on to say:

Services rendered the various shippers of mobile homes to Dammam by PRMSA were identical as were the terms and

<sup>14</sup> The \$17,280 per unit rate was the result of applying the tariff rate of \$1.80 per cu. ft. to each mobile home measured with wheels and hitches.

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conditions of shipments, i.e. lump-sum, with wheels and hitch-  
es.

Finally Adel concludes:

The record reflects that there was close competition in the market and that the marketability of mobile homes depended on the ultimate freight rate.

Inasmuch as Adel was not afforded equal treatment with respect to the tariff rate charged or PRMSA's underlying acts . . . a finding is warranted that PRMSA acted in violation of Section 16.

In *North Atlantic Med. Frgt Conf. - Rates on Household Goods*, a case cited by Adel, the Commission discussed the criteria necessary to establish a violation of section 16. The Commission pointed out that the purpose of the prohibitions of section 16 are "designed to deal with two or more competing shippers or localities receiving different treatment [by a carrier] which is not justified by differences in competitive or transportation conditions." (11 FMC at 209.) The Commission went on to say:

Since the section is intended to prevent unlawful favoritism among competitors in the same marketplace, the allegedly preferred shipper must ordinarily be in competition with the allegedly prejudiced shipper.<sup>15</sup>

The only competition testified to by Mr. Adel was that from "the Europeans" using "overland transportation." No explanation is offered as to how PRMSA's actions were responsible for the preference seemingly enjoyed by the Europeans' overland rates. There is simply no evidence in the record that Adel was in competition with any particular shipper of mobile homes which received a preference from PRMSA which resulted in prejudice to Adel.

Despite Adel's assertion that "the services rendered the various shippers of mobile homes to Dammam . . . were identical in terms and conditions," on the shipments cited by Adel the sizes of the various mobile homes differed both from each other and from Adel's.

Adel has failed to show that PRMSA has violated section 16 of the Act.

### 3. THE SECTION 17 VIOLATION

As Adel itself states, in order to find a violation of section 17, "there must be two shippers of like traffic over the same line between the same points under the same circumstances and conditions." Adel again points to the fact that PRMSA had made three other shipments of mobile homes on two prior voyages and says that no mobile home was

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<sup>15</sup> The qualifying "ordinarily" obviously refers to those cases involving other than "transportation charges" where the carrier's duty is "absolute."

ever carried by PRMSA at an effective rate of \$17,280 per unit. And here again, Adel ignores the question of the characteristics of the other mobile homes carried by PRMSA. It simply states:

A total of eight homes moved on the voyage of May 22, 1976, all with wheels and hitches attached -- six homes for one shipper and two homes for a second shipper -- however, the rates charged were inexplicably different -- \$12,000 per unit for the six homes and \$11,000 per unit for the two homes . . . the rates applied were lump-sum rates and were not based on cubic footage.

PRMSA's second shipment of mobile homes . . . involved six house trailers. The tariff rate . . . was \$9,200 per unit

To Adel it "is clear that all of the units for these two shipments should have moved at the same unit rate since the rate was not based on a cubic measurement." Adel's logic is flawed to say the least. This kind of reasoning could require the same per unit rate for a Fiat as for a roadgrader. Furthermore, Adel makes an assumption it has not established on the record -- that the several units were identical. There is no evidence of record from which to infer this much less establish it as a fact. Indeed, Adel simply makes the assertion without a single citation to the record.<sup>16</sup>

Adel has failed to establish that the other shipments of mobile homes carried by PRMSA moved under the same transportation circumstances and conditions as the shipment in question. Adel has failed to establish that PRMSA has violated section 17 of the Act.

#### 4. THE SECTION 18(B)(5) VIOLATION

According to Adel, a violation of section 18(b)(5) is established if it is proved (1) that the rate is unreasonably high and (2) the unreasonable rate would be detrimental to United States commerce. Adel argues that it has established a *prima facie* case by showing (1) that "the rates charged for the same commodity moving in the same trade are substantially lower than the rate PRMSA seeks to impose," and (2) that the mobile home market in Saudi Arabia would not have borne an ocean freight rate of \$17,280 per unit. Before dealing with the argument, it is necessary to consider an argument by PRMSA that the Commission cannot find a violation of section 18(b)(5) in this case. That section provides:

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<sup>16</sup> The only citation to the record in Adel's entire discussion of the two shipments is to PRMSA's revised tariff page 75B which shows the per unit rate of \$9,200 for the July 22d shipment of six house trailers. PRMSA states that documents furnished Adel during discovery make it perfectly plain that on the May 22d shipment, the cubic measurements of each of the six units which moved under the \$12,000 rate were substantially greater than that of each of the two used mobile homes that moved at \$11,000 each. One can readily see why these documents were not made part of the record by Adel -- I have not been cited to them, nor have I been able to find them among the several hundred pages of exhibits.

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The Commission shall disapprove any rate or charge filed by a common carrier by water in the 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.

It is PRMSA's position that the Commission cannot find a violation of section 18(b)(5) if the rate in question is no longer in effect. Indulgence in yet another somewhat long quote from *Valley Evaporating, supra*, will demonstrate the rationale of PRMSA's position:

*This section is purely prospective in nature and, as the court explained in Federal Maritime Commission v. Caragher, 364 F.2d 709, 717 (1966):*

. . . simply reflects Congress's awareness that whether a certain rate is "unreasonable" is often a close question and that consequently a regulated carrier should be liable for . . . penalties *only if it continues to charge unreasonable rates after the Commission has determined they are unreasonable.* (Emphasis added.)

We see no reason to distinguish the situation where an allegation of "unreasonableness" under section 18(b)(5) forms the basis for a request for reparation rather than a suit for penalties. Therefore, we find that the court's rationale in the *Caragher* case, *supra*, applies with equal force to the present situation and conclude that 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. *Complainant's reliance on the provisions of section 18(b)(5) in this proceeding is therefore clearly misplaced. Since the alleged "unreasonable" rate is no longer in effect, the Commission has nothing before it to consider for "disapproval" under the provisions of section 18(b)(5).* 14 FMC at 26-27 (emphasis added, footnote omitted).

As in *Valley Evaporating*, there is nothing here to disapprove since PRMSA's rate which is here challenged by Adel is no longer in effect. Thus, since there is nothing to disapprove and since PRMSA's \$1.80 rate was never before disapproved by the Commission, there can be no violation of section 18(b)(5).<sup>17</sup>

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<sup>17</sup> Adel argues that since it is not seeking "reparation," the cases cited by PRMSA are inapposite. This is really a distinction without a difference. Had Adel paid the additional freight charges and brought this suit to recover them, the clear precedent would bar that recovery. The prospective intent of the statute cannot be avoided by the simple expedient of refusing to pay the freight charges and then filing a complaint asking that the carrier be ordered to cease and desist its attempts to collect them. Finally, Adel cites *United Nations Children's Fund v. Delta Steamship*, 16 FMC 423 (1972), as support for its position. In that case the Commission found the rate in question to be unreasonable under section 18(b)(5) and concluded that it was all right for the carrier to make a *voluntary* refund -- a decidedly different situation than the case here.

PRMSA, however, perhaps out of an excess of caution, argues that even were PRMSA's rate now before the Commission, the evidence of record would not support a finding that the rate was so unreasonably high as to be detrimental to the commerce of the United States and therefore could not in any event be disapproved by the Commission.

Adel's entire case under section 18(b)(5) consists of the argument that Adel has never paid and PRMSA has never charged (except in this one instance) a rate as high as \$17,280 per mobile home. It says that PRMSA cannot justify its rate on the basis of exceptional service, terms, or conditions because (1) no such circumstance existed in its service, (2) the offer made to Adel was not based on exceptional services but was upon the same terms and conditions as the Central Gulf offer, and (3) the rate offered and accepted was \$12,000, not \$17,280. Finally, Adel argues that it has established a *prima facie* case for a violation of section 18(b)(5) because (1) the rates charged for the same commodity moving in the same trade are substantially lower than the rate PRMSA seeks to impose and (2) PRMSA's rate would "have priced [Adel] out of the market" and thus the units would not have moved in U.S. commerce.

First, the mere existence of a disparity between rates, in and of itself, does not establish that a rate is so unreasonably high as to be in violation of section 18(b)(5). *Investigation of Ocean Rate Structures*, 12 FMC 34, 58 (1968), *aff'd sub nom, American Export Isbrandtsen Lines, Inc. v. FMC*, 417 F.2d 749 (D.C. Cir. 1969); *Outbound Rates Affecting Exportation of High Pressure Boilers*, 9 FMC 441, 457 (1966); *Iron and Steel Rates Export-Import*, 9 FMC 180, 191 (1965).

Secondly, the argument that the mobile homes would not have moved at the \$17,280 rate is based solely on the testimony of Mr. Adel that the rate ". . . would have priced us out of the market and would not have allowed us a legitimate profit." (Emphasis mine.) But having asserted that "a legitimate profit" was an element in its case, Adel seeks to dismiss evidence introduced by PRMSA (Exhibit 8 as amended by Exhibit 70) which shows that Adel made a profit at the \$17,280 rate as "totally irrelevant."<sup>18</sup>

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<sup>18</sup> In arguing that profit is irrelevant, Adel cites cases which were decided more than 25 years before section 18(b)(5) was enacted and which deal with a different section of the Act.

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Adel cannot have it both ways; and on the record before me, Adel has failed to establish that PRMSA's rate was so unreasonably high as to be detrimental to the commerce of the United States in violation of section 18(b)(5).

The complaint is dismissed.

**(S) JOHN E. COGRAVE**  
*Administrative Law Judge*

Washington, D.C.  
July 11, 1980

**FEDERAL MARITIME COMMISSION**

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**FORMAL DOCKET NO. 699(1)****GLADISH & ASSOCIATES****v.****SEA-LAND SERVICE, INC.**

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**ORDER ON RECONSIDERATION***December 30, 1980*

This proceeding is before the Commission upon receipt of a letter from Gladish & Associates constituting a petition for reconsideration of the Commission's September 25, 1980 Order Partially Adopting Decision of Settlement Officer. The Commission denied Complainant's request for reparations on a number of shipments of toothbrushes on the ground that it had failed to meet its burden of proof.

Complainant requests "re-examination of the documentation heretofore presented," and argues that its submission of evidence established that the shipments in question were "plastic toothbrushes." Complainant's petition does not meet the criteria for reconsideration set forth in section 502.261 of the Commission's Rules. This rule provides that a petition for reconsideration will be summarily 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. 46 C.F.R. 502.261(a).

Complainant merely reargues its position, which was already rejected by the Settlement Officer and the Commission as insufficient to prove the exact nature of the commodities in question. Accordingly, Complainant's petition will be denied.



THEREFORE, IT IS ORDERED, That the Petition for Reconsideration of Gladish & Associates is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.\*

(S) FRANCIS C. HURNEY  
*Secretary*

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\*Chairman Richard J. Daschbach did not participate.

**FEDERAL MARITIME COMMISSION**

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**SPECIAL DOCKET NO. 683****FLOMERCA LINE TO BENEFIT THE  
U.S. DEPARTMENT OF AGRICULTURE**

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**ORDER ADOPTING INITIAL DECISION***December 31, 1980*

The Commission has before it the Exceptions of Flomerca Line to the October 7, 1980 decision of Administrative Law Judge Seymour Glanzer denying Flomerca's special docket application. This decision was largely based upon Flomerca's failure to furnish the supplementary information required by the Commission's July 3, 1980 Order of Remand. 20 S.R.R. 131.

Flomerca now contends that the confusion which resulted from its June 1, 1979 change in steamship agents constitutes good cause for granting it special permission to file a lower rate for "Corn in Bags" upon less than the 30 days notice prescribed by 46 U.S.C. 817(c)(3). Flomerca also claims it carried no other shipments of bagged corn between July 2 and October 9, 1979 so that the inclusion of a 500-ton minimum requirement in Flomerca's corrective tariff filing was an immaterial deviation from the terms of the Flomerca/USDA booking contract.

Flomerca's tardily presented contentions provide an insufficient basis for granting special docket relief and clearly do not meet the standards set forth in the Commission's Order of Remand. 20 S.R.R. at 135, n.13. It would be particularly inappropriate if a controlled carrier were allowed to rely upon the same inadvertent conduct which created the need for a special docket application in the first instance to establish good cause for waiving the 30 day notice requirement of section 18(c)(3).

**THEREFORE, IT IS ORDERED,** That the October 7, 1980 decision in this matter is adopted and the Exceptions of Flomerca Line are denied; and

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

By the Commission.

(S) FRANCIS C. HURNEY  
*Secretary*

**FEDERAL MARITIME COMMISSION**

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**SPECIAL DOCKET NO. 683****APPLICATION OF FLOMERCA LINE FOR THE BENEFIT  
OF U.S. DEPARTMENT OF AGRICULTURE,  
A.S.C.S. COMMODITY OFFICE**

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Pursuant to directions contained in Order of Remand, the application is denied for inadequacy of proof.

**ON REMAND, FURTHER INITIAL DECISION<sup>1</sup>  
OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE**

*Adopted December 31, 1980*

This matter is before me in accordance with the Commission's Order of Remand served July 3, 1980.

On February 7, 1980, I issued an initial decision denying Flomerca Line's application for permission to waive portions of freight charges due it from the United States Department of Agriculture in connection with two shipments of corn transported from Galveston, Texas, to Puerto Cortez, Honduras. The application sought a waiver in the aggregate amount of \$25,415.03 for the two shipments.

The initial decision set forth two separate grounds for denial of the application. One was bottomed on what has come to be known as the *Munoz y Cabrero* doctrine.<sup>2</sup> The second was a determination that "controlled carriers"<sup>3</sup> operating in cross trades are not eligible for special docket relief.

In denying the application, among other things, I ordered Flomerca Line to take appropriate action to collect the balance of freight charges due it from the United States Department of Agriculture.

No exception was filed, but, on its own initiative the Commission undertook to review the initial decision.<sup>4</sup>

On review, the Commission held that "controlled carriers" are eligible to file special docket applications, but that in addition to the need to

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<sup>1</sup> 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).

<sup>2</sup> "It is well settled that a corrective tariff must conform to the tariff originally intended." *Munoz y Cabrero v. Sea-Land Services, Inc.*, 20 F.M.C. 152 (1977)." *Application of Sea-Land Service, Inc. for the Benefit of New Era Shipping as Agent for Central National Corporation*, Order on Remand, 22 F.M.C. 270 (1979). Served November 21, 1979.

<sup>3</sup> Carriers subject to regulation under the Controlled Carrier Act, section 18(c) of the Shipping Act, 46 U.S.C. 817(c).

<sup>4</sup> See Notice of Determination to Review, Served March 10, 1980, 20 S.R.R. 131.

meet the usual requirements for special docket relief, controlled carriers must also demonstrate that the intended rate was not unreasonable on or about the date of shipment--a condition "which would have warranted the grant of a timely filed special permission request to implement [an intended] rate."<sup>5</sup>

In the light of its reversal of the initial decision's holding on the eligibility of controlled carriers to file special docket applications, and for other reasons, the Commission determined that a limited remand<sup>6</sup> should be ordered. On the "controlled carrier" issue, the remand was fashioned to provide Flomerca with an opportunity to demonstrate that the intended rate was not unreasonable on or about the date of shipment. On the *Munoz y Cabrero* issue the remand was fashioned to provide Flomerca Line with the opportunity to establish that the corrective tariff did not differ from the intended rate, or, alternatively, whether any deviation in those rates was material.<sup>7</sup> Incorporating those concepts in formal terminology, the Commission ordered the proceeding remanded to determine:

- 1) Whether there were conditions which existed on or about July 2, 1979 which would have warranted granting Flomerca special permission to file a \$42.00 rate on less than 30 days' notice?
- 2) Whether any shipments of bagged corn other than the two USDA shipments were transported by Flomerca from U.S. points specified in its Tariff FMC No. 17 between July 2, 1979 and October 9, 1979, and, if so, the weight and other transportation characteristics of each such shipment?<sup>8</sup>

To simplify Flomerca Line's undertaking on remand, the Order of Remand explained the nature of the evidence the Commission required on the enumerated issues and specified the manner in which the evidence was to be furnished to the Presiding Officer on remand.<sup>9</sup>

Aware, however, that Flomerca Line's prosecution of the application earlier in the proceeding did not exemplify diligence, the Commission stressed that the application was at risk if the additional evidentiary material were not timely filed. The Commission put it this way, Order of Remand, 20 S.R.R. at 135:

The Presiding Officer previously encountered difficulties in obtaining complete and verified information from Flomerca. *If*

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<sup>5</sup> Order of Remand, 20 S.R.R. at 135.

"Controlled Carriers'" tariff filings may not become effective within less than thirty (30) days following the date of filing with the Commission unless special permission of the Commission is sought and granted. See Initial Decision, 19 S.R.R. 1383, text and n.15.

<sup>6</sup> Order of Remand, 20 S.R.R. at 133.

<sup>7</sup> Order of Remand, 20 S.R.R. at 135.

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., Order of Remand, 20 S.R.R. at 135, n. 13.

*Flomerca fails to produce the information requested by this Order in a timely fashion, the Presiding Officer should issue a brief further decision describing the procedures followed and denying the application for inadequacy of proof. If additional evidence is provided, the Presiding Officer should prepare findings of fact on the issues specified in this Order and refer the matter to the Commission for final decision. [Emphasis supplied.]*

Three months have gone by since the Order of Remand was served. I have received no written or oral communication from Flomerca Line or anyone authorized to act on its behalf.

Accordingly, I find that Flomerca Line has failed to produce the information requested by the Order of Remand in a timely fashion and deny the application for inadequacy of proof.

#### ORDER

It is ordered that the application for permission to waive portions of freight charges for the benefit of the U. S. Department of Agriculture in connection with two shipments of corn from Galveston, Texas, to Puerto Cortez, Honduras, be denied. It is further ordered that Flomerca Line take appropriate action to collect the balance of freight charges due under its tariff rates in effect on July 6, 1979. It is further ordered that within 30 days of service of notice by the Commission that this decision has become administratively final that Flomerca Line shall notify the Commission of the steps taken to effect compliance with this order.

(S) SEYMOUR GLANZER  
*Administrative Law Judge*

Washington, D. C.  
October 7, 1980

## FEDERAL MARITIME COMMISSION

## SPECIAL DOCKET NO. 757

APPLICATION OF HAPAG-LLOYD FOR THE  
BENEFIT OF GENERAL FOODS INTERNATIONAL

## ORDER ADOPTING INITIAL DECISION

*December 31, 1980*

This proceeding was instituted pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817), upon the application of Hapag-Lloyd Aktiengesellschaft for permission to refund \$7,329.00 of the applicable freight charges collected from General Foods International on a shipment of goods rated as "Foodstuffs N.O.S." transported from New York to Limassol, Cyprus.

Administrative Law Judge William Beasley Harris served his Initial Decision on October 24, 1980 granting Hapag-Lloyd's application. No exceptions were filed, but the Commission on its own motion determined to review the Initial Decision.

Upon determining that the application should be granted, the Presiding Officer noted that this action would have the effect of reducing the amount of "compensation" that should have been paid to Rapid World Forwarders, the forwarding agent in the transaction, and, accordingly, directed the forwarder to refund to the shipper any excess "brokerage compensation" resulting from the grant of the application.<sup>1</sup>

Because the freight forwarder, Rapid World Forwarders, is not a party to this proceeding, the Commission cannot order it to remit any excess payments herein. However, in order to preclude the forwarder from retaining excess compensation as a result of the grant of the application in this proceeding, the Commission is directing the carrier, Hapag-Lloyd, to collect any such excess compensation from the forwarder and to advise the Commission of its collection efforts within thirty days of service of this Order.

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<sup>1</sup> On October 30, 1980, the Presiding Officer issued an "Errata" to his Initial Decision which substituted "carrier" for "shipper" as the entity to whom a refund should be made and correspondingly modified the discussion of the excess "brokerage compensation" noting that "brokerage is paid by a common carrier by water to an ocean freight broker for performance of functions specified -- 46 C.F.R. 510.21." Despite these corrections, the Initial Decision fails to adequately distinguish between freight forwarder "compensation" and "brokerage." These terms are defined in our regulations and should be used to prevent confusion. "Compensation" is payment to a licensed freight forwarder by a carrier for rendering specific forwarding services (46 C.F.R. 510.21(h)). "Brokerage" is payment by a common carrier by water to an ocean freight broker for marketing that carrier's transportation services. (46 C.F.R. 510.21(i)).

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With these modifications, the Initial Decision is determined to be proper and well-founded and is adopted by the Commission.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY  
*Secretary*

## FEDERAL MARITIME COMMISSION

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SPECIAL DOCKET NO. 757

APPLICATION OF HAPAG-LLOYD FOR  
THE BENEFIT OF GENERAL FOODS INTERNATIONAL

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Permission granted to refund \$7,329.00 portion of aggregate freight charges of \$10,557.88 collected because of error due to inadvertence in failing to file a new tariff to comply with agreed upon rate.

INITIAL DECISION<sup>1</sup> OF WILLIAM BEASLEY HARRIS  
ADMINISTRATIVE LAW JUDGE

*Adopted December 31, 1980*

This is a proceeding under 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 instant application contains certification that it was mailed at New York September 25, 1980, to the Secretary of this Commission. Under Rule 92(a)(3) and such circumstances, the date so certified is the date of filing of the application. The date of sailing of the shipment involved on the vessel *Stuttgart Express* from New York is given as August 30, 1980. The filing of the application, being within 180 days of the sailing date, is timely.

Hapag-Lloyd Aktiengesellschaft (Hapag-Lloyd) Bill of Lading No. 17393162, dated August 29, 1980, describes the packages and goods as 1 "20 ft. House to House Container said to contain"

- 60 ctns. cooked cereal
- 10 ctns. bran cereals
- 111 ctns. cooked cereal
- 30 ctns. rice cereal
- 500 ctns. coffee roasted

Gross weight 17,453 lbs. Measurement 939 cu.ft. Rate 440.00 M (234.75 X \$4.40 = \$10,329.00 + 228.88 tariff bunker charge = \$10,557.88). Total freight charges to be prepaid \$10,557.88. The cargo loaded as indicated above was shipped by General Foods International to Limassol, Cyprus, via Hamburg, to consignee Cosmos Trading Ltd. The freight charges of \$10,557.88 were paid by the shipper, General Foods International.

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<sup>1</sup> 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 tariff applicable is that of Hapag-Lloyd, FMC 108, an independent service which is not a member of any conference, from Hampton Roads, Philadelphia, Baltimore, New York, Boston and Portsmouth to ports in the Med. Sea, Benghazi, Libya, Spanish Morocco, via ports in the United Kingdom or Bordeaux/Hamburg Range.

On August 10, 1980, Hapag-Lloyd quoted the shipper, General Foods, with a lump sum rate for 20 ft. containers of Foodstuffs N.O.S. from New York to Limassol, Cyprus, for the amount of \$3,000 plus the applicable tariff bunker surcharge.

On August 25, 1980, General Foods booked 1 X 20 ft. container from New York to Limassol, Cyprus, of Foodstuffs N.O.S. for the *Stuttgart Express*, Voy. 939/036, which sailed New York on August 30, 1980.

FMC 108, the applicable tariff, did not contain the entry or rate for Foodstuffs N.O.S.; therefore, the general cargo entry had to apply and the bill was rated at \$440.00 W/M plus the applicable tariff bunker surcharge -- total freight charge of \$10,557.88. The new tariff page -- 31st Revised Page 12, effective September 20, 1980, was filed by Hapag-Lloyd for Foodstuffs N.O.S. at a lump sum rate of \$3,000.00. The rate of \$3,000.00 plus tariff bunker surcharge of \$228.88 totals \$3,228.88, to be subtracted from the \$10,557.88 collected, leaving \$7,329.00 to be refunded.

The application states the failure to file with this Commission the proper rate of \$3,000.00 for Foodstuffs N.O.S. as agreed upon by the shipper, General Foods, and the line, Hapag-Lloyd, was due to an administrative oversight at the time of the agreement.

No information is supplied as to whether there are other special docket applications or decided or pending formal proceedings involving the same rate situation. Nor is information supplied as to whether there are shipments of other shippers of the same or similar commodity which (a) moved via applicant during the period of time beginning on the day before the effective date of the conforming tariff and (b) moved on the same voyage of the vessel carrying the shipment described above.

#### DISCUSSION

The instant application was filed September 25, 1980, and the effective tariff setting forth the rate on which refund was based was effective September 20, 1980. Thus the Commission received the effective tariff before the application was filed in conformity with Rule 92. Too, the application was filed timely.

The application speaks only of this one shipment. If there are others, appropriate notice of this proceeding published in the appropriate tariff should enure to the benefits of any similarly situated.

Rapid World Forwarders, Inc., FMC No. 624, are shown as the forwarding agent herein. Consistent with Commission policy, the

freight forwarder is required to refund a proportionate percentage of brokerage compensation it has received for the shipment. *Application of Sea-Land Service, Inc., for the Benefit of BDP International, Inc., as Agent for Champion International Export Corporation.* 20 F.M.C. 226 (1979).

Upon consideration of the above, the Presiding Administrative Law Judge *finds* and *concludes* the applicant has pointed out satisfactorily and explained the error due to inadvertence in failing to file a new tariff to comply with the rate quoted the shipper on August 10, 1980, so that along with other factors warrants the conclusion that this application, under section 18(b)(3) of the Shipping Act, 1916, and Rule 92 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 should be granted.

(2) The freight forwarder of the shipment, Rapid World Forwarders, Inc., FMC No. 624, shall refund to the carrier (brokerage is paid by a common carrier by water to an ocean freight broker for performance of functions specified-- 46 C.F.R. 510.21) the excess brokerage compensation it has received by virtue of the adjusted freight charges; and the said freight forwarder shall certify to the Commission that such refund has been made.

(3) The refund will not result in discrimination as between shippers. Wherefore, it is *ordered* that:

(A) The application be and hereby is granted.

(B) Applicant-carrier, Hapag-Lloyd, is granted permission to refund to the shipper, General Foods International, a \$7,329.00 portion of aggregate freight charges of \$10,557.88 collected.

(C) Appropriate notice shall be published by the applicant in the appropriate tariff.

(D) Freight Forwarder Rapid World Forwarders, Inc., FMC No. 624, shall refund to the carrier the excess brokerage compensation it received by virtue of the adjusted freight charges; and the freight forwarder shall certify to the Commission that such refund, based on a percentage of the freight charges, has been made.

(S) WILLIAM BEASLEY HARRIS  
*Administrative Law Judge*

Washington, D.C.  
October 24, 1980

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-51****MISSOURI PACIFIC RAILROAD COMPANY****v.****GULF EUROPEAN FREIGHT ASSOCIATION, ET AL**

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**NOTICE***January 2, 1981*

Notice is given that the time within which the Commission could determine to review the November 17, 1980 order of discontinuance in this proceeding has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY  
*Secretary*

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-51****MISSOURI PACIFIC RAILROAD CO.**

v.

**GULF EUROPEAN FREIGHT ASSOCIATION, ET AL.**

---

**JOINT MOTION TO DISCONTINUE PROCEEDING GRANTED***Finalized January 2, 1981*

On November 10, 1980 (received November 13, 1980), the Missouri Pacific Railroad Company, Complainant, and the Gulf European Freight Association, Lykes Bros. Steamship Co., Inc., Gulf Europe Express, Hapag Lloyd A.G., Sea-Land Service, Inc., United States Lines, Inc., and Seatrain International S.A.,<sup>1</sup> Respondents, served this motion to discontinue this proceeding. In support of the motion it is stated:

(1) The complaint challenged the validity of the Railroad Usage Surcharge imposed by Tariff No. 4 (FMC-4), pages 6-a through 6-j, inclusive. This surcharge has been cancelled as of November 7, 1980, by all participating steamship lines. (Seatrain International S.A. resigned from the Gulf European Freight Association on October 8, 1980 and did not participate in this cancellation.)

(2) This cancellation renders moot all issues involved in this proceeding. The Commission can accord to Complainant no relief that has not already been provided by its cancellation of the tariff surcharge.

(3) The Complainant and Respondents agree that this requested discontinuance will not prejudice Complainant's continuing right to challenge before the Federal Maritime Commission any subsequently published Railroad Usage Surcharge.

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<sup>1</sup> On November 5, 1980, the appearance of Neal M. Mayer and Peter J. King of Coles & Goertner was filed as separate counsel for respondent Seatrain International S.A. for the limited purpose of the submission of a motion to dismiss Seatrain International S.A. as a respondent in this proceeding. The motion to dismiss complaint as to Seatrain was filed November 5, 1980. Time to respond has not expired.

Wherefore upon consideration of the above and the record herein, it is *ordered*:

- (A) The motion is granted.
- (B) The proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS  
*Administrative Law Judge*

November 17, 1980

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-64**

**CUTTER LABORATORIES OVERSEAS CORPORATION**

**v.**

**MAERSK LINES**

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**NOTICE**

*January 6, 1981*

Notice is given that the time within which the Commission could determine to review the November 21, 1980 order of discontinuance in this proceeding has expired. No such determination has been made and, accordingly, that decision has become administratively final.

**(S) FRANCIS C. HURNEY**  
*Secretary*

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-64****CUTTER LABORATORIES OVERSEAS CORPORATION****v.****MAERSK LINES**

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*Eugene Simonalle*, Assistant Corporate Counsel of Cutter Laboratories, Inc., for Complainant.

*Robert B. Yoshitomi*, of Lillick, McHose & Charles, for Respondent.

- (1) SETTLEMENT AGREEMENT APPROVED**
- (2) MOTION TO WITHDRAW COMPLAINT GRANTED**
- (3) PROCEEDING DISCONTINUED WITH PREJUDICE**

*Finalized January 6, 1981*

This proceeding was instituted by a complaint served September 19, 1980, under section 22 of the Shipping Act, 1916, alleging the respondent Maersk Lines has violated sections 17, 18(a) and 18(b)(3) of the Shipping Act, 1916.

An unopposed motion to enlarge time for answer to the complaint was served October 10, 1980, by the respondent. By Order served October 15, 1980, the motion was granted extending time to answer the complaint to and including November 19, 1980.

On October 13, 1980, the complainant served an unopposed motion for leave to amend its complaint by adding an additional ground on which relief is due by adding the following language at the bottom of page 5 of the complaint:

Cutter alternatively alleges that the parenteral solutions shipped by Cutter during the period in controversy, the first nine months of 1979, were misrated. During this period, the correct rating should have been:

Parenteral solutions, for human use, put up in measured doses or in forms for packings of a kind sold in retail. Ordinary stowage.

In support it was stated that after the filing of the complaint Cutter and Respondent Maersk conferred to discuss the merits of Cutter's claim. Maersk agrees that relief is due on the additional ground set forth and it is expected the parties will shortly reach a settlement.

The unopposed motion for leave to amend the complaint was granted by Order served October 21, 1980.

On November 11, 1980, the complainant served its motion to withdraw the complaint, setting forth, *inter alia*, the parties have entered into a settlement agreement which is to be submitted to the Presiding Officer for approval; that if the settlement agreement is approved, then Maersk will pay to Cutter the amount which the parties have agreed to in the Settlement Agreement as settlement for the claim. Then, the complaint should be withdrawn and the proceeding should be dismissed with prejudice

Under date of November 10, 1980, respondent sent a letter (received November 17, 1980) which states in part:

\* \* \*

Cutter's Complaint, as amended, alleges that certain of its cargo carried in 1979 by Maersk from California to Hong Kong was misrated. Upon a review of the pertinent bills of lading, export declarations, packing lists, and other documents, Maersk agrees that the cargo was inadvertently misrated. A review of the thirteen shipments in controversy results in twelve adjustments in favor of Cutter and one adjustment in favor of Maersk. On this basis the parties have agreed, subject to your approval, to settle this claim.

Accordingly, the enclosed Settlement Agreement contains a stipulated statement of facts as well as references to and attachment of the pertinent shipping documents. As you will see, Exhibit 25 to the Settlement Agreement contains a recalculation of the freight for each of these shipments. We have attempted to state the factual basis for the settlement in a simple yet complete manner, sufficient to show what the cargo was and correct freight payment should have been. While we believe that these freight calculations are self-explanatory, should you need additional information, we, of course, stand ready to provide whatever you may require.

\* \* \*

Enclosed was the following Settlement Agreement (the exhibits attached have been filed in the docket in this proceeding):

#### SETTLEMENT AGREEMENT

THIS AGREEMENT is made as of the 10th day of November, 1980, by and between Cutter Laboratories Overseas Corporation ("Cutter") and A. P. Moller-Maersk Line, known as Maersk Line ("Maersk"):

W I T N E S S E T H:

WHEREAS, during the period January through September, 1979, Cutter shipped certain cargoes of parenteral solutions and disposable intravenous equipment on Maersk vessels from Long Beach and Oakland, California to Hong Kong

WHEREAS, in regard to these shipments, Cutter has filed a Complaint against Maersk with the Federal Maritime Commis-



sion ("FMC"), designated as Docket No. 80-64, alleging that the freight rates charged to and paid by Cutter were contrary to the terms of the Shipping Act, 1916, as amended, and therefore Cutter was harmed;

WHEREAS, Cutter has filed an Unopposed Motion to Amend its Complaint to allege, *inter alia*, that all of the subject cargo was misrated, and this motion has been granted;

WHEREAS, Cutter and Maersk have conferred for the purpose of discussing Cutter's claim and of attempting to negotiate a settlement thereof consistent with their respective commercial positions as well as the requirements of the Shipping Act;

WHEREAS, the parties seek to avoid the great expense and inefficiency necessarily involved in litigation;

NOW, THEREFORE, the parties agree to settle Cutter's claim as follows:

1. The parties stipulate to the following statement of facts:

a. During the period in controversy, January through September 1979, Maersk served the trade from Long Beach and Oakland, California to Hong Kong as a member of the Pacific Westbound Conference ("PWC"). The PWC is a conference of carriers, authorized by the FMC, which serves the outbound trades from the Pacific Coast of the United States (including California) and Canada to the Far East (including Hong Kong).

b. Effective January 1, 1979, the PWC reconstituted its tariffs and, in particular, its tariff governing the local movements from California to Hong Kong. This tariff was designated No. 11-FMC-19 ("Tariff No. 11").

c. During the first nine months of 1979, Cutter shipped cargoes of parenteral solutions and disposable intravenous equipment (and certain other cargoes not germane to this controversy) on Maersk vessels from California to Hong Kong. These cargoes were shipped on thirteen separate voyages with one bill of lading for each such voyage. Copies of these bills of lading are attached hereto and designated Exhibits 1 through 13, respectively.

d. Although some of these voyages carried both of the subject cargoes--parenteral solutions and disposable intravenous equipment--through inadvertance not all of the bills of lading for such voyages reflect the actual cargoes. Therefore, the other pertinent transit documents such as export declarations, inland drayage receipts, packing lists, etc. are attached as Exhibits 3A through 3F, 7A through 7C, 8A through 8D, 9A through 9C, and IIA and IIB to identify the cargo actually carried.

e. The freight rate *applied* to all of the parenteral solutions (including the disposable intravenous equipment erroneously

grouped with it on certain bills of lading) was the local rate to Hong Kong for:

"Preparations affecting electrolytic, caloric and water balance (except diuretics preparations) for human use, put up in measured doses or in forms or packings of the kind sold at retail. Ordinary Stowage."

This description is listed on page 421 of Tariff No. 11 (and is assigned PWC commodity item number 442 4900 00). The freight monies calculated under this rate were paid by Cutter to Maersk.

f. Regarding the *parenteral solutions*, the bills of lading show this cargo to be listed as "parenteral solutions". The parties agree that it was misrated and, for those cargoes listed in Exhibit 1 through 12, that the correct rate should have been the local rate to Hong Kong for:

"Parenteral solutions, for human use, put up in measured doses or in forms or packings of the kind sold at retail. Ordinary Stowage."

This description is listed on page 423 of Tariff No. 11 (and is assigned PWC commodity item number 442 8500 30).

g. For the *disposable intravenous equipment*, the bills of lading and other transit documents show this cargo to be listed as "disposable intravenous equipment." The parties agree that it was misrated and that the correct rate is the local rate to Hong Kong for:

"Bougies, Catheters, Drains, and Sondes and Parts Thereof".

This description is listed on page 681 of Tariff No. 11 (and is assigned PWC commodity item number 709 0900 20).

h. During the period January 1 through September 27, 1979, the rates pertaining to these three tariff categories were as follows:

Effective	Preparations affecting...(see ¶ 1.e above) <sup>1</sup>	Parenteral solutions...(see ¶ 1.f above) <sup>2</sup>	Bougies...(see ¶ 1.g above) <sup>3</sup>
Jan. 1, 1979	\$160.00 W/M	\$111.00 W/M	\$88.00 W/M
Apr. 1, 1979	\$170.00 W/M	\$121.00 W/M	\$97.00 W/M

<sup>1</sup> The tariff pages reflecting these rates are attached hereto as Exhibits 14 to 16.

<sup>2</sup> The tariff pages reflecting these rates are attached hereto as Exhibits 17 to 19.

<sup>3</sup> The tariff pages reflecting these rates are attached hereto as Exhibits 20 to 22.

i. Review of the traffic which is the subject of Cutter's claim also reveals a misrating in favor of Cutter. Exhibit 13 is a bill of lading for cargo (including some parenteral solutions) all of which was refrigerated--as evidenced by the reference

“Chill Room” in the bill of lading. Therefore, this movement should have been rated under the tariff category

“Refrigerated Rule No. 58”.

This description is listed on page 410 of Tariff No. 11 (and is assigned PWC commodity item number 004 0300 03). The bill of lading for this shipment is dated September 15, 1979, and the pertinent freight rate on this date was \$258.00 W/M, as evidenced by the pertinent tariff pages, attached hereto and designated as Exhibits 23 and 24.

j. Based on the foregoing, the table attached hereto and designated as Exhibit 25 contains a calculation of the freight rate paid by Cutter as well as the freight rate which it should have paid. (Additionally Exhibits 1 through 13 also contain certain handwritten supporting calculations.) Based on these calculations, the net amount of \$13,116.41 is due and owing to Cutter from Maersk, as excess freight paid.

k. Effective September 28, 1979, Tariff No. 11 was amended to add a category entitled:

“Parenteral solutions affecting electrolytic, caloric and water balance, for human use”.

This description is contained on page 421 of Tariff No. 11 (and is assigned PWC commodity item number 442 4900 30). See 4th Revised page 421 (Exhibit 16 hereto). Once this category was added to the PWC tariff, it was the one under which the parenteral solutions should be, and now correctly are, rated. Prior to that time, however, the correct rating for parenteral solutions was as stated above.

2. This Settlement Agreement shall promptly be submitted to the presiding Administrative Law Judge for his approval.

3. At least seven days before Maersk's Answer to the Complaint is due (which is now November 19, 1980), Cutter shall file a Motion to Withdraw its Complaint and dismiss the proceeding with prejudice, conditioned upon acceptance of the Settlement Agreement by the presiding Administrative Law Judge and, if it reviews the matter, the Commission.

4. If the settlement is accepted and the Complaint is withdrawn and the proceeding is dismissed with prejudice, then Maersk shall pay to Cutter within fifteen days thereafter the amount of \$13,116.41 in settlement of this claim.

5. Upon such payment, Cutter releases Maersk, its successors, assigns, and agents, from all claims whatsoever, known or unknown, arising out of the transportation, litigation, or other transactions which are or could be the subject matter of F.M.C. Docket No. 80-64. Cutter understands that this is a general release and it waives the benefit of California Civil Code section 1542 (or any other comparable provision under any law) which states as follows:

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

6. Each of the parties shall use its best efforts, consistent with the requirements and spirit of this agreement, to promote acceptance of this Settlement Agreement.

7. If the settlement is refused, then at such time each party is no longer bound by any aspect of this Settlement Agreement.

Cutter Laboratories Overseas Corporation

By  
Treasurer

A.P. Moller - Maersk Line

By  
Jens J. Raun, Attorney-in-fact

#### DISCUSSION

The settlement agreement is silent as to and thus negates any admission of violation of law, and if the settlement agreement is approved, there will be no finding of violation of law. The law, of course, encourages settlement and every presumption is indulged in which favor their fairness, correctness and validity generally. *General Discount Corp. v. Shram*, 47 F. Supp. 845 (D. Ct. E.D. Mich. 1942); *Florida Trailer & Equipment Company v. Deal*, 284 F. 2d 567, 571 (CA 5, 1960).

The Presiding Administrative Law Judge *finds* and *concludes* that the settlement agreement is a bona fide attempt to terminate the controversy and not a device to circumvent the requirements of law. The settlement agreement reflects a rational, valid and fair solution of the dispute and obviates the need for further extensive and expensive litigation. The settlement itself is proper and does not violate any provision of law.

Wherefore, it is *ordered*:

- (A) The Settlement Agreement is approved.
- (B) Motion to Withdraw the Complaint is Granted.
- (C) This proceeding is discontinued with prejudice.

(S) WILLIAM BEASLEY HARRIS  
*Administrative Law Judge*

November 21, 1980

# FEDERAL MARITIME COMMISSION

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INFORMAL DOCKET NO. 724(1)  
COTTON IMPORT AND EXPORT CO.

v.

SEA-LAND SERVICE, INC.

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## ORDER ON RECONSIDERATION

*January 6, 1981*

On August 11, 1980, the Commission reversed the Decision of the Settlement Officer and denied Cotton Import and Export Co.'s request for reparation on the ground that it had failed to meet its burden of proof. Specifically, the Commission cited several inconsistencies and unanswered questions in Complainant's case.<sup>1</sup>

This proceeding is now before the Commission upon receipt of a letter from Complainant constituting a petition for reconsideration of the Commission's August 11 Order.<sup>2</sup>

Complainant's request does not meet the criteria for reconsideration pursuant to the Rules of Practice and Procedure. Rule 261 provides that a petition for reconsideration will be summarily 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. 46 C.F.R. 502.261(a).

Complainant alleges neither error nor change in material fact, but rather offers explanation and proof which were previously requested of it and which were not forthcoming until the case had been decided. Thus, none of the criteria for reconsideration under the Rules has been met.

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<sup>1</sup> Clarification of several of the problem areas had been sought from Complainant on two occasions prior to issuance of the Commission's decision: by the Settlement Officer on September 18, 1979, and by the Commission's Secretary pursuant to the Commission's instructions, on May 19, 1980. On both occasions, Complainant's response was unsatisfactory, and the Commission's August 11 Order denying reparation ensued.

<sup>2</sup> The letter, dated September 9, 1980, was addressed to then Vice Chairman Moakley.

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration of Cotton Import and Export Co. is denied; and  
IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.\*

(S) FRANCIS C. HURNEY  
*Secretary*

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\* Vice Chairman Kanuk concurs in the result.

## FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 720(1)

3M

v.

HAPAG LLOYD

## ORDER DENYING RECONSIDERATION

*January 8, 1981*

By Petition filed December 5, 1980, Complainant 3M requests that the Commission reconsider its order of November 5, 1980, adopting the Settlement Officer's decision issued August 20, 1980.<sup>1</sup>

3M's Petition for Reconsideration must fail unless it meets the criteria set forth in Rule 261 of the Commission's Rules.<sup>2</sup> 3M's Petition essentially consists of a restatement of arguments already considered by the Settlement Officer and properly disposed of by him.<sup>3</sup> The Petition therefore must be denied.

It is so ordered.

By the Commission.\*

(S) FRANCIS C. HURNEY  
*Secretary*

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<sup>1</sup> The Commission adopted the decision of the Settlement Officer upon reviewing it on its own motion.

<sup>2</sup> 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. 46 C.F.R. 502.261.

<sup>3</sup> 3M's explanation that it has the policy of filing claims worldwide in its own name does not warrant a different conclusion. Such a policy does not, in the absence of a valid assignment, confer standing upon 3M to seek reparation for freight overcharges it has not paid.

\* Chairman Richard J. Daschbach did not participate.

**FEDERAL MARITIME COMMISSION**

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(46 C.F.R. - 503; DOCKET NO. 80-48)

**APPEALS OF DENIALS OF REQUESTS FOR INFORMATION**

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*January 9, 1981*

**ACTION:** Discontinuance of Proceeding

**SUMMARY:** The Commission has determined to discontinue this proceeding without issuing a rule. A change in the present system of processing of appeals from denials of requests for information under the Freedom of Information and Government in the Sunshine Acts is considered unnecessary.

**DATES:** Effective January 14, 1981

**SUPPLEMENTARY INFORMATION:**

By notice published in this proceeding (45 F.R. 48172; July 18, 1980), the Federal Maritime Commission proposed to amend its rules regarding appeals from a denial by the Secretary of certain requests submitted pursuant to the Freedom of Information and Government in the Sunshine Acts. At present, section 503.34 of 46 C.F.R. provides that such appeals are made to the Chairman. The proposed amendment would have the appeals addressed to the entire Commission where they involve a request for transcripts of closed Commission meetings and "other documents which have been prepared through joint action or effort of a quorum of Commissioners."

In response to the notice, comments were received from The Adherence Group; a number of conferences in the North European trades; the "8900" Lines; a number of conferences in the Latin American trades; Sea-Land Service, Inc.; and the firm of Kominers, Fort, Schlefer and Boyer.

The Commission has considered the comments in this proceeding and reviewed its experience over the years with respect to appeals of denials of requests and concluded that a change in the current procedure is unnecessary. Appeals are made in relatively few circumstances and appeals of the type contemplated in this proposed rulemaking are extremely rare. The present procedure of appeal to a single authority,



viz., the Chairman of the Commission is efficient and fair. Accordingly, this proceeding is discontinued.

By the Commission.\*

(S) FRANCIS C. HURNEY  
*Secretary*

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\* Dissenting Opinion of Vice Chairman Kanuk is attached.

*Vice Chairman Leslie Kanuk, dissenting.* The majority bases its decision to discontinue this proceeding on grounds that appeals of the type involved in this rulemaking are rare and that, in any event, the present appeal process is "efficient and fair". In my opinion, neither of these rationales forms a basis for the result reached.

The fact that the appeals involved may occur infrequently is certainly not grounds for refusing to institute a rule to deal with them when they do occur. Furthermore, the proposed rule would be a more appropriate and certainly a fairer way to handle appeals which involve requests for documents resulting from actions taken by the Commission as a collegial body. The Commission itself pointed out in its notice of proposed rulemaking (published July 18, 1980) that "each of the Commissioners should have an equal voice" in decisions relating to the release of transcripts, recordings, or minutes of sessions during which the Commissioners jointly conduct the agency's official business. In addition, the Commission stated that "each Commissioner has an equal interest in whether to release other 'sensitive' agency documents which are the product of joint effort or action of the Commission." Implicit in the proposed rule was the intent to remove any basis for an allegation of bias, which can arise if one Commissioner alone is deciding an appeal.

It appears to me, as it appeared earlier to the rest of the Commission, that there is a sound basis for adopting the rule. In addition, all of the parties filing comments, with one exception, support its adoption. Therefore, in light of the Commission's own statements, and public support for the proposed rule, I cannot agree with the majority's latest conclusion that the current system is "fair" and should remain unchanged.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-5

**DYNAMIC INTERNATIONAL FREIGHT FORWARDER, INC.,  
INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE  
APPLICATION AND POSSIBLE VIOLATION OF  
SECTION 44, SHIPPING ACT, 1916**

The terms "dispatching" and "carrying on the business of forwarding" are interchangeable terms referring to services performed for shippers in connection with the movement of cargo to port for ocean carriage.

Respondent violated section 44(a) of the Shipping Act, 1916, by engaging in unlicensed forwarding. Respondent is found unfit to be licensed and is fined \$2,500 in civil penalties.

*Richard N. Sharood*, of Wilcox and Sharood, for Respondents.

*Joseph C. Slunt, Deana E. Rose and John Robert Ewers*, for the Commission's Bureau of Investigation and Enforcement.

## REPORT AND ORDER PARTIALLY ADOPTING INITIAL DECISION

*January 16, 1981*

**BY THE COMMISSION:** (RICHARD J. DASCHBACH, *Chairman*; JAMES V. DAY, THOMAS F. MOAKLEY AND PETER N. TEIGE, *Commissioners*. LESLIE KANUK, *Vice Chairman*, CONCURRING IN PART AND DISSENTING IN PART.)

This proceeding was instituted by Order of Investigation and Hearing, served January 23, 1980, to determine:

- (1) Whether Dynamic International Freight Forwarders, Inc. (Dynamic) violated section 44(a), Shipping Act, 1916 by engaging in unlicensed forwarding activities;
- (2) Whether civil penalties should be assessed against Dynamic International Freight Forwarders 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; and
- (3) Whether, in light of the evidence adduced pursuant to the first issue, together with any other evidence adduced, Dynamic 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.

On June 16, 1980, Administrative Law Judge William Beasley Harris served his Initial Decision wherein he found that:

- (1) The respondent had engaged in "*unlicensed forwarding activities*" in violation of section 44(a) of the Act.
- (2) A \$2,500 civil penalty should be assessed against respondent for violating the Shipping Act, 1916 and that "payment of said penalty is a condition precedent to the issuance of the respondent's license;" and
- (3) Upon payment of the civil penalty respondent will possess the "requisite fitness" within the meaning of section 44(b), Shipping Act, 1916 to be licensed as an independent ocean freight forwarder.

The Commission's Bureau of Investigation and Enforcement (BIE, formerly Hearing Counsel) and Dynamic filed Exceptions to the Initial Decision. Both parties filed Replies to Exceptions.

#### BACKGROUND

The facts in this proceeding as stipulated by the parties and found by the Presiding Officer are essentially as follows:

1. Dynamic, a Michigan corporation, applied for a freight forwarder's license on January 18, 1979. Evelyn Siegel is the President and qualifying officer of the applicant.

2. On January 25, 1979 Mrs. Siegel advised the Commission's Office of Freight Forwarders by telephone that Dynamic had engaged in some "ocean freight forwarding" which she considered permissible so long as no compensation was received from the ocean carrier. She further indicated that Dynamic had received \$120 in "documentation fees" for forwarding services on four shipments.

3. Mrs. Siegel was warned on August 31, 1978, January 25, 1979, and January 30, 1979, about unlicensed freight forwarding. On March 7, 1979, Mrs. Siegel, in response to Commission staff inquiries, advised that "no further forwarding work will be performed" until the company is licensed.

4. Autoliner, Inc., agent for Hoegh-Ugland Auto Liner (HUAL), provided 13 HUAL bills of lading covering the period September 28, 1979 through February 2, 1980 on which Dynamic's name appeared as freight forwarder.

5. Motorship, Inc., agent for Wallenius Line, provided 24 bills of lading dated between July 28, 1979 and October 13, 1979 on which Dynamic's name appeared as freight forwarder. On an additional 42 Wallenius bills of lading issued during the period November 1, 1979 through February 3, 1980, Dynamic's name appeared in the forwarder's box, although the carrier's "freight statement" provides that "no forwarder" was involved in the shipments. Motorship advised that Dy-

dynamic appeared as forwarder on all of these shipments at its request. The request was made for accounting purposes.

6. By affidavit of May 21, 1980, Mrs. Siegel attested that Dynamic's name appeared on the Wallenius and HUAL bills of lading to note that the credit arrangements had been made through Dynamic. She further advised that the documentation services were performed either without charge or for a nominal fee.

7. Autos International was the shipper on virtually all of the above-referenced bills of lading. Autos did not pay nor was it billed by Dynamic for its service, although Autos was invoiced by Dynamic for ocean freight charges advanced by Dynamic.

8. In connection with the subject shipments, Dynamic prepared the bill of lading or the export declaration, advanced ocean freight charges, or was extended credit by the carrier or its agent on the shipper's behalf. Dynamic did not seek nor was it paid brokerage by the carrier's agents, Autoliners and Motorship.

9. Robert Hunter, a shipper from Mission Viejo, California, furnished four Dynamic invoices dated September 9, 1979 through December 4, 1979 which listed charges for inland transportation, estimated ocean freight, insurance, documentation, telexes and mail.

#### POSITIONS OF THE PARTIES

Dynamic excepts to the Presiding Officer's finding that it violated section 44(a). Dynamic contends that the Presiding Officer "side-stepped" its argument that "carrying on the business of forwarding," as that term is used in section 1 of the Act,<sup>1</sup> requires *both* the dispatching of shipments (which Dynamic interprets to include booking cargo space and ordering cargo to port) *and* the handling of the formalities incident to such shipments (which Dynamic interprets to include preparing or processing ocean bills of lading, preparing or processing export declarations, or arranging for trucking or lightering).<sup>2</sup> Dynamic submits that Commission General Order 4, upon which both BIE and the Presiding Officer rely, "unlawfully merges the two distinct provisions of section 1 into a unified concept of freight forwarding service *or* dispatching of shipments." (46 C.F.R. 510.2(c)).

BIE supports the Presiding Officer's finding that Dynamic had engaged in unlicensed forwarding within the meaning of sections 1 and 44 of the Act. It points out that the term "carrying on the business of

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<sup>1</sup> Section 1, Shipping Act, 1916, provides in pertinent part:

The term "carrying on the business of forwarding" means the dispatching of shipments by any person on behalf of others, by oceangoing common carriers in commerce from the United States . . . to foreign countries, . . . and handling the formalities incident to such shipments.

<sup>2</sup> The Initial Decision does not clearly address this issue. The Presiding Officer couched the violations only in terms of "unlicensed forwarding activities."

forwarding" was first addressed in Docket No. 621 - *Port of New York Freight Forwarder Investigation*, 3 U.S.M.C. 157 (1949), where the Commission delineated the scope of forwarding services and noted that a forwarder engages in a wide range of activities, any one of which constitutes freight forwarding. In so doing, the Commission described a wide range of activities performed by forwarders and noted that these services may vary from shipment to shipment. BIE submits that section 1, as subsequently enacted, reflects the Commission's reasoning in Docket No. 621 and that any forwarding service, set forth in General Order 4, 46 C.F.R. 510.2(c), constitutes the "carrying on the business of forwarding."<sup>3</sup>

BIE therefore concludes that the Commission's "longstanding" interpretation of section 1 as reflected in section 510.2(c) of General Order 4 is correct and consistent with the statute's legislative history and the Commission's regulatory policy. In this regard, BIE points out that a construction given to a statute by the administrative agency whose duty it is to carry out its provisions is entitled to "great weight" and should not be overruled unless clearly unlawful.

BIE disagrees, however, with the Presiding Officer's finding that Dynamic is fit to be licensed as an independent ocean freight forwarder because the unlicensed forwarding activities were performed in good faith on the advice of counsel. It contends that Dynamic did not retain counsel until October 1979 and that Dynamic had engaged in unlicensed forwarding on at least 32 instances prior to that date.<sup>4</sup> BIE therefore urges the Commission to find Dynamic unfit and assess a civil penalty of \$10,000 for past violations of the statute and the Commission's Rules.

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<sup>3</sup> Section 510.2(c) of General Order 4 describes services similar to the services detailed in Docket No. 621. That section provides:

The term "freight forwarding service or dispatching of shipments" means a service rendered by an independent ocean freight forwarder on behalf of other persons in the process of dispatching or facilitating an export shipment as authorized by such person. Such service includes, but is not limited to the following: examining instructions and documents received from shippers; ordering cargo to port; preparing or processing export declarations; booking cargo space; preparing or processing delivery orders and dock receipts; preparing instructions to truckmen or lightermen, or arranging for, or the furnishing of trucks and lighters; preparing and processing ocean bills of lading; preparing or processing consular documents and arranging for their certification; arranging for or furnishing warehouse storage when necessary; arranging for insurance when so instructed; clearing shipments in accordance with United States government regulations; preparing advance advice notices of shipments and sending copies thereof to banks, shippers, or consignees as required; sending completed documents to shippers, banks or consignees as directed; advancing necessary funds in connection with the foregoing; providing supervision in the coordination of services rendered to shipments from origin to vessel; rendering special services on unusual shipments or when difficulties in transit arise; and giving expert advice to exporters as regard letters of credit, licenses, and inspection.

<sup>4</sup> In response to BIE's Exceptions, Dynamic advises that it retained counsel in August 1979 and not October 1979; also that Mrs. Siegel, prior to the retention of counsel, performed services on 9 shipments rather than 32.

DYNAMIC INT'L FREIGHT FORWARDER LICENSE  
APPLICATION  
DISCUSSION

1. THE DEFINITION OF "CARRYING ON THE BUSINESS OF FORWARDING"

Dynamic's Exceptions to the Initial Decision raise the following issues:

- (1) Does carrying on the business of forwarding within the meaning of sections 1, 44(a), and 44(e) of the Act require a person to both dispatch and handle the formalities incident to such shipments?
- (2) What does the term "dispatching shipments" include?

Section 1 of the Act defines "carrying on the business of forwarding"

as:

[T]he *dispatching of shipments* by any person on behalf of others, by oceangoing common carriers in commerce from the United States, its Territories, or possessions to foreign countries, or between the United States and its Territories or possessions, or between such Territories and possessions, *and handling the formalities* incident to such shipment. (Emphasis supplied).

Section 1 of the Act would, on first impression, require both "dispatching" and "handling the formalities incident to such shipments" in order for an activity to constitute "carrying on the business of forwarding." Section 44(a) prohibits a person from "carrying on the business of forwarding" without a license. Dynamic argues that it did not carry on the business of forwarding because it did not "dispatch" any shipments (as it construes that term) but merely handled certain "formalities incident to such shipments." Fundamentally, Dynamic's argument rests upon the conjunctive language of section 1. There is no legislative history, nor has Dynamic attempted to cite any, which clearly defines "dispatching" or "handling the formalities."<sup>5</sup> Moreover, nowhere in the Shipping Act are the terms "dispatching" and "handling the formalities" defined. However, while the term "handling the formalities" does not appear anywhere in the body of the freight forwarder legislation set forth in section 44 of the Act, the term "dispatch" appears three times, once in section 44(a) and twice in section 44(e).

If Dynamic is correct, section 44(a), which uses the term "dispatch", would have to be interpreted in a manner clearly inconsistent with the

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<sup>5</sup> As support for its position, Dynamic states:

"Respondent readily acknowledges that this analysis is based not upon explicit statements of legislative history tracing the development of the law which are simply non-existent, but rather upon a reading of the English language and grammatical usage coupled with the factual development of these bills which evolved over a period of five years prior to enactment of the Public Law." Respondent's Submission in Response to Notice of Further Procedural Schedule at 9.

Act and the intent of Congress. The proviso clause of section 44(a) reads:

That a person whose primary business is the sale of merchandise may *dispatch* shipments of such merchandise without a license. (Emphasis added.)

It is beyond dispute that Congress intended to allow shippers to forward their own shipments without a license. This suggests that "dispatch" and "forward" have the same meaning. However, if Dynamic is correct in arguing that "dispatching" and "handling the formalities" were intended to refer to separate and distinct activities, a shipper who both "dispatched" and "handled the formalities" of his own shipment would be required to be licensed because section 44(a) would only exempt his dispatching functions.

Section 44(e) reads, in part:

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 space for, such cargo . . . . (Emphasis added).

Under this section a carrier may grant compensation to a licensee who performs certain enumerated services. The language clearly suggests that "dispatching" is a service which is performed for a person other than a common carrier by water, i.e., for the shipper. As previously indicated, "handling the formalities incident to such shipments" is omitted.

"Handling the formalities" is also omitted from the proviso clause of section 44(e) in which the term "dispatch" again appears.

The legislative history also strongly indicates that the terms "dispatching" and "carrying on the business of forwarding" are interchangeable terms referring to services performed for shippers in connection with the movement of cargo to port for ocean carriage. In passing H.R. 5068, it was said on the floor of the House:

The bill provides for the licensing of a person engaged in the business of dispatching shipments on behalf of other persons. An exporter who forwards his own goods or that of a subsidiary or affiliate as an incidental activity of his main occupation is not engaged in the business of forwarding . . . . (S)ince the goods he forwards are his own, he is not dispatching shipments on behalf of others. 106 Cong. Rec. 16073 (1959) (Remarks of Rep. Tollefson).

Two years later, the Senate Committee on Commerce, reporting out essentially the same bill, said:



Section 43(a)<sup>6</sup> would provide that a person must hold a license issued by the (Commission) to carry on the business of forwarding but would permit a person whose primary business is the sale of merchandise to dispatch shipments of such merchandise without a license. S. Rep. No. 691, 87th Cong. 1st Sess. 2 (1961).

BIE correctly points out that Respondent has failed to identify a source for its categories of activities which constitutes "dispatching" and those which constitute "handling the formalities". BIE's Reply to Exceptions at 2. As BIE further points out, the definition of freight forwarding in section 1 originated from the Commission's decision in *Port of New York Freight Forwarder Investigation*, 3 U.S.M.C. 157 (1949). There the Commission said:

We are of the opinion that any person carrying on the business of dispatching shipments by ocean going vessels . . . and of handling the formalities incident thereto, is a forwarder within the provisions of the Shipping Act, 1916. 3 U.S.M.C. at 163.

Earlier in the same decision, the Commission said:

A forwarder in foreign commerce in many instances furnishes a necessary link in preparing shipments for export. These services are diverse in character and may vary as to almost every shipment. 3 U.S.M.C. at 159.

In that decision the Commission listed several services performed by forwarders. 3 U.S.M.C. at 159, note 2. All of the services listed in the Commission's decision now appear, virtually verbatim, in the Commission's current rules and regulations. 46 C.F.R. 510.2(2).

From the very outset of its investigation of ocean freight forwarding, Congress fully understood that the definition of carrying on the business of forwarding originated in the Commission's *Port of New York* decision, *supra*. See *Investigation Into the Activities of Foreign Freight Forwarders and Brokers*, H.R. Rep. 2939, 84th Cong. 2nd Sess. 5-7 (1956). The definition of freight forwarding as conceived by the Commission in 1949 survived without significant alteration and is embodied in section 1 of the Act and the Commission's rules and regulations. The terms "dispatching" and "handling formalities" have been treated as a single concept to describe a range of activities, any one of which may constitute "forwarding," from the inception of their use by the Commission in 1949; through approximately six years of Congressional investigations and hearings; and for the past twenty years since enactment of section 1.

<sup>6</sup> Section 43(a) is now section: 44(a) which reads, in part:

That a person whose primary business is the sale of merchandise may dispatch shipments of such merchandise without a license.

The Commission concludes that the rules and regulations contained in Part 510 are not inconsistent with section 1 of the Act. The terms "dispatching" and "handling formalities" are separate and distinct *only* in grammatical construction. The term "handling the formalities" has never been ascribed any meaning and has been deleted from use in connection with the term "dispatch" elsewhere in the Shipping Act, the legislative history, and the Commission's rules and regulations. "Dispatch" is interchangeable in meaning with "forwarding," and describes the activities set forth in the Commission's regulations at 46 C.F.R. 510.2(c).

## II. DYNAMIC'S FITNESS TO BE LICENSED

Under the analysis set forth above, a freight forwarding license is required for anyone who proposes to engage in any of the "forwarding" (or "dispatching") activities described in the Commission's regulations at 46 C.F.R. 510.2(c). A review of the record in this proceeding shows that the Presiding Officer was correct in holding that Dynamic engaged in one or more of these activities on numerous occasions without a license, and therefore violated section 44(a) of the Shipping Act.

Mrs. Evelyn Siegel, Dynamic's president and qualifying officer, was first warned by the Commission's staff not to engage in unlicensed forwarding in a letter dated August 31, 1978, which accompanied a license application form she had requested. The same letter also advised Mrs. Siegel of the civil penalties and prejudice to the issuance of a license which might result from unlicensed forwarding.

On January 18, 1979, Dynamic applied for a freight forwarder's license. The description of Mrs. Siegel's experience as a qualifying officer, which was submitted in connection with Dynamic's application, stated that she had worked for three freight forwarders since 1970 and had engaged in a wide variety of forwarding activities during the course of her employment.

On January 25, 1979, Mrs. Siegel admitted to a member of the Commission's staff that Dynamic had engaged in some unlicensed forwarding activities. It was later developed that Dynamic had provided documentation services on four shipments during January, 1979. The provision of services relating to the preparation or processing of documents such as export declarations, bills of lading and dock receipts are specifically included in the range of "forwarding" activities described in the Commission's regulations.

On January 30, 1979, the Commission's staff again warned Dynamic in a letter to Mrs. Siegel not to engage in unlicensed forwarding and of the possible adverse consequences of such activity.

By letter dated March 7, 1979 to the Commission, Mrs. Siegel acknowledged that Dynamic had violated the Shipping Act by engaging in forwarding without a license. She contended that these violations

were not wilful, and that no further freight forwarding would be performed by Dynamic until it was licensed.

Despite Mrs. Siegel's promise, and despite the repeated warnings given to her by the Commission's staff, the facts of this case summarized above, which Dynamic does not dispute, show that Dynamic continued to engage in unlicensed forwarding through February 3, 1980. On 13 shipments carried by Hoegh-Ugland Auto Liner from September 28, 1979 through February 2, 1980, and on 66 shipments carried by Wallenius Line from July 28, 1979 through February 3, 1980, Dynamic performed documentation services or advanced ocean freight charges for the shipper, or was extended credit by the carrier or its agent on the shipper's behalf.<sup>7</sup> Like documentation services, the extension of credit by a forwarder to a shipper (either directly or from the carrier) is specifically included within the range of "forwarding" activities set forth at section 510.2(c) of the Commission's regulations.

Ultimately, the issue to be determined by the Commission is whether Dynamic, in view of the above-described activities, possesses the requisite fitness to be licensed as an independent ocean freight forwarder. We believe it does not.

Section 44(b) of the Shipping Act, 1916 (46 U.S.C. 841(b)) limits the issuance of a forwarder license to those applicants found by the Commission to be ". . . 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."

In *Harry Kaufman, Independent Ocean Freight Forwarder*, 16 F.M.C. 256, 271 (1973), the Commission enunciated the standard of conduct required of an applicant seeking a license:

It is crucial to his "fitness" that it appears 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. (Citation omitted.)

The Commission has emphasized its responsibility in maintaining and preserving high standards for the licensing of ocean freight forwarders:

The profession of ocean freight forwarding is a highly responsible one requiring honorable conduct by all its practitioners . . . [W]e can make our influence felt only by establishing and maintaining high quality standards of access to licenses. *Inde-*

<sup>7</sup> On at least four of the shipments carried by Wallenius Line, Dynamic's activities were more extensive. As noted above, Robert Hunter, a shipper from Mission Viejo, California, furnished four Dynamic invoices dated September 9, 1979 through December 4, 1979 which listed charges for inland transportation, estimated ocean freight insurance, documentation, telexes and mail.

*pendent Ocean Freight Forwarder License Application, James J. Boyle*, 10 F.M.C. 121, 127 (1966).

The existence of past Shipping Act violations by an applicant for a freight forwarder license is highly pertinent to the issue of whether the applicant "intends to or will obey" the U.S. shipping laws.

The Commission, in denying a freight forwarder license application in *Concordia International Forwarding Corporation Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916*, 21 F.M.C. 587 (1978), emphasized that disregard of the shipping statutes would not be tolerated. The Commission said:

In determining whether an applicant possesses the requisite fitness, a past violation of the Shipping Act militates against the issuance of a license. 21 F.M.C. at 592.

In *Concordia*, the Commission rejected the applicant's excuse for violating section 44(b) of the Shipping Act, 1916, i.e., that it was "acting as a good samaritan" by forwarding without a license, and found that where "violations [were] committed by persons, who, by their own admissions, [had] many years of experience in ocean freight forwarding, the attempt to justify their unlawful activities . . . must be viewed with extreme skepticism. The applicant knew or should have known that its activities were in violation of the Shipping Act." *Id.*

Likewise, Evelyn Siegel has been actively involved in the ocean shipping industry since 1970, during which time she was employed by three licensed ocean freight forwarders. The Commission is justified in expecting from an individual, with her experience in the forwarding industry, knowledge, or at the very least, awareness of the laws and regulations governing the business in which she elects to operate.

Despite numerous warnings by the Commission to Mrs. Siegel to refrain from unlicensed forwarding activity and despite Mrs. Siegel's assertion to the Commission that she would cease all future unlicensed ocean freight forwarding, there is substantial evidence that Dynamic continued to engage in its unlawful activity.<sup>8</sup>

The integrity of the U.S. shipping laws must be preserved in order to effectuate their intended purpose and to protect the public interest. The activities of Dynamic do not constitute the standard of conduct the law imposes upon those seeking to be licensed as an independent ocean freight forwarder. "Section 44 of the Shipping Act . . . requires the Commission to make qualitative judgments concerning the . . . integrity of the forwarder applicants before issuing a license." *Concordia, supra*, at 591. The record fully supports a finding that Dynamic, having

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<sup>8</sup> The fact that Dynamic did not collect ocean freight compensation payments from ocean carriers is irrelevant to the issue of whether section 44(a) of the Act was violated. The prohibition against carrying on the business of forwarding without a license is absolute and cannot be avoided by not collecting ocean freight compensation. *Concordia, supra*.

Evelyn Siegel as its qualifying officer, has failed to meet this burden of demonstrating the requisite character qualifications and fitness to operate as a freight forwarder and to conform to the provisions of the Shipping Act. Dynamic's application for a license is therefore denied.

There is one final matter requiring discussion. The Bureau of Investigation and Enforcement takes exception to the Administrative Law Judge's conclusion that a civil penalty against Dynamic of \$2,500 is appropriate in the circumstances of this case, and urges a penalty of \$10,000. Upon consideration of the record, and particularly the evidence that Dynamic played a relatively small forwarding role in the shipments involved here and received little or no compensation for its activities, the Commission agrees with the ALJ that a civil penalty of \$2,500 is appropriate.

#### CONCLUSION

For the foregoing reasons, the Commission finds that Dynamic is, at this time, unfit to be awarded a freight forwarder license.

**THEREFORE, IT IS ORDERED,** That the application of Dynamic International Freight Forwarder, Inc. for an independent ocean freight forwarder license is denied; and

**IT IS FURTHER ORDERED,** That Dynamic International Freight Forwarder, Inc. is hereby assessed a civil penalty of \$2,500; and

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

#### SEPARATE OPINION OF VICE CHAIRMAN LESLIE KANUK.

While I agree with the majority's assessment of the \$2,500 civil penalty, I disagree with the conclusion that Dynamic is unfit and its application for a license should be denied. Based on the *de minimis* nature of the violations involved, I would find Dynamic fit and grant its application.

(S) FRANCIS C. HURNEY  
Secretary

## FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-5

**DYNAMIC INTERNATIONAL FREIGHT FORWARDERS INC.,  
INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE  
APPLICATION AND POSSIBLE VIOLATION OF SECTION 44,  
SHIPPING ACT, 1916**

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Applicant found to have engaged in unlicensed forwarding activities. However, the respondent appears to have acted in good faith upon the advice of counsel. Draconic action of denying the application is not taken. Nevertheless, the Commission cannot countenance flagrant disregard of the statutes it is charged with enforcing. A civil penalty of \$2,500 is assessed to the applicant pursuant to section 32(e) of the Shipping Act, 1916. Payment by the applicant of the civil penalty is a condition precedent to the issuing of the license applied for. Failure to meet the condition precedent, the application is denied.

Upon payment of the civil penalty imposed upon the applicant, and applicant notifying the Secretary of this Commission thereof, and filing with the Secretary originals or copies of all pertinent documents, the Secretary is to record Dynamic International Freight Forwarders, Inc.'s application granted.

*Richard N. Sharood* of Wilcox & Sharood for respondent.

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

### INITIAL DECISION<sup>1</sup> OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

*Partially Adopted January 16, 1981*

This is a proceeding pursuant to sections 22, 32 and 44 (46 U.S.C. 821, 831 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), instituted to determine:

1. Whether Dynamic International Freight Forwarders, Inc. violated section 44(a), Shipping Act, 1916 by engaging in unlicensed forwarding activities;
2. Whether civil penalties should be assessed against Dynamic International Freight Forwarders, 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;

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<sup>1</sup> 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. 302.227).

3. Whether, in light of the evidence adduced pursuant to the first issue, together with any other evidence adduced, Dynamic International Freight Forwarders, 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.

The Commission's Bureau of Hearing Counsel is a party in this proceeding by Commission Rule 42, 46 C.F.R. 502.42.

#### BACKGROUND

The January 23, 1980, Order of Investigation and Hearing assigning this proceeding for hearing before an Administrative Law Judge of the Commission's Office of Administrative Law Judges provided, *inter alia*, that the hearing shall include oral testimony and cross-examination in the discretion of the presiding officer only upon a proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions or other documents, or that the nature of the matters in issue are such that an oral hearing and cross-examination are necessary for the development of an adequate record. The Presiding Administrative Law Judge under the circumstances of this proceeding, in which the respondent agreed to all findings of fact proposed by Hearing Counsel, *finds* and *concludes* there has been proper regard to due process of law, and in his discretion could not do other than also to *find* and *conclude* that oral testimony and cross-examination was not necessary under the circumstances and did not have to be included in this proceeding. The respondent in its March 20, 1980, opening memorandum of law admitted all 15 of Hearing Counsel's proposed findings of fact. While the opportunity to cross-examine is regarded as of great importance and may usually be insisted upon, the requirement is not enforced as rigidly in administrative proceedings. As has been pointed out, with the admission of the facts herein, there is no need for cross-examination. Further, the respondent was fully advised of all matters to which to respond with ample and sufficient time to respond thereto. Thus, this proceeding was conducted upon memoranda of law and affidavit of facts submitted herein.

By notice served February 8, 1980, the Presiding Administrative Law Judge had advised the parties of the following schedule to which they would, and did, adhere in this proceeding:

Thursday, February 28, 1980 - Opening Memorandum of Law, Request for Penalty and Affidavits of Fact from Hearing Counsel.

Thursday, March 20, 1980 - Opening Memorandum of Law and Affidavits of Fact from respondent.

Thursday, April 10, 1980 - Reply Memorandum of Law and Affidavits of Fact from Hearing Counsel.

On or before Thursday, April 24, 1980, which is two weeks following the Reply Memorandum of Law of Hearing Counsel, the parties will submit written statements identifying any unresolved issues of fact and specifying the type of procedure they feel is best suited to resolve them and why.

Following the above submissions, and his careful reading of them, on April 30, 1980, the Presiding Administrative Law Judge served the following Notice of Further Procedural Schedule:

Hearing Counsel served and filed an opening memorandum of law, request for penalty and affidavits of fact on February 28, 1980. The Respondent on March 20, 1980, served and filed an opening memorandum of law and no affidavits of its own. The Respondent used the affidavits supplied by Hearing Counsel and other attachments, but no affidavit to present Respondent's proposed findings of fact, which opens with the statement (p. 3) "Since all 15 of Hearing Counsel's proposed findings of fact are admitted subject only to inferences to be drawn therefrom, Respondent will number its proposed findings of fact commencing with number 16 for ease of reference." The Respondent then lists proposed findings of fact 16 through 28.

Hearing Counsel on April 10, 1980, served and filed a reply to the Respondent's opening memorandum, saying, *inter alia*, that while the Respondent admits the activities it performed involved handling the formalities incident to shipments the Respondent denies that it dispatched those shipments. Thus Hearing Counsel contends that the Respondent failed to establish that the activities admittedly performed constitute only handling formalities of shipments as opposed to acts which constitute dispatching.

In a statement regarding outstanding factual issues and recommended procedure served and filed April 24, 1980, the Respondent contends the evidence introduced by Hearing Counsel not only fails to impute any violation of law but rather affirmatively disproves any violation. The Respondent says, "There is no factual issue to be resolved by an evidentiary hearing." That is possible.

Neither Hearing Counsel nor the Respondent has supplied any cases or legislative history anent the interpretation of section 1 of the Shipping Act, 1916, as to dispatching of shipments and handling the formalities incident to such shipments.

Hearing Counsel in its statement regarding further procedural scheduling, served and filed April 22, 1980, stated, *inter alia*, ". . . There still remains unresolved the following issues: whether the activities performed by Dynamic International constitute dispatching and to what extent these activities have been performed." Hearing Counsel continues, "In order to



elicit facts related specifically to these issues we intend to commence discovery pursuant to Rule 201 . . . 46 C.F.R. 502.201, thereafter we request an evidentiary hearing be scheduled. . . ." Suffice it to say that the Order of Investigation and Hearing instituting this proceeding was published in the *Federal Register*, Vol. 45 No. 21, on Wednesday, January 30, 1980, page 6836, and that under Rule 201--discovery shall be commenced no later than 30 days after the date of publication in the *Federal Register* of the Commission's order instituting the proceeding. Rather than discovery, a legal brief by each party on the issue should be submitted.

The Respondent in its April 24, 1980, statement regarding outstanding factual issues contends that Hearing Counsel acknowledges that a violation of section 44(a) depends upon a finding that Respondent both dispatched and handled the formalities incident to each of the shipments identified through the various affidavits and attachments. Respondent says further that the burden is upon Hearing Counsel to proffer sufficient evidence of both acts constituting the offense, before there is any burden upon Respondent to go forward with evidence to overcome a showing of violation.

However, it must be faced, that the Respondent, as an applicant for an Independent Ocean Freight Forwarder license, has the burden of proof in this proceeding. *Independent Ocean Freight Forwarder Application Lesco Packing Co., Inc.*, Docket No. 74-31, 19 F.M.C. 132, 136 (1976). To date the Respondent-applicant has not presented any evidence to support that burden. The Respondent shall submit in writing as hereinafter directed its direct case.

The Respondent also has ignored the possibility of the assessment against it of civil penalties. Hearing Counsel has suggested the imposition against the Respondent of a civil penalty of \$25,000, however asked that all possible factors in mitigation be considered. Again, the Respondent has not touched on this area.

Receipt of the materials enumerated in this further procedural schedule may obviate need for evidentiary oral hearing, as it is hoped to do.

Upon consideration of the above and the record herein, it is *ordered*, that on or before Monday, May 12, 1980,

(A) the parties shall clearly state, in writing, severally or jointly, those facts therein upon which they agree.

(B) The parties each shall submit a brief and documents on the issue as to the interpretation of section 1 of the Shipping Act, 1916, as to "dispatching of shipments and handling the formalities incident to such shipments."

(C) Hearing Counsel is denied the use of discovery under Rule 201, not having commenced same within time. Each

party is briefing issue as provided in (B) above. Parties are not precluded from consulting and stipulating where possible.

(D) The Respondent having the burden of proof in this proceeding shall submit, in writing, its direct case.

(E) The Respondent shall respond to Hearing Counsel's suggestion as to civil penalties herein.

Counsel for respondent on May 8, 1980, moved for an enlargement of time to file its brief and other matter required by the April 30, 1980, Notice of Further Procedural Schedule. Hearing Counsel on May 9, 1980, filed a response to said motion stating that Hearing Counsel has no objection and that grant of motion would provide an opportunity for counsel to discuss possible stipulations of fact. The motion was denied by notice served May 15, 1980, for reasons stated therein.

Hearing Counsel and respondent filed statements on May 22, 1980, required by the April 30, 1980 notice. Hearing Counsel entitled it "Brief of Hearing Counsel"; the respondent entitled it "Respondent's Statement Regarding Outstanding Factual Issues and Recommended Procedure."

In the absence of oral testimony and cross-examination in this proceeding, there is no transcript of testimony. The exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for decision. Rule 169 (46 C.F.R. 502.169).

Hearing Counsel proposed 15 findings of fact. The respondent wrote (March 20, 1980 opening memorandum of law, p. 3, and respondent's May 22, 1980 submission, p. 2), "All 15 of Hearing Counsel's proposed findings of fact are admitted subject only to inferences to be drawn therefrom. . . ."

The addition by the respondent of ". . . subject only to inferences to be drawn therefrom . . ." does not alter the agreement with or admission of the proposed findings of fact. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. When not so denied the averments are admitted. The respondent having admitted Hearing Counsel's 15 proposed findings of fact, the 15 compared by the undersigned with the record references, are found as facts, as hereinafter indicated.

Respondent proposed 13 findings of fact in its March 20, 1980, Opening Memorandum of Law.

Hearing Counsel in its May 22, 1980, Brief agreed with most of Respondent's 13 (numbered 16 through 28) proposed findings of fact. Hearing Counsel did not agree with numbers 17, 24 and 28. The Presiding Administrative Law Judge reviewed carefully the disputed proposed findings of fact, the exhibits, reputed to be in support and the arguments and has made adjustments accordingly. Numbers 17 and 24 were as proposed, continued substantially, but more in accord with the

language of the reference. Number 28 was denied as it was drafted as a conclusion, which conclusion is the province of the Presiding Administrative Law Judge and upon which he must rule relative to respondent's and Hearing Counsel's positions as to definitions of terms of ocean freight forwarders found in section 1 of the Shipping Act, 1916, and supports proffered.

#### FACTS

Upon the consideration of the record herein and the above the Presiding Administrative Law Judge finds these facts herein.

The following facts proposed by Hearing Counsel, and agreed to by the parties, are found:

1. Dynamic International, applicant for a freight forwarder license, is a Michigan corporation with its place of business at 19400 West Ten Mile Road, Suite 103, Southfield, Michigan, 48075. Evelyn Siegel, Dynamic International President, is the qualifying officer of the applicant. (Klapouchy Affidavit, Para. 4.)

2. By letter of August 31, 1978, Evelyn Siegel received a warning not to engage in the business of forwarding without a license and of possible penalties and prejudice to the issuance of a license as a result of unlicensed forwarding. This warning accompanied the license application form which Mrs. Siegel had requested from the Office of Freight Forwarders. (Klapouchy Affidavit, Para. 3.)

3. Mrs. Siegel has worked in the field of ocean freight forwarding since 1970 during which time she developed extensive experience while in the employment of three licensed ocean freight forwarders. (Klapouchy Affidavit, Para. 5.)

4. On January 25, 1979, following the Office of Freight Forwarder's January 18, 1979 receipt of Dynamic International's application, Robert James Klapouchy of the Commission's Office of Freight Forwarders discussed the application with Mrs. Siegel. Mrs. Siegel advised Mr. Klapouchy that Dynamic International engaged in ocean freight forwarding and believed that such unlicensed activity was permissible because she did not collect compensation from the ocean carrier. Mr. Klapouchy told her that Dynamic International may not perform ocean freight forwarding prior to receiving a license. (Klapouchy Affidavit, Para. 6.)

5. On January 30, 1979, the Office of Freight Forwarders sent two letters to Mrs. Siegel: the first letter, a follow-up to Mr. Klapouchy's conversation with Mrs. Siegel described in PFF 4 above, requested detailed description of Dynamic International's forwarding activities; and the second letter acknowledged receipt of Dynamic International's application, again reiterating the statutory requirement of a license and the possibility of penalties and prejudice to the issuance of a license as a result of unlicensed forwarding. (Klapouchy Affidavit, Para. 7.)

6. By letter of March 7, 1979, to the Office of Freight Forwarders, Evelyn Siegel advised that Dynamic International had performed forwarding services with respect to four shipments, receiving a total of \$120.00 in "documentation fee(s)," and that as a result of the telephone conversation with Mr. Klapouchy, discussed in PFF 4 above, Mrs. Siegel said that Dynamic International ceased performing any forwarding work. Subsequently, the Office of Freight Forwarders received documentation supplied by Evelyn Siegel covering Dynamic International forwarding activities. (Klapouchy Affidavit, Paras. 8 and 9 and Attachments E-1 through E-4.)

7. On October 16, 1979, Alfred J. Stretz, President of Autoliners, Inc., Agents for Hoegh-Ugland Auto Liners ("HUAL") advised Investigator Christopher M. Kane of the Commission's Atlantic District Office that Dynamic International's name was appearing in the space or box which calls for the name of the freight forwarder on certain HUAL bills of lading, but that Autoliners neither paid Dynamic International ocean compensation nor was Autoliners invoiced by Dynamic for compensation. (Kane Affidavit, Paras. 3 and 4.)

8. On October 17, 1979, Kenneth J. Campbell, Outward Traffic Manager of Motorships, Inc., Agents for Wallenius Line ("Wallenius") provided Christopher Kane with data freight receipts covering two separate vehicle movements to Europe under data freight receipt Nos. W80005 and W80006, both dated October 13, 1979. On these documents the name Dynamic International was written in the space or box which calls for the name of the freight forwarder (Kane Affidavit, Para. 6; Ex. A-1 and A-2.)

9. Motorships, Inc., and Autoliners, Inc., subsequently provided a combined total of thirty bills of lading or data freight receipts (twenty-four Wallenius plus six HUAL) covering shipments during the period July 28, 1979 through October 13, 1979 in which the Dynamic International name appeared in the freight forwarder box. (Kane Affidavit, Paras. 9 and 10; Ex. B-1 through B-31.)

10. Evelyn Siegel maintained frequent contact with Motorships, Inc., continuing into February 1980 and the name Dynamic International continued to appear in the freight forwarder box on bills of lading dated after October 13, 1979; and, Motorships, Inc., was extending ocean freight credit to Dynamic International on prepaid shipments where Dynamic International's name appeared as forwarder and Autos International, an exporter of automobiles, appeared as the shipper. (Kane Affidavit, Para. 12.)

11. Motorships, Inc., supplied 42 additional Wallenius bills of lading or data freight receipts covering shipments dated November 1, 1979 through February 3, 1980, on which the Dynamic International name appeared in the freight forwarding box and Autos International ap-

peared as the shipper. (Kane Affidavit, Paras. 12 and 13; Ex. D-1 through D-43.)

12. Autoliners, Inc., supplied nine additional HUAL bills of lading dated January 23, 1979 through February 2, 1980, on which the Dynamic International name appeared as the forwarder. Included in this group of nine bills of lading were two previously furnished, thus resulting in a total of thirteen HUAL bills of lading on which Dynamic International appeared as forwarder covering the period January 23, 1979 through February 2, 1980. On six of these thirteen HUAL bills of lading, Autos International was shown as the shipper. (Kane Affidavit, Para. 14; Ex. E-1 through E-8.)

13. Dynamic International's name began appearing as freight forwarder on bills of lading for Autos International shipments about the end of September 1979 and continued to appear until the beginning of February 1980. Dynamic International did not prepare the bills of lading and export declarations for Autos International shipments to Europe, even though Dynamic International appeared in the freight forwarding box on the bills of lading covering these European shipments. However, payment of the ocean freight on all Autos International prepaid shipments, including European, was made by Dynamic International. With respect to Autos International shipments to the Middle East, Dynamic International prepared the documentation, including the ocean bills of lading and export declarations. (Kane Affidavit, Paras. 15, 16 and 17.)

14. Dynamic International advanced ocean freight charges on behalf of Autos International on shipments covered by 42 Wallenius bills of lading or data freight receipts. On five Autos International Middle Eastern shipments via HUAL, Dynamic International prepared export documentation, including bills of ladings and export declarations (Kane Affidavit, Para. 18.)

15. On February 20, 1980, Commission Investigator Michael A. Murphy obtained from Robert Hunter, Mission Viejo, California, four invoice statements by Dynamic International Freight Forwarders to Robert Hunter, dated September 9, 1979 through December 4, 1979, which list charges for inland transportation, estimated ocean freight, insurance, documentation, telexes and express mail. (Murphy Affidavit, Para. 2.)

The following facts proposed by respondent, and agreed to by the parties, are found:

16. The Commission received Dynamic's application on January 18, 1979, and received a response to its inquiries regarding forwarding activity by letter dated March 7, 1979. (Klapouchy Affidavit, Paras. 4 and 8.)

17. Following receipt of the March 7, 1979, letter from Dynamic, there was no communication from the Commission staff in Washington,

D. C., until Christopher M. Kane, a Commission investigator, during the course of an unrelated investigation on October 16, 1979, determined that Dynamic was "appearing as forwarder" on bills of lading of Autos International, Inc. (Kane Affidavit, Paras. 2, 3 and 7.) (Adjustment made as indicated above.)

18. By letter dated October 17, 1979, the Commission was advised that Dynamic had retained legal counsel in the matter of its pending application. (Attachment 2.)

19. By letter dated November 15, 1979, counsel to Dynamic submitted to the Managing Director of the Commission samples of Wallenius Line bills of lading and explained the basis for Dynamic's name appearing as forwarder. (Attachment 3.)

20. Notice of intent to deny the Dynamic application was given by the Commission Secretary by letter dated December 10, 1979, and the Commission acted on the matter January 17, 1980, one year after the application was filed. (Attachments 4, 5 and 6.)

21. After its letters of January 30, 1979, acknowledging receipt of an application and requesting information regarding forwarding activity, the Commission staff in Washington, D. C., did not communicate further with Dynamic regarding its application until advised that counsel had been retained and then communicated with counsel beginning on October 24, 1979. (Klapouchy Affidavit and Attachment 7.)

22. Autoliners, Inc., agents for HAUL (sic "HUAL"--Hoegh-Ugland Auto Liners) did not pay compensation to Dynamic nor did Dynamic seek compensation. (Kane Affidavit, Para. 4.)

23. It is not alleged that Motorships, Inc., agents for Wallenius Lines, paid compensation to Dynamic nor that Dynamic sought compensation, and Motorships, Inc., knew Dynamic was not licensed. (Kane Affidavit, Para. 13.)

24. Motorships, Inc.,<sup>2</sup> requested Dynamic to appear so that Motorships would be able to know who the forwarder was and who could be billed for ocean freight. No credit was extended to Autos International, but Motorships extended credit to Dynamic on prepaid shipments where Dynamic appeared as the forwarder and Autos International

<sup>2</sup> Counsel for respondent in a letter dated June 5, 1980, requested the following affidavit to be entered as a late-filed exhibit: (Affidavit is signed by Kenneth J. Campbell, Outward Traffic Manager, Motorships, Inc., Sworn to by Notary May 13, 1980.)

February 5, 1980

To whom it may concern:

Re: Dynamic International

Please be advised that Dynamic International placed their name on the bill of lading in the space reserved for freight forwarders at the request of our office. This was requested in order to use identification for our accounting purposes.

The ocean freight statement prepared by our office always indicated "No Forwarder" and brokerage was not billed to us by Dynamic International, nor was it ever paid out to Dynamic International.

appeared as the shipper. (Kane Affidavit, Para. 12.) (Adjustment made as indicated above.)

25. Autos International, Inc., was not charged by Dynamic for forwarding services but handled payment of freight on prepaid shipments. On certain shipments documentation was prepared by Dynamic on behalf of Autos International. (Kane Affidavit, Paras. 15, 16 and 17.)

26. Based upon affidavit of Investigator Kane and supporting exhibits, Dynamic either advanced freight money and/or provided certain documentation services to shippers at no charge to either shipper or carrier. These shipments involve 55 Wallenius and five HAUL (sic "HUAL") shipments. (Kane Affidavit, Paras. 15 and 18.)

27. Based upon Investigator Murphy's affidavit, Dynamic advanced freight and insurance money, and provided documentation services on four shipments for Mr. Robert Hunter at a charge of \$60.00 per shipment for documentation. There is no evidence offered that Dynamic sought forwarder compensation from any carrier with respect to these shipments. (Murphy Affidavit and Attachments.)

Additional facts found are:

A. Dynamic International Freight Forwarders, Inc., was established November 28, 1978. It's application for a license as an independent ocean freight forwarder dated January 5, 1979, was received in the Commission January 18, 1979.

B. The stock in Dynamic International is held: 33 $\frac{1}{3}$ % by Evelyn Siegel, who is its President-Treasurer; 33 $\frac{1}{3}$ % by Kenneth Peter, who is its Financial Vice President; and 33 $\frac{1}{3}$ % by Walter Baker, who is its Vice-president Secretary. Evelyn Siegel is the proposed qualifying officer of the applicant.

C. Evelyn Siegel, after forming Dynamic International, continued to work with shippers of automobiles by preparing documentation and in some instances enabling them to secure credit through her credit standing with the carriers (respondent's Exhibit No. 1, page 1, attached to its May 22, 1980, submission). The documentation work she performed was for a very nominal charge or at no charge. She did this work to maintain a relationship with people she hoped to serve, if licensed (*Ibid.*, p. 2).

#### DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

Hearing Counsel, in presenting this proceeding, served on February 28, 1980, the affidavits of Robert-James Klapouchy, who is employed in the Office of Freight Forwarders of this Commission as a Transportation Industry Analyst; Christopher M. Kane, who is employed as a District Investigator in the Commission's Atlantic District Office in New York City; and of Michael A. Murphy, who is employed as the Supervisory Investigator in the Pacific District, Los Angeles Office of the Commission. Evelyn Siegel, President-Treasurer of the applicant

corporation, has examined the affidavits of Mr. Kane and Mr. Murphy and the exhibits submitted by Hearing Counsel (Siegel affidavit of May 21, 1980, attached as Exhibit 2 to respondent's May 22, 1980, submission).

It is the position of Hearing Counsel that Dynamic International performed unlicensed forwarding activities on at least 79 instances in violation of section 44 of the Act, and absent mitigating factors, Dynamic International should be found unfit to be licensed as an independent ocean freight forwarder pursuant to section 44, Shipping Act, 1916 (Hearing Counsel's February 28, 1980, Opening Memorandum of Law, pp. 2 and 3).

Hearing Counsel says Mrs. Siegel acknowledged that Dynamic International conducted unlicensed forwarding, evidenced by her letter of March 7, 1979, to the Office of Freight Forwarders and by her subsequent submission of documentation covering 4 shipments she advised were the ones forwarded by Dynamic International (*Ibid.*, p. 8).

Hearing Counsel also says, while the appearance of the Dynamic International name on the bill of lading freight forwarder box does not conclusively establish Dynamic International as performing the freight forwarding function incident to each of these 79 shipments, it raises a strong presumption of unlicensed forwarding. This box is intended for the insertion of the name of the person performing as freight forwarder on each shipment, i.e., dispatching the shipment and handling the formalities incident thereto (*Ibid.*, p. 11).

The fact that Dynamic International did not collect ocean freight compensation payments from ocean carriers, according to Hearing Counsel, is irrelevant to the issue of whether section 44(a) of the Act was violated. The prohibition against carrying on the business of forwarding without a license is absolute and cannot be avoided by not collecting ocean freight compensation. (*Ibid.*, p. 12).

Hearing Counsel points to section 510.2 of the Commission's General Order 4 (46 C.F.R. 510.2) for definition of the term "freight forwarding service or dispatching of shipments" as "a service rendered by an independent ocean freight forwarder on behalf of other persons in the process of dispatching or facilitating an export shipment as authorized by such persons." Hearing Counsel argues that Mrs. Siegel acknowledged that Dynamic International conducted unlicensed forwarding, evidenced by her letter of March 7, 1979, to the Office of Freight Forwarders and by her subsequent submission of documentation covering four shipments she advised were the ones forwarded by Dynamic International (*Ibid.*, p. 8). Also, Hearing Counsel, comparing this situation to that in the case of *Concordia International Corp.--Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916*, 21 F.M.C. 587 (1978), argues that Evelyn Siegel has been actively involved in the ocean shipping industry since 1970,



during which time she was employed by three licensed ocean freight forwarders; that the Commission is justified in expecting from an individual with her experience in the forwarding industry knowledge, or at the very least, awareness of the laws and regulations governing the business in which she elects to operate.

The respondent in its March 20, 1980, opening memorandum of law (p. 6) contends that the undisputed facts established by the Commission's investigation of Dynamic's alleged unlicensed forwarding activity reveals that Dynamic either acted as a credit source on prepaid shipments, prepared various shipping documents, or both. According to the respondent the admitted activities of Dynamic involve handling the formalities incident to shipments and not the dispatching thereof. It is urged by the respondent that the Commission's rules and regulations governing the licensing and activities of independent ocean freight forwarders, General Order 4 (46 C.F.R. Part 510) creates a new term not found in the Shipping Act, 1916, "freight forwarding service or dispatching of shipments." (46 C.F.R. 510.2(c).) (*Ibid.*, p. 7.)

46 C.F.R. 510.2(c), according to the respondent, is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law and in excess of statutory authority, all within the meaning of 5 U.S.C. 705 (*Ibid.*, p. 8).

Hearing Counsel in its April 10, 1980, reply memorandum of law contends that the respondent failed to establish that the activities which it admittedly performed constitute only handling formalities of shipments as opposed to acts which constitute dispatching.

The respondent in its May 22, 1980, submission says its position is, "simply that the definition of 'carrying on the business of forwarding' within the meaning of the Shipping Act, 1916 consists of two acts. By mathematical analogy the definition may be stated as: one plus one equals two; not one or one equals one." The respondent continues that, "While this is essentially an exercise in English grammar, the statute does support this interpretation." (p. 4.)

The respondent's counsel, in his November 15, 1979, letter (Attachment 3 to respondent's March 20, 1980, opening memorandum of law) to the Managing Director of this Commission, had advanced that "Carrying on the business of forwarding" by statute means the "dispatching of shipments" and "handling the formalities incident to such shipments."

Respondent in its May 22, 1980, submission argues that the Commission's General Order 4, 46 C.F.R. 510.2(c), merges the terms "dispatching" and "handling the formalities incident to such shipments" into a single agency created open ended term, "freight forwarding service or dispatching of shipments" coupled with a list of activities which is broad in the extreme but not inclusive. The respondent then gives

dictionary definitions of "and" as well as "or"--and discusses use of the semicolon.

Purporting to delve into the legislative history of the freight forwarder licensing question (*Ibid.*, p. 6) the respondent asserts that H.R. 8382, 85th Cong., 1st Session, introduced by Mr. Boykin, a Member of Congress from the State of Alabama, defined "independent foreign freight forwarders" and attached as respondent's Exhibit No. 2, the text of the bill.

Hearing Counsel in its May 22, 1980, brief (p. 2) contends the term "dispatching of shipments and handling the formalities incident to such shipments" originated in the Commission's decision in Docket No. 621-*Port of New York Freight Forwarder Investigation*, 3 U.S.M.C. 157, 163 (1949), wherein the Commission stated:

We are of the opinion that any person carrying on the business of dispatching shipments by ocean going vessels in foreign commerce and domestic commerce with or between our territories and possessions, and of handling the formalities incident thereto, is a forwarder within the provisions of the Shipping Act, 1916.

Hearing Counsel asserts (*Ibid.*, p. 4) that in the same decision the Commission also established that a freight forwarder engages in a wide range of activities, any of which constitutes freight forwarding and none of which are, as respondent claims, assignable into distinct categories of dispatching shipments or handling formalities incident to such shipments.

The Presiding Administrative Law Judge has considered the above positions and arguments of the parties. He has noticed that the respondent in its exercise in English grammar did not define dispatching and handling. Little wonder that Hearing Counsel in its April 10, 1980, Reply Memorandum of Law says that, "while Dynamic International admits that the activities it performed involved 'handling the formalities incident to shipments,' it denies that it 'dispatched' those shipments (Resp. Op. Mem., at 7). We contend that Dynamic International failed to establish that the activities which it admittedly performed constitute only handling formalities of shipments as opposed to acts which constitute dispatching."

Perhaps respondent's exercise in English grammar should have considered also Bastard enumeration and otiosity. The Presiding Administrative Law Judge is not persuaded by the respondent's exercise in English grammar. The respondent's legislative history stops with 1957. The respondent did not tie bill H.R. 8382 with bills H.R. 2488 or S-1368. S-1368, to Amend Shipping Act, 1916, to provide for licensing independent freight forwarders, and for other purposes, was passed by the House in lieu of H.R. 2488. Approved (Public Law 87-254), signed by President September 18, 1961.

The respondent does not explain whether what it did was dispatching or handling.

It is deemed by the Presiding Administrative Law Judge that the respondent engaged in unlicensed forwarding activities in violation of section 44(a), Shipping Act, 1916.

Counsel for respondent “. . . advised Mrs. Siegel that in my opinion she has done nothing illegal in attempting to perform minor services for shippers to maintain contact with them while her application is being processed. . . .” (Attachment 3 to respondent’s March 20, 1980, Opening Memorandum of Law.) Under agreed Fact 4 above Mrs. Siegel advised that Dynamic International engaged in ocean freight forwarding and believed that such unlicensed activity was permissible because she did not collect compensation from the ocean carrier. Under Fact 6 above Mrs. Siegel advised that Dynamic International had performed forwarding services with respect to four shipments, receiving a total of \$120.00 in documentation fee(s). Under Fact 27 above Dynamic International advanced freight and insurance money and provided documentation services on four shipments for Mr. Robert Hunter at a charge of \$60.00 per shipment for documentation. Under Fact 13 above, with respect to Autos International shipments to the Middle East, Dynamic International prepared the documentation, including the ocean bills of lading and export declarations.

Under most circumstances, willful violations of law of the nature set forth above would be sufficient standing alone to deny respondent’s application for a forwarder license. However, the record establishes the respondent appears to have acted in good faith upon the advice of counsel. While the activities of respondent are violations of section 44(a), Shipping Act, 1916, nevertheless, the Presiding Administrative Law Judge is disinclined at this point to deny respondent a license when respondent appears to have acted in good faith upon the advice of counsel. See *Bolton & Mitchell, Inc.--Independent Ocean Freight Forwarder License No. 516*. Docket No. 70-9, 15 F.M.C. 248, 255 (1972).

It seems clear that respondent admits it was performing such services with consideration for future of the Dynamic International corporation. Section 44 of the Shipping Act requires the Commission to make qualitative judgments concerning the business expertise and integrity of forwarding applicants before issuing a license. The Commission cannot countenance a flagrant disregard of the statutes it is charged with enforcing. The functions performed herein are looked upon as an attempt to evade regulation. See *Concordia* case, cited above. An attempt to evade regulation, under different circumstances than here, is a significant act of unfitness. Because, as already stated, the respondent appeared to have acted in good faith upon the advice of counsel, such draconic action is not applied.

There must be, however, resort to imposition upon the applicant Dynamic International a civil penalty under section 32 of the Shipping Act, 1916. Hearing Counsel in its February 20, 1980, Opening Memorandum of Law (p. 15) urges that the Presiding Administrative Law Judge find that Dynamic International has carried on the business of forwarding without a license on at least 79 shipments. Hearing Counsel recommends a penalty in the amount of \$25,000 be assessed Dynamic International, based upon the flagrancy of its unlawful activities and that Dynamic International, having Evelyn Siegel as its President and qualifying officer, be found unfit for licensing and its application for an independent ocean freight forwarder license be denied. In its May 22, 1980, brief (p. 6), Hearing Counsel revised the statement by adding--in the absence of mitigating factors that a penalty of \$25,000.00 be assessed, the respondent be found unfit for licensing and the application be denied.

Respondent in its May 22, 1980, submission asserts that Hearing Counsel's suggested penalty assessment is clearly extreme in light of the evidence in this proceeding; that if respondent is found to have violated section 44 of the Shipping Act, 1916, a nominal penalty is the most that the circumstances might justify.

Mrs. Siegel in her affidavit sworn to May 21, 1980, and attached as Exhibit No. 1 to respondent's May 22, 1980, submission, states, 13 (p. 3 of Exh. No. 1), "I have no means of paying a fine if the Commission rules that I have violated the law. I have been precluded from earning a living as an independent ocean freight forwarder and have consumed my resources awaiting the opportunity to engage in compensatory work."<sup>3</sup> Mrs. Siegel appears to forget that this application is for a license for Dynamic International--a corporation, and that she owns only 33 1/3% of the corporation stock; that two others also hold 33 1/3% each of the stock.

Great consideration already has been shown for the applicant having acted upon the advice of counsel. Counsel for applicant also complained of amount of time between the receipt of the application by the Commission on January 18, 1979, and urged the time interval as a mitigating factor. It is not a mitigating factor under the circumstances of this case.

The imposition of a nominal civil penalty under the circumstances herein is another great consideration given to the applicant. Therefore, the payment of the civil penalty by the applicant should be made a condition precedent to the granting of the application. Failure of the

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<sup>3</sup> The instant application dated January 5, 1979, and signed by Mrs. Siegel gives her employment from 1970-76 with A. F. Burstrom & Son, Inc.; from 1976-77 with S. H. Moulton & Co.; and from 1977 to present with Air & Sea Pak Co.; Evelyn Siegel will be leaving this company to devote her full time to working for the applicant should this license be granted.

applicant to pay the civil penalty as a condition precedent is denial of the application.

The Presiding Administrative Law Judge *finds* and *concludes* that civil penalties should be assessed against Dynamic International pursuant to section 32(a) of the Shipping Act, 1916, and that payment of the civil penalty is a condition precedent to issuing the license. The unpaid civil penalty causes the violations for which imposed not yet expunged, and those violations preclude finding applicant to have requisite fitness within the meaning of section 44(b) of the Act. The amount of such civil penalty under the circumstances shall not be \$25,000 as proposed by Hearing Counsel, but a nominal penalty, the payment of which by applicant is a condition precedent<sup>4</sup> to issuance of license applied for, since the applicant does not now qualify for a license. That nominal penalty the Presiding Administrative Law Judge determines shall be \$2,500.00. Dynamic International Freight Forwarders, Inc., therefore, is assessed a civil penalty for violations of section 44(a) of the Shipping Act, 1916, by engaging in unlicensed forwarding activities and payment of the civil penalty of \$2,500 is a condition precedent to granting a license herein.

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

(1) Dynamic International Freight Forwarders, Inc., violated section 44(a), Shipping Act, 1916, by engaging in unlicensed forwarding activities.

(2) Civil penalties in the amount of \$2,500 should be assessed against Dynamic International pursuant to section 31(e) of the Shipping Act, 1916, and that payment of the civil penalty of \$2,500 shall be and is a condition precedent to the issuance of a license herein.

(3) Upon payment of the civil penalty of \$2,500 and notice thereof given to the Secretary of this Commission with original or copies of all documents involved, Dynamic International Freight Forwarders, Inc., should then be found to possess the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, to be licensed as an independent ocean freight forwarder; and the Secretary shall note in the record the application is granted and shall issue same.

Wherefore, it is *ordered*, subject to review by the Commission, as provided in the Commission's Rules of Practice and Procedure, that:

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<sup>4</sup> Perhaps the procedure should be as the Commission did in Docket No. 66-17, *Independent Ocean Freight Forwarder License Application No. 552, Heskell Saleh Doing Business as Eastern Forwarding Service*, 10 F.M.C. 281, 288 (1967). Deny the application--postpone the effective date of the denial to enable the applicant to comply with conditions, in which event the denial order would not be entered.

In the above the decision was made February 14, 1967, and denial of application was postponed until August 1, 1967.

It is the view of the Presiding Administrative Law Judge that either procedure is acceptable.

(A) Dynamic International Freight Forwarders, Inc., applicant-respondent herein, is found to have violated section 44(a), Shipping Act, 1916, by engaging in unlicensed forwarding activities.

(B) Civil penalties in the amount of \$2,500 be and hereby are assessed against Dynamic International Freight Forwarders, Inc., pursuant to section 31(e) of the Shipping Act, 1916, and that payment of said civil penalty of \$2,500 be and hereby is a condition precedent to the issuance of a license herein.

(C) Upon compliance with the said condition precedent to issuance of a license herein by the applicant, the applicant shall give notice thereof and copies of all pertinent documents to the Secretary of this Commission; Dynamic International Freight Forwarders then shall, having met the condition precedent, be found to possess the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, to be licensed as an independent ocean freight forwarder. The Secretary of the Commission shall note in the records that the application is granted, and shall issue the license to applicant.

(D) Failure of compliance by applicant as set out above, the license is denied.

(S) WILLIAM BEASLEY HARRIS  
*Administrative Law Judge*

Washington, D. C.  
June 16, 1980

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-31****BILLIE IONE CRTALIC, VIRGO INTERNATIONAL CORPORATION AND MERCURY INTERNATIONAL CORPORATION; POSSIBLE VIOLATIONS OF SECTION 44 (A) - BILLIE IONE CRTALIC; INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION**

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**REPORT AND ORDER***January 19, 1981*

The Commission initiated this proceeding by Order of Investigation and Hearing on January 17, 1980, to determine:

1. Whether Respondents Billie Ione Crtalic, Virgo International Corporation, and Mercury International Corporation engaged in unlicensed freight forwarding in violation of section 44(a) of the Shipping Act, 1916 and 46 C.F.R. 510.3(a)2, and, if so, whether civil penalties should be imposed; and
2. Whether Billie Ione Crtalic should be licensed as an independent ocean freight forwarder.

The proceeding was assigned to Administrative Law Judge William Beasley Harris for hearing. Prior to the submission of opening memoranda, Billie Ione Crtalic withdrew her application for a freight forwarder's license and, together with Virgo, entered into a stipulation of facts with the Commission's Bureau of Investigation and Enforcement (BIE), which was submitted, together with a proposed settlement agreement, to the Presiding Officer. Under the terms of this agreement Virgo would pay \$1,900 and Billie Ione Crtalic \$2,500, in full compromise of the claims against them.

On September 24, 1980, the Presiding Officer issued an Initial Decision in which he declined to approve the proposed settlement and suggested that any additional settlement proposal meet certain stated concerns and assess penalties equally against Crtalic and Virgo. Respondents filed "Exceptions" to the Initial Decision, and BIE filed a reply.

**POSITIONS OF THE PARTIES**

Respondents and BIE argue that their negotiated settlement should have been accepted and approved by the Presiding Officer. They contend that, based upon the circumstances of this proceeding, the amounts agreed upon serve a regulatory purpose. The parties advise that they

considered a variety of factors in arriving at the settlement amounts, including: (1) the number of alleged violations; (2) the percentage of violations committed after receipt of a written warning (75); (3) the termination of activities after a second, oral warning; (4) the cooperation of Respondents in disclosing information and also entering into settlement negotiations; (5) the withdrawal of Crtalic's freight forwarder's application; and (6) the nature of Crtalic's conduct.<sup>1</sup>

Based upon these considerations, BIE initially determined that the proper settlement amount against both Respondents should be \$15,000. Crtalic agreed to pay \$2,500 of this amount, even though her percentage of shipments might have warranted a lesser amount (27 out of 300). The remaining \$12,500 was deemed to be Virgo's obligation. However, because Virgo (1) has only \$1,901 in assets, (2) received only \$1,516 net profit, and (3) is presently "inactive," BIE doubted its ability to pay more than \$1,900 and, therefore, accepted that amount as appropriate.<sup>2</sup>

#### DISCUSSION

Pursuant to the Commission's rules, proposed settlements of civil penalties must be submitted to the presiding officer for approval, and are, therefore, subject to disapproval at his discretion. 46 C.F.R. 505.3. However, it is also important to recognize that negotiated settlements are encouraged by the Commission as an expeditious and equitable means of resolving proceedings before it. *See Consolidated International Corporation v. Concordia Line*, 18 F.M.C. 180, 183 (1975).

The Commission has been mindful of these sometimes conflicting principles in its assessment of the instant appeal. It has thoroughly reviewed the proposed stipulation of facts and settlement agreement, along with the briefs of the parties. Although a settlement totalling \$15,000 against both Respondents would generally be appropriate in a case such as this, because of the special financial circumstances presented, the Commission concludes that the settlement amounts recommended by BIE are not unreasonable and, therefore, approves this settlement.

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<sup>1</sup> Because Virgo was a legitimate corporation, the parties agreed that the responsibility for forwarding activities after its incorporation should fall upon Virgo alone. Mercury International Corporation was never formally incorporated. The shipments forwarded under that name have therefore been attributed to Ms. Crtalic.

<sup>2</sup> Respondents also argue that the Presiding Officer erred in finding them in violation of the Shipping Act and General Order 4 and in "piercing" Virgo's corporate veil. BIE responds by stating that such arguments are without merit at this stage of the proceeding. These issues are indeed without merit. The Presiding Officer did not make "findings" that Respondents violated the Shipping Act. His rejection of the proposed settlement was based upon the stipulation of facts submitted by the parties. If no settlement were subsequently approved, Respondents would have their opportunity for a hearing to contest the alleged violations. Nor has the Presiding Officer "pierced the corporate veil" by concluding that Virgo and Ms. Crtalic should be assessed equal penalties. If anything, he has simply arrived at this conclusion without clearly articulating his reasons therefor.



**BILLIE IONE CRTALIC; POSSIBLE VIOLATIONS & FREIGHT 567  
FORWARDER LICENSE APPLICATION**

**THEREFORE, IT IS ORDERED,** That the settlement agreement jointly proposed by Respondents and the Bureau of Investigation and Enforcement is hereby approved; and

**IT IS FURTHER ORDERED,** That Respondents comply with the terms of said agreement within 30 days of the date of this Order, at which time this proceeding will be dismissed.

By the Commission.

(S) FRANCIS C. HURNEY  
*Secretary*

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-31****BILLIE IONE CRTALIC, VIRGO INTERNATIONAL CORPORATION AND MERCURY INTERNATIONAL CORPORATION; POSSIBLE VIOLATIONS OF SECTION 44(A) - BILLIE IONE CRTALIC; INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION**

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Proposed settlement of civil penalties not approved.

Respondents Crtalic and Virgo assessed civil penalties pursuant to section 32(e) of the Shipping Act, 1916, which are to be against each equally.

*Charles C. Hunter, Joseph B. Slunt, Janet G. Speck and Paul J Kaller, Acting Director of the Bureau of Hearing Counsel, for Commission's Bureau of Hearing Counsel.*

*Carlos Rodriguez for Respondents.*

**INITIAL DECISION<sup>1</sup> OF WILLIAM BEASLEY HARRIS,  
ADMINISTRATIVE LAW JUDGE**

*Finalized January 19, 1981*

This is a proceeding instituted May 21, 1980, pursuant to sections 22, 32, and 44 (46 U.S.C. 821, 831 and 841(b)) of the Shipping Act, 1916, and action 510.8 of the Commission's General Order 4 (46 C.F.R. 510.8), to determine:

- 1) Whether Billie Ione Crtalic, and/or Virgo International Corporation and/or Mercury International Corporation violated section 44(a) of the Shipping Act, 1916, and section 510.3 of the Commission's General Order 4, by engaging in unlicensed forwarding activities;
- 2) Whether civil penalties should be assessed against Billie Ione Crtalic, and/or Virgo International Corporation, and/or Mercury International Corporation pursuant to section 32 and Part 505.3 of the Commission's regulations (46 C.F.R. 505.3) for violations of the Shipping Act, 1916, and section 510.3 of the Commission's General Order 4, and, if so, the amount of any such penalty which should be imposed, taking into consideration factors in possible mitigation of such a penalty; and

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<sup>1</sup> 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).

**BILLIE IONE CRTALIC; POSSIBLE VIOLATIONS & FREIGHT 569  
FORWARDER LICENSE APPLICATION**

- 3) Whether in light of the evidence adduced pursuant to the foregoing issues, together with any other evidence adduced, Billie Ione Crtalic possesses the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, and section 510.5 of the Commission's General Order 4 to be licensed as an independent ocean freight forwarder.

Under date of July 14, 1980, Billie Ione Crtalic through her counsel withdrew her application for a license as an independent ocean freight forwarder. (July 24, 1980, Prehearing Conference TR 3). That action eliminates from the proceeding the issue of possession by her of the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, and section 510.5 of the Commission's General Order 4, to be licensed as an independent ocean freight forwarder (TR 4).

The parties herein entered into the following stipulation.

**STIPULATION**

Pursuant to Rule 162 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.162, Respondents and Hearing Counsel, the only parties to this proceeding, hereby file this joint stipulation.

1. Billie Ione Crtalic had been employed by Darwin Liao d/ b/a Pegasus International Corporation (Pegasus), holder of Independent Ocean Freight Forwarder License No. 1500, as office manager for Pegasus for approximately five and one half years. Ms. Crtalic left Pegasus in late July, 1978.

2. Thereafter, Ms. Crtalic established another office.

3. Respondents forwarded more than 300 ocean freight shipments without benefit of an independent ocean freight forwarder license during the period July, 1978 through July, 1979. In forwarding these shipments, Respondents utilized Pegasus' name and FMC license number.

4. During the period July, 1978 through September, 1978, Ms. Crtalic conducted activity under the name of Mercury International Corporation (Mercury). In September, 1978, it was discovered that she could not incorporate as Mercury because that name had been registered with the California State Department of Corporations by another firm. Ms. Crtalic, during this period, forwarded twenty-seven ocean freight shipments. Ms. Crtalic owned 50% of the stock in Virgo and served as its President and Chairman of the Board. On July 24, 1979, she resigned as President and Chairman of the Board and transferred her holdings in the corporation.

5. Although respondents received freight forwarding fees from their shipper principals, they did not receive a share of the compensation paid by ocean going common carriers.

6. On April 19, 1979, the Commission's Office of Freight Forwarders received an application for an Independent Ocean

Freight Forwarder License from Ms. Crtalic. The application was dated March 26, 1979.

7. By letter dated April 19, 1979 and signed by Charles L. Clow, Chief, Office of Freight Forwarders, the Commission's Office of Freight Forwarders acknowledged receipt of Ms. Crtalic's application. This letter contained the following language:

Your attention is specifically directed to Section 44, Shipping Act, 1916, which prohibits any person from engaging in carrying on the business of forwarding unless such person holds a license issued by the Federal Maritime Commission to engage in such business. "Carrying on of forwarding" is defined under Section 510.2 of the enclosed General Order 4 and Section 1, Shipping Act, 1916.

8. Virgo forwarded approximately 75 ocean freight shipments after the receipt of the letter referred to in section 8 above.

9. On July 15, 1979, Eleanor V. Navickas, District Investigator, Los Angeles Office, advised Ms. Crtalic that it was unlawful for Virgo to utilize the name and FMC license number of a licensed independent ocean freight forwarder to engage in carrying on the business of ocean freight forwarding.

10. Thereafter, Virgo ceased all ocean freight forwarding activities in July, 1979.

11. Ms. Crtalic withdrew her application for an Independent Ocean Freight Forwarder License by a letter dated July 14, 1980.

RESPECTFULLY SUBMITTED,

Carlos Rodriguez  
Counsel for Respondent

PAUL J. KALLER, ACTING DIRECTOR  
*Bureau of Hearing Counsel*

JOSEPH B. SLUNT  
*Hearing Counsel*

CHARLES C. HUNTER  
*Hearing Counsel*

The parties submitted the following:

#### PROPOSED SETTLEMENT OF CIVIL PENALTIES

This Proposed Settlement has been entered into between the Bureau of Hearing Counsel and Respondents Billie Ione Crtalic and Virgo International Corporation (Respondents). It is submitted to the Presiding Officer for approval pursuant to Rule 162 of the Commission's Rules of Practice and Proce-

dure, 46 C.F.R. 502.162, and section 505.3 of the Commission's General Order 30, 46 C.F.R. 505.3, and is to be incorporated into the Final Order in this proceeding, if so approved.

Whereas, by Order of Investigation and Hearing dated May 21, 1980, the Commission instituted the present proceeding to determine whether the Respondents had violated section 44(a) of the Shipping Act, 1916, 46 U.S.C. §841b(a), and section 510.3 of the Commission's General Order 4, 46 C.F.R. 510.3, and whereas, that Order includes the issue of whether civil penalties should be assessed for any violations of Section 44(a) of the Shipping Act, 1916, and section 510.3 of the Commission's General Order 4, 46 C.F.R. 510.3;

Whereas, the Order of Investigation alleges that the Respondents may have violated section 44(a) of the Shipping Act, 1916, and section 505.3 of the Commission's General Order 4;

Whereas, the Respondents have stipulated that they have engaged in specified activities which may be violative of section 44(a) of the Shipping Act, 1916, and section 505.3 of the Commission's General Order 4;

Whereas, the parties, in order to avoid the delays and expense which would be occasioned by further litigation of the issues specified in the Order of Investigation and Hearing, are desirous of expeditiously settling the issue of the amount of the appropriate civil penalty to be assessed against Respondents in accordance with the terms and conditions of this agreement;

Whereas, section 32(e) of the Shipping Act, 1916, U.S.C. §831(e), authorizes the Commission to assess or compromise all civil penalties provided for by the Shipping Act, 1916; and

Whereas, the Respondents have terminated all ocean freight forwarding activities and have instituted, and have indicated their willingness and commitment to maintain measures designed to eliminate, discourage, and prevent future violations of the Shipping Act, 1916, and the Commission's General Order 4;

The undersigned Respondents hereby agree to pay to the Federal Maritime Commission the following sums in accordance with the designated terms of settlement:

1. In compromise of all civil liability which may have been incurred by Billie Ione Crtalic between July, 1978 and July, 1979 under the Shipping Act, 1916, and the Commission's General Order 4, Ms. Crtalic agrees to pay to the Federal Maritime Commission the sum of Two Thousand and Five Hundred Dollars within 30 days from the date of the approval by the Commission of this Proposed Settlement;

2. In compromise of all civil liability which may have been incurred by Virgo International Corporation between July, 1978 and July, 1979 under the Shipping Act, 1916, and the

Commission's General Order 4, Virgo International Corporation agrees to pay to the Federal Maritime Commission the sum of One Thousand Nine Hundred Dollars within 30 days from the date of the approval by the Commission of this Proposed Settlement;

3. In consideration of the payment of the civil penalties agreed upon by the parties and approved by the Presiding Administrative Law Judge and the Commission, the commencement of any civil or administrative action for the recovery of civil penalties from the Respondents which would be based upon activities engaged in by Respondents between July, 1978 and July, 1979 shall be barred; and

4. It is expressly understood and agreed that this Agreement is not to be construed as an admission by Ms. Crtalic or Virgo International Corporation or its officers, directors or employees of the violations alleged in the Order of Investigation and Hearing.

Carlos Rodriguez  
Counsel for Respondents

PAUL J. KALLER, ACTING DIRECTOR,  
*Bureau of Hearing Counsel*

JOSEPH B. SLUNT  
*Hearing Counsel*

CHARLES C. HUNTER  
*Hearing Counsel*

Hearing Counsel and Respondents submitted on August 29, 1980, memoranda in support of the proposed settlement. Hearing Counsel pointed out in its memorandum, *inter alia*, that during the period July, 1978 through July, 1979, Respondents forwarded over 300 ocean freight shipments without benefit of a license issued by the Commission; that of these 300 shipments, Ms. Crtalic was responsible for the forwarding of twenty-seven and Virgo was responsible for forwarding the remainder; that only seventy-five of the shipments for which Virgo is responsible were forwarded after the receipt of a written warning that unlicensed ocean freight forwarding activity is unlawful. Upon the receipt of a second such warning, Virgo ceased all such activities.

The Respondents in their memorandum refer, *inter alia*, to 300 alleged violations; that the acts of Respondent(s) may not be characterized as knowing and willful conduct within the strict meaning of the terms; and precedes such references with "The facts of the case support the provisions of the proposed settlement." They are not the facts in the proceeding.

The Respondents and Hearing Counsel urge approval of the settlement.

**BILLIE IONE CRTALIC; POSSIBLE VIOLATIONS & FREIGHT 573  
FORWARDER LICENSE APPLICATION**

**DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS**

The parties to this proceeding stipulated that from July, 1978 through July, 1979, Respondents forwarded over 300 ocean freight shipments without benefit of an independent ocean freight forwarder license. The Respondent Virgo International Corporation, according to its financial statement herein, dated August 18, 1980, was incorporated May 28, 1975, licensed to do business in California. The corporation has no Profit and Loss Statement or Balance Sheets. The financial statement shows Virgo's income for the last taxable year of:

\$17,565.00	gross income
15,749.00	expenses (fixed & current)
1,716.00	gross profit
1,516.00	net profit after taxes

The corporation is presently active according to its financial form; yet Hearing Counsel says Virgo is apparently an inactive corporation at this time. Both Hearing Counsel and Respondents refer to Virgo showing assets of only \$1,900.00, neither mentions Virgo's gross income of \$17,565 for the year in which it engaged in unlicensed ocean freight forwarding activities, however, Hearing Counsel in saying the net profit was only \$1,516.00, tacitly recognized the gross income.

As to Respondent Ms. Crtalic, who had been employed as office manager of another licensed Independent Ocean Freight Forwarder (License No. 1500) for approximately 5½ years until late July 1978, Ms. Crtalic owned 50% of the stock in Virgo and served as its President and Chairman of the Board, and didn't resign and transfer her holdings in the corporation until July 24, 1979. She was involved in these violations from July 1978. Her experience as office manager should have taught her better. There is no financial data submitted as to Ms. Crtalic, who agreed to payment in settlement of a greater civil penalty than Virgo.

Under the circumstances presented, it appears to the Presiding Administrative Law Judge that the proposed settlement accepting a net profit of \$1,516 from gross income of \$17,565 tends to condone the activities herein of violation of the Act as though the violators are persons who have not violated the provisions of the Shipping Act. The stipulation herein is to more than 300 ocean freight shipments without benefit of an Independent Ocean Freight Forwarder License during the period July 1978 through July 1979, utilizing the name and FMC license number of another in so doing.

Under section 32(e) of the Shipping Act (46 U.S.C. 831(e)) there is authority to assess civil penalties; under section 32(a) thereof, violators are subject to a civil penalty not to exceed \$5,000 for each such violation; under section 32(c) thereof, violation of any order, rule, or regulation of the Federal Maritime Commission made or issued in the

exercise of its powers, duties, or functions, are subject to a civil penalty of not more than \$1,000 for each day such violation continues. Thus it is seen, 300 violations at \$5,000 or 1 year at \$1,000 per day could result in assessments herein of a civil penalty of some magnitude. The Presiding Administrative Law Judge cannot *find* and *conclude* that the settlement proposed should be approved under the circumstances of this case. The current status of Respondent Virgo as a corporation is ambiguous as reflected in this proceeding. There is no reflection of the financial status of the Respondent Ms. Crtalic. Under the proposed settlement Ms. Crtalic agrees to pay \$2,500 and Virgo agrees to pay \$1,900, for a total assessment in this proceeding of \$4,400. Such settlement tends to treat the \$17,565 gross income of Virgo as presented above as the income from a non-violator of the Shipping Act, 1916, which the Presiding Administrative Law Judge *finds* and *concludes* is not acceptable.

The matter of mitigation is regarded in the cooperation of the parties herein in resolving this proceeding.

Upon review of the situation and record herein the gross income of \$17,565, obtained during the period as to settlement of civil penalties, in the opinion of the undersigned, should not be regarded the same as income brought in under a period free from such cloud, because a violator of the Shipping Act could then possibly profit from such violations. The Presiding Administrative Law Judge *finds* and *concludes* that while Ms. Crtalic and Virgo International Corporation have each expressly understood and agreed the proposed settlement is not to be construed as an admission of having violated section 44(a) of the Act and section 510.3 of the Commission's General Order 4, or of engaging in unlicensed forwarding activities, that the situation presented herein warrants assessment of civil penalties against the Respondents, considering mitigation, to disabuse any show of gains possible were there violations. Pursuant to section 32(e) of the Shipping Act, it is deemed such assessment should be made; that because of the circumstances, the assessment be against Ms. Crtalic and Virgo equally in an amount higher than that in the proposed settlement, which is not approved.

Wherefore, upon consideration of the above, it is ordered:

(A) The Settlement of Civil Penalties proposed by the parties hereto is not approved.



**BILLIE IONE CRTALIC; POSSIBLE VIOLATIONS & FREIGHT 575  
FORWARDER LICENSE APPLICATION**

**(B) Civil Penalties, in a renewed settlement proposal should provide for the concerns expressed herein and be assessed against Billie Ione Crtalic and Virgo International Corporation equally.**

**(S) WILLIAM BEASLEY HARRIS**  
*Administrative Law Judge*

**Washington, D. C.**  
**September 24, 1980**

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 76-34****TARIFF FMC 6, RULE 22 OF THE CONTINENTAL  
NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE**

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**DOCKET NO. 76-36****TARIFF RULES CONCERTEDLY PUBLISHED DEFINING  
PRACTICES OF CONFERENCES AND RATE AGREEMENT  
MEMBERS REGARDING THE ACCEPTANCE AND  
RESPONSIBILITY FOR SHIPPER-OWNED OR SHIPPER-LEASED  
TRAILERS OR CONTAINERS**

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**ORDER ON REMAND***January 27, 1981*

On November 18, 1980, the United States Court of Appeals issued its decision in D.C. Cir. No. 79-1194, *Interpool, Ltd. v. FMC*, vacating the Commission's Report and Order in these consolidated dockets and remanding the case to the Commission.

The issue before the Court was whether the Commission correctly held that certain conferences of shipping lines were authorized by their approved section 15 agreements to publish tariff rules which effectively shifted responsibility for the rental costs associated with the use of leased or "neutral" containers from the conference member lines to the shippers using such containers. The Court held that the Commission erred in failing to consider the competitive effect of the tariff rules before determining whether the rules concerned a type of ratemaking activity authorized under the relevant conference agreements.

Although the Court remanded these dockets for further proceedings, the purpose and direction to be taken by this Commission-instituted investigation (as opposed to a private party complaint) is presently unclear. There is reason to believe that certain facts and litigation positions have changed since the Commission first acted in this matter. All but one of the participating conferences have seemingly abandoned any present interest in implementing container use practices of the type prescribed by the tariff regulations which were the subject of this proceeding.\*

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\* Except for the Pacific Coast European Conference (PCEC), the original tariff rules were cancelled shortly after the Commission's Show Cause Order was issued in 1976. The PCEC rule pre-

Accordingly, in order for the Commission to fashion an appropriate vehicle for examining the remaining issues in these dockets, interested parties -- and especially the container leasing companies -- should state whether they believe further proceedings are necessary, and, if so, to describe in detail the evidentiary issues which require determination and the appropriate procedures for resolving such issues. Based on these submissions, the Commission will provide an opportunity to participate in further proceedings of such nature and extent as may be warranted. In any further proceedings, those persons alleging competitive harm caused by container use practices would have an opportunity to adduce evidence of such harm. The Commission would also welcome comment from interested parties as to whether it might be desirable to approach the general question of container use practices and allowances from a broader perspective, including both conference and nonconference carriers.

**THEREFORE, IT IS ORDERED,** That interested parties file with the Commission on or before February 27, 1981, a statement which describes any further administrative proceedings believed to be necessary and the exact issues which would be developed in such proceedings.

By the Commission.\*

(S) FRANCIS C. HURNEY  
*Secretary*

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existed the others and may reflect the absence of a "neutral container system" on the West Coast. Thus, in any further proceeding involving the PCEC rule, it will be necessary to develop evidence as to whether such a "system" exists on the West Coast and, if so, the effect, if any, of the rule on that system.

\* Vice Chairman Kanuk dissents.

*Vice Chairman Leslie Kanuk, dissenting.*

I can not agree with the majority's approach to the Court's remand in this case. The majority states that the purpose and direction of a Commission investigation are "presently unclear", and suggests, in effect, that this proceeding may be moot. The problem with this approach is that the Court (1) specifically found that a justiciable controversy does exist regarding the correctness of the Commission's prior decision, and (2) set out the issue to be addressed on remand.

In its opinion, the Court vacated the Commission's prior order and remanded the case "for further proceedings in accordance with this opinion". *Interpool Ltd. v. Federal Maritime Commission*, No. 79-1194, Slip Op. at 18 (D.C. Cir. Nov. 18, 1980). The Court found that the Commission had misapplied the appropriate legal standard in making its decision, since it failed to consider how the involved neutral container rules would affect competition. The Court pointed out that the Commission itself had, in its 1976 Show Cause Order, raised serious antitrust questions about the effects of the rules. The Court noted, however, that in its subsequent report, the Commission merely concluded that the neutral container rules did not require separate approval under section 15 because they were routine implementations of authority contained in the carriers' basic conference agreements. *Interpool Ltd. v. Federal Maritime Commission*, *supra* at 9. Therefore, the Court directed the Commission, on remand, to reconsider the rules in terms of their effect on competition.

I cannot understand how the majority can now conclude that the purpose and direction of further proceedings are unclear. The Court's instruction seems clear to me. The Commission is to consider the actual competitive effect of the involved rules. In addition, the majority's suggestion that the case may be moot is clearly untenable. If the majority is basing this suggestion on the grounds that all but one of the involved conferences have cancelled the neutral container tariff rules in issue, the relevance of this fact is not clear, since the tariff rules were cancelled well before the Commission issued its Report in 1978. In point of fact, these rules were cancelled shortly after the Show Cause Order was issued in 1976. Despite this fact, the Commission found, in its 1978 Report, that the case was *not* moot, and proceeded to reach a decision on the merits. Furthermore, the Court itself concluded that since the Commission's decision allowed the conferences to implement the neutral container rules, and since the container leasing companies argued that the Shipping Act prohibits their implementation, a justiciable controversy exists regarding the Commission's final decision. *Interpool v. Federal Maritime Commission*, *supra* at 9, n. 9.

Thus, at this point, it appears to me that the Commission has no choice but to re-examine the involved rules, taking into consideration

their anti-competitive effects, if any. The Commission should not be asking interested parties to describe any further proceedings believed to be necessary, since the Court has concluded that further proceedings are necessary, and has set out the specific issue to be addressed in such proceedings.

FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-39

UNION CARBIDE CORPORATION

v.

THE SHIPPING CORPORATION OF INDIA, LIMITED

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NOTICE

*January 27, 1981*

Notice is given that no exceptions have been filed to the December 16, 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

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DOCKET NO. 80-39

UNION CARBIDE CORPORATION

v.

THE SHIPPING CORPORATION OF INDIA, LIMITED

---

Reparation granted.

*Warren Wytzka* for complainant.

*T. Ciminello* for respondent.

## INITIAL DECISION<sup>1</sup> OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

*Finalized January 27, 1981*

Union Carbide Corporation, in the business of marketing chemical products, charges the Shipping Corporation of India with the assessment of a higher rate than was properly applicable to a shipment of its products. Reparation of \$19,628.98 is sought. Respondent has agreed to the use of the shortened procedure provided in Subpart S of the Commission's Rules of Practice and Procedure.

Complainant contends that the shipment in question consisted of 520 drums & pallets consisting of 220 bags of Polyethylene Resin (Non-Hazardous) and should have been so classified under Item 1270 of respondent's Tariff No. 14.<sup>2</sup> Respondent classified the shipment as Chemical N.O.S. The only issue presented is that of the proper classification of the commodity shipped.

On the bill of lading the shipment was described as Chemicals N.O.S. On the shipper's Export Declaration it was described as (LOW DENSITY POLYETHYLENE) Chemicals N.O.S. On the Dock Receipt the cargo was described as 520 drums Insulation Compound and 5 pallets Insulation Compound. Finally on an unnamed document of Union Carbide the cargo was variously described as "INFILLED XLPE COMPOUND, HFDE 4201;" SEMICONDUCTING XLPE INSULATION COMPOUND, HFDA 0580 BLACK;" and "FILLED XLPE INSULATION COMPOUND, HFDA 5630." Complainant submitted an

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<sup>1</sup> 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).

<sup>2</sup> Third revised page 233, item 1270, Tariff No. 14, FMC No. 3 of the India, Pakistan, Bangladesh, Ceylon and Burma Outward Freight Conference, Synthetic Resin: Non-Hazardous, Polyethylene.

overcharge claim to respondent which rejected it on the ground that it was untimely filed under Rule 20 of the Conference Tariff which requires that claims involving changes in description of the cargo be filed before the cargo leaves the custody of the carrier.

Complainant's contention is that the export declaration and Union Carbide's Chemical Brochure, page 70 (submitted with the complaint), establish that the commodity shipped was in fact Polyethylene Resin. Respondent's answering memorandum (actually a one page letter) simply asserts its belief that complainant has failed to sufficiently prove that the commodity description was erroneous, particularly when the bill of lading listed the goods Chemicals N.O.S. and the Dock Receipt described the goods as insulation Compound.

Polyethelene Resin is generically described as Synthetic Resin. The Schedule B number 444.1610, shown on the Export Declaration is applied to Polyethylene: Low and Medium Density (with specific gravity not over 0.940). Thus the shipment was classified as Polyethylene Resin on the Export Declaration. Page 70 of Union Carbide's Brochure, under the overall heading of Polyethylene Resins, lists "Semiconductive Shielding HFDA 0580 Black 55;" "Primary Vulcanizable Insulation HFDE 4201 Natural," and "weatherproof Vulcanizable Insulation HFDA 5630 Black." The numbers following the description of the three commodities coincide with the numbers on the previously mentioned unnamed document which would appear to be some kind of Union Carbide order form or more probably packing list.

In *Western Publishing Company v. Hapag Lloyd A.G.*, the Commission said:

The description on the bill of lading is not the single controlling factor in cases of this nature (overcharge cases). Rather, the test is what claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description. In rating a shipment the carrier is not bound by the shipper's misdescription on the bill of lading. Likewise claimant is not bound at least where the misdescription results from unintentional mistake or inadvertence.

In order to sustain a claim the complainant "must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim." *Merck Sharp & Dohme v. Atlantic Lines*, 17 F.M.C. 244, 245 (1973). The decision must be based on "all the evidence of record with no single document or piece of evidence necessarily being controlling." *Kraft Foods v. Moore McCormack Lines, Inc.*, 19 F.M.C. 84, 85 (1976).

On the basis of the record as a whole, I conclude that the shipments should have been classified under Item 1270 as Synthetic Resin: Non-Hazardous, Polyethylene with total freight charges in the amount of



\$14,646.90. The freight charges actually paid under the Cargo N.O.S. classification were \$34,275.88. Reparation is awarded in the amount of \$19,628.98.<sup>3</sup>

(S) JOHN E. COGRAVE  
*Administrative Law Judge*

Washington, D. C.  
December 16, 1980

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<sup>3</sup> See Appendix.

## APPENDIX

Below are all Pertinent data concerning this shipment:

Our shipment consisted of:	520 Drums & 5 Pallets consisting of 220 bags Polyethylene Resin (Non-Hazardous)
Our shipment measured:	6607 cubic feet
Our shipment weighed:	157880 lbs.
Shipment's origin:	New York
Shipment's destination:	Bombay
Name of Vessel:	Vishva Nayak
Bill of Lading No.:	126
Bill of Lading date:	March 9, 1979
Freight rate assessed:	\$148.75 per 40 cu.ft. plus 4% Suez Transit Surcharge, plus \$30.50 per 40 cu.ft. Bunker Surcharge, plus 15% Bombay Port Detention Surcharge
Total freight:	\$34275.88
Paid by:	Union Carbide Corporation
The amount herewith claimed as over-charged is:	\$19628.98
Correct B/L description:	Polyethylene Resin as Synthetic Resin (Non-Hazardous)
Correct freight rate:	\$149.00 per 2240 lbs. plus 4% Suez Transit Surcharge, plus \$30.50 per 2240 lbs. Bunker Surcharge, plus 15% Bombay Port Detention Surcharge
Correct Total freight:	\$14646.90

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-58

LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE

v.

CIA. SUD AMERICANA DE VAPORES

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## NOTICE

*January 27, 1981*

Notice is given that no appeal has been taken to the December 17, 1980, 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

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DOCKET NO. 80-58

LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE

v.

CIA. SUD AMERICANA DE VAPORES

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## SETTLEMENT APPROVED; COMPLAINT DISMISSED

*Finalized January 27, 1981*

This case began with the service of a complaint on August 29, 1980. Complainant Latin America/Pacific Coast Steamship Conference alleged that respondent Cia. Sud Americana de Vapores (Chilean Line) had on three occasions in February and March of 1980 carried fruit from Chile to Long Beach or Los Angeles, California, as a common carrier by water without having first filed a tariff with the Commission, thereby violating section 18(b) of the Shipping Act, 1916, 46 U.S.C. 817(b). Complainant alleged, furthermore, that respondent's failure to file a tariff subjected complainant's member lines to unjust and undue prejudice and unlawful competition and caused damages in an amount not ascertainable at the time of filing the complaint. Respondent admitted that it had operated three ships from Chile to California during the time mentioned in the complaint but denied that it had acted as a common carrier by water or that it had been required to file a tariff.

After the issue had been joined, respondent commenced discovery on September 29, 1980, by serving a detailed set of interrogatories and requests for production of documents. Shortly before this time, however, the parties had begun to consider possible settlement which would avoid the expense of litigation, a problem aggravated by the distance between respondent in Chile and complainant in California. In order to permit settlement discussions to continue, the parties requested permission to defer the normal discovery schedule, a request which I granted. Relieved of the burden of continuing with discovery and litigation, the parties continued with their discussions which ripened into a settlement. On December 4, 1980, the parties filed (mailed) a request that their settlement be approved and that the complaint be dismissed.

In their papers describing their settlement and urging its approval, the parties describe the terms of their settlement which are rather simple.<sup>1</sup> The complainant Conference recognizes the extreme difficulty

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<sup>1</sup> The papers embodying the settlement were received by the Commission Secretary on December 5, 1980. They consist of a three-page request for approval of the settlement with explanation, signed

of proving the amount of damages which its member lines allegedly suffered as a result of respondent's three sailings from Chile many months ago. Of course, it would also have been necessary for complainant to prove that respondent had operated as a common carrier by water subject to the tariff-filing requirements of the Shipping Act since respondent denies that it had operated as such. If complainant had been able to prove everything it alleged and, in addition, had been able to develop some type of formula and evidence proving financial injury, complainant might have obtained all that it had asked in its complaint, namely, an order requiring respondent to file a tariff if it resumed carriage in the future as well as reparation. By the terms of the settlement, however, complainant is willing to resolve its controversy with respondent on condition that respondent file a tariff if it resumes carriage and complainant agrees to forego the difficult task of proving damages and violations of law for past sailings. In return respondent promises to file a tariff in case of future sailings in which it may carry fresh fruit from Chile to United States West Coast ports without admitting that it had violated the law in the past. Both parties therefore believe that it is more beneficial to their respective interests to settle on such a basis rather than to attempt to vindicate such interest at great expense associated with litigation. Since a continuation of litigation in this case would undoubtedly entail further discovery, possibly with complications because of the distant location of respondent and respondent's records in Chile and the difficulties of proving damages and the exact status of respondent when it operated the three ships in early 1980, it appears that the settlement is far more economical to each side than protracted litigation.

#### DISCUSSION AND CONCLUSIONS

It is well settled that both the law and Commission policy encourage settlements and engage in every presumption which favors a finding that they are fair, correct, and valid. See *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 505 (1978) and the many cases cited therein. See also Commission Rules 91 and 94, 46 C.F.R. 502.91; 502.94, and the Administrative Procedure Act on which Rule 91 is based, 5 U.S.C. 554(c)(1).<sup>2</sup> The general policy favoring settlements is summa-

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by counsel for both parties, and a one-page letter, dated November 26, 1980, signed by respondent's General Manager. My ruling describes the contents of these documents.

<sup>2</sup> The APA, 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 proceedings, and the public interest permit;

The courts view this provision and its legislative history "as being of the 'greatest importance' to the functioning of the administrative process." *Pennsylvania Gas & Water Co. v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972). Congress encouraged agencies to make use of settlements and wished to advise private parties that "they may legitimately attempt to dispose of cases at least in

rized in the following passage drawn from a recognized authority, which language was adopted by the Commission in the *Old Ben Coal Company* case, cited above, 21 F.M.C. at 512.

The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy . . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims . . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy. 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976). (Footnote citations omitted.)

Consistent with these policies, the Commission has in recent years approved a wide variety of settlements and discontinued numerous complaint cases under various provisions of the Shipping Act, 1916. See list and description of settled cases recited in *Del Monte Corporation v. Matson Navigation Company*, 22 F.M.C. 364, 368-369 (1979). As explained in *Old Ben*, cited above, 21 F.M.C. at 512, the Commission recognizes the advantages to settlements but exercises some judgment before approving them. Mainly the Commission is concerned that the settlement not contravene any law or public policy, for example, that it not be the result of fraud, duress, or mistake, that it not constitute a discriminatory device or consummate a desire to contravene any provision of the Shipping Act, or, if a certain type of agreement, that it be filed for approval under section 15 of that Act.

The present settlement seems fully consistent with all the principles cited above that favor its approval. It represents the considered judgment of both partes that it is an amicable solution to a controversy that is far preferable to the uncertainties and expense of protracted litigation. It gives complainant the assurance that respondent will file a tariff if it carries fruit in the subject trade in the future and relieves complainant of the burden of trying to prove damages as well as violations of law. It also relieves respondent of the expense of showing that it had not operated as a common carrier in connection with the past sailings in

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part through conferences, agreements, or stipulations." Senate Judiciary Committee, APA-Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess., at 24.

question. Regardless of which party might have prevailed on the merits had the case proceeded to conclusion, both parties apparently believe that the cost of protracted litigation would outweigh the benefits of ultimate vindication.

The present settlement shows every sign of being a traditional, amicable resolution of a controversy which, as noted, the law has long encouraged. Moreover, it shows no indication of violation of any principle or policy.<sup>3</sup> Hence, I find it deserving of approval. Accordingly, the settlement is approved, the complaint is dismissed, and the proceeding is terminated.

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

December 17, 1980

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<sup>3</sup> This settlement is not affected by the complications relating to settlements reached under section 18(b)(3) of the Act concerning alleged tariff overcharges nor is the settlement an anticompetitive agreement among carriers falling under one of the seven categories of section 15 of the Act. The settlement merely means that respondent Chilean Line will file a tariff in accordance with section 18(b)(1) of the Act if it resumes carriage of fresh fruit in the subject trade, an act which the law would require anyway if the Chilean Line operates as a common carrier.

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 76-59**

**AGREEMENT NOS. T-3310 AND T-3311**

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**NOTICE**

*January 28, 1981*

Notice is given that no exceptions have been filed to the December 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

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DOCKET NO. 76-59

AGREEMENT NOS. T-3310 AND T-3311

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The Indiana Port Commission and Ceres, Inc., found not shown to have violated section 16 First and section 17 of the Shipping Act. Proceeding discontinued.

*Theodore L. Sendak, William E. Daily, Timothy J. May, Richard A. Earle, and John V. E. Hardy, Jr.* for respondent Indiana Port Commission.

*Warren C. Ingersoll* for respondent Ceres, Inc.

*Paul J. Kaller, Joseph B. Slunt, and Deana E. Rose* as Hearing Counsel.

### INITIAL DECISION<sup>1</sup> OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

*Finalized January 28, 1981*

The subject proceeding originally encompassed a number of issues, but now is concerned only with the alleged violations by the Indiana Port Commission (Port Commission) of sections 16, First, and 17 of the Shipping Act, 1916 (the Act), and the alleged violation by Ceres, Inc. (Ceres),<sup>2</sup> of section 17 of the Act. The subject proceeding also includes an investigation of whether Ceres violated section 16, First, but Hearing Counsel state that they do not believe that the record supports a finding against Ceres under section 16, First, and this issue will not be considered further herein.

The alleged violations are said by Hearing Counsel to have resulted from the Port Commission's alleged grant to Ceres of exclusive control of every berth at Burns Waterway Harbor, Portage, Indiana (Burns Harbor), adequate in size for serving ocean vessels, thereby precluding a competing stevedore, Lakes and Rivers Transfer Corporation (LRTC), from access to all berths at Burns Harbor suitable in size to serve ocean vessels (section 16, First), and by the alleged failure of the Port and Ceres to adopt reasonable rules or practices regarding a public terminal (section 17).

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<sup>1</sup> 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).

<sup>2</sup> Ceres, Inc., owns 100 percent of Calumet Harbor Terminals, Inc. (Calumet). Ceres and Calumet own 100 percent of Ceres Marine Terminals, Inc. (Ceres Marine). Ceres Marine was formerly known as Tri-State Terminals, Inc. Ceres, Ceres Marine and Tri-State Terminals, Inc., have operated or operate terminal facilities, and have performed or perform stevedoring services at Burns Waterway Harbor, Portage, Indiana. For convenience, these three entities will be referred to as Ceres or Ceres, Inc., and where leases and agreements were made at Burns Harbor with Tri-State Terminals or with Ceres Marine, they will be referred to as if made with Ceres.

To put the above remaining issues in this proceeding into proper perspective, it is appropriate to go into the history of this proceeding and into what has taken place in a related proceeding, No. 76-22, *Lakes and Rivers Transfer Corporation v. The Indiana Port Commission*.

Burns Harbor, also known as the Port of Indiana, is a man-made port located on the south shore of Lake Michigan. It consists of a break-water on the north and west, which protects a turning basin running east and west, and it consists of two harbor arms running north and south, known as the West Harbor Arm and the East Harbor Arm.

The west wall of the West Harbor Arm and adjacent property are owned by the National Steel Corporation, and the east wall and one-half of the south wall of the East Harbor Arm and adjacent property are owned by the Bethlehem Steel Corporation. These facilities of the two steel companies are not in issue herein.

The issues are concerned with the inner walls of the two Harbor Arms, that is, the east wall of the West Harbor Arm, and the west wall of the East Harbor Arm, and the south walls of both Arms except the half of the south wall on the East Harbor Arm owned by Bethlehem Steel. The Port Commission owns the land beneath Burns Harbor and about 500 acres immediately south of Burns Harbor.

The Port Commission's facilities at the time of the close of hearings in Docket No. 76-22, on October 21, 1976, on the West Harbor Arm, consisted of a self-unloaded area with mooring dolphins, berth No. 5, at the south end of the West Harbor Arm; a berth at the south end of the east wall of the West Harbor Arm, berth No. 1, which was 250 feet long; and three 500 feet long berths on the east wall of the West Harbor Arm, Berths Nos. 2, 3, and 4. The Port Commission's facilities on the East Harbor Arm at that time consisted of a 688-foot long berth on the west side of the East Harbor Arm, Berth No. 6; and a 360-foot long berth on the south wall of the East Harbor Arm, Berth No. 7.

Berth No. 5 does not have a dock and its use is limited to ships with self-unloading equipment of a type used for bulk cargoes in the Great Lakes. Berths Nos. 1 and 7 are limited by their size to barges and lake vessels, and cannot accommodate large ocean-going vessels.

Ceres (then Tri-State) and the Port Commission on March 1, 1972, entered into an agreement for the lease of Transit Shed No. 1 and an outside storage area immediately adjacent, and agreed for the exclusive use of the wharfage and trucking concourse adjacent to Transit Shed No. 1 and the outside storage area, all located on the West Harbor Arm. This agreement, No. T-2602, was filed with the Commission on March 2, 1972, and approved on March 6, 1973.

Ceres and the Port Commission entered into an agreement dated April 1, 1975, by which Ceres leased Transit Shed No. 2 and was granted exclusive use of the adjacent wharfage and trucking concourse

areas, all located on the West Harbor Arm. This was Agreement No. T-3310.

Ceres and the Port Commission entered into another agreement dated May 1, 1975, by which Ceres leased Outside Storage Area No. 2 and the adjacent wharfage and trucking concourse areas, all located on the East Harbor Arm. This was Agreement No. T-3311. The exclusive use of this area was subject to a concurrent right of the Levy Corporation to use the premises until the Port Commission made other wharfage and dockage facilities available to Levy elsewhere at Burns Harbor. Levy has a plant west of the main road going into Burns Harbor where it processes steel mill slag for road building materials and other aggregate substitutes.

Both Agreements Nos. T-3310 and T-3311 were filed with the Commission on May 25, 1976, which was after they had been entered into and effectuated.

The subject proceeding (No. 76-59) is the second of two related proceedings concerning these lease agreements at Burns Harbor. In this second proceeding (No. 76-59), the Commission ordered an investigation and hearing to determine whether Agreements Nos. T-3310 and T-3311 are unlawful and should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916 (the Act); whether these two agreements had been implemented prior to their approval; whether these agreements constituted the parties' complete understanding with respect to the use of the facilities covered thereunder or whether there was implementation of unfiled agreements; whether these two agreements resulted in undue or unreasonable preference or advantage or in undue or unreasonable preference or disadvantage to any person in violation of section 16, First, of the Act; and whether these two agreements resulted in unjust or unreasonable practices relating to or connected with the receiving, handling, storing or delivering of property in violation of section 17 of the Act. This second proceeding (No. 76-59) was consolidated with the first proceeding (No. 76-22). As early as December 7, 1976, the Administrative Law Judge, in his denial of a first motion for a cease and desist order, had suggested that LRTC and the Port Commission negotiate the lease of new berthing space, and in effect resolve their own problems.

As of November 24, 1976, the Port Commission advised that it had contracted at a cost of \$1,465,241.02 to extend by 600 feet the berth on the East Harbor Arm, estimating completion of the additional berthing space by April 22, 1977, one week after the opening of the 1977 shipping season on the Great Lakes. The construction of a new berth was intended to enlarge the Port's facilities and such increased facilities were intended to provide adequate facilities for any and all stevedores who might use them. However construction was delayed by adverse weather and other problems. On May 2, 1977, the Administrative Law

Judge, in response to a second or renewed motion for a cease and desist order, recommended that a cease and desist order be issued against the Port Commission regarding Agreements Nos. T-3310 and T-3311 so that the parties could make other arrangements to serve LRTC.

Two orders were served by the Commission on August 9, 1977, requiring the Port Commission and Ceres to cease and desist implementation of Agreements Nos. T-3310 and T-3311. The parties thereby were required to cease and desist from carrying out all terms of these agreements, and otherwise were required to cease providing for the exclusive or preferential use of any facilities at Burns Waterway Harbor.

In its cease and desist orders the Commission found that Agreements Nos. T-3310 and T-3311 were subject to section 15 of the Act, and had been implemented without prior approval of the Commission. In its order regarding No. T-3311, the Commission stated that by virtue of Agreements Nos. T-2602, T-3310 and T-3311, Ceres had exclusive control of every berth at Burns Harbor capable of receiving a vessel larger than a barge or small lake vessel, and that LRTC was precluded from access to all berths which could be used to service customers using ocean vessels.

In time, LRTC and the Port Commission settled all their differences largely through the construction of new facilities at Burns Waterway Harbor, and the execution of new lease agreements filed with and approved by the Commission.

In particular, on July 19, 1979, the Administrative Law Judge approved a settlement agreement (No. T-3762), between the Port Commission and LRTC, and also approved six other agreements, namely, No. T-3763 between the Port Commission and LRTC regarding Outside Storage Area No. 2, etc.; No. T-3764 between the Port Commission and LRTC regarding 6.36 acres for storage of bulk cargo, etc.; No. T-3765 between the Port Commission and Ceres regarding Outside Storage Area No. 3, etc.; No. T-3766 between the Port Commission and Ceres regarding Transit Shed No. 2, etc.; No. T-3767 between the Port Commission and Ceres regarding Transit Shed No. 1, etc.; and No. T-3768 between the Port Commission and Ceres regarding a freezer facility, etc.

The lease agreement between the Port Commission and LRTC provided for the lease of Outside Storage Area No. 2 (formerly leased to Ceres under Agreement No. T-3311) and for the preferential use of Berth No. 6 and of the wharfage and trucking concourse adjacent to the berth, initial term to expire September 30, 1980, with a five year renewal option.

The preference granted above to LRTC for the use of Berth No. 6 is applicable only to ships longer than 360 feet. So long as LRTC notifies the Port Commission two days in advance of when one of its ships

longer than 360 feet is to arrive at Burns Harbor, LRTC can utilize Berth No. 6, but otherwise Berth No. 6 is an open berth available on a first-come, first-serve basis by any stevedore licensed at Burns Harbor.

The above settlement agreement and the six lease agreements resolved all the disputes (in both Docket Nos. 79-22 and 79-69) between the Port Commission and the complainant--LRTC, a stevedore of bulk cargoes, and any related disputes with Ceres, a stevedore mainly of general cargoes. On August 28, 1979, the Commission determined not to review the approval of the above seven agreements (No. T-3762 through T-3768, inclusive), and noted that these agreements stood approved.

By ruling and order served October 24, 1979, the Administrative Law Judge, among other matters, ruled that the complaint in No. 76-22 had been withdrawn and that the proceeding in No. 76-22 was terminated. By notice served November 28, 1979, the Commission determined not to review the dismissal of the complaint in No. 76-22, and noted that the dismissal became final.

The settlement agreement (No. T-3762) provided for the withdrawal of the complaint in No. 76-22 and for the withdrawal of LRTC's protests of Agreements Nos. T-3310 and T-3311 in Docket No. 76-59, in consideration for which and for other considerations, the Port Commission agreed to give LRTC a certain preferential use of Berth No. 6 at Burns Harbor, and the exclusive use of Berth No. 7, subject to the stevedoring needs of the Levy Corporation, and subject to other conditions, as well as the lease and rental of certain other facilities to LRTC.

During the course of these proceedings the facilities at Burns Harbor have been expanded by the construction of more dock space and berths at very considerable costs to the Port Commission and the State of Indiana. The Port Commission is an agency of the State of Indiana.

As a result of the approval of the above settlement agreement and approval of the six related agreements, Agreements Nos. T-3310 and T-3311 have been replaced, and approval of these two agreements is no longer sought.

The parties remaining in the proceeding now are the respondents, Ceres and the Port Commission, on the one side, and Hearing Counsel, as the only litigant on the other side.

Presently, as stated by the Port Commission, "It is not clear precisely what interest of the public is being vindicated by Hearing Counsel," inasmuch as the Port Commission assertedly has acted reasonably in accordance with its responsibilities to both the shipping public and the State of Indiana.

It appears to the Administrative Law Judge that this proceeding now has become a case, particularly in its present stage, following the various approved agreements and settlement above, where there should be no further regulation merely for the sake of regulation. This is so,

considering that the Port Commission, as an agency of the State, ostensibly at all times acted in what it believed to be the interests of the shipping public and the State of Indiana. Nevertheless, Hearing Counsel take the position that the Indiana Port Commission violated sections 16, First, and 17 of the Act by the carrying out of Agreements Nos. T-3310 and T-3311, thereby granting Ceres exclusive control at the Port of Burns Harbor, Indiana, over all berths in the port suitable in size for the handling of oceangoing ships (as distinguishable from berths suitable for the handling of self-unloader ships, lake barges and river boats). Hearing Counsel also take the position that Ceres violated section 17 of the Act, and that the Indiana Port Commission violated section 17, by failing to adopt reasonable rules or practices regarding a public terminal, by establishing a stevedoring monopoly.

Contrariwise, it is the position of Ceres that the Port of Burns Harbor was in competition with the Port of Chicago, that Ceres could not have provided desirable service to regularly scheduled liner operators without being able to guarantee berthing space for the prompt and efficient discharge of ocean cargo and that no anti-trust violations were committed either by Ceres or by the Indiana Port Commission.

The Indiana Port Commission takes the position that it entered into the subject two agreements in the belief that they were crucial to the financial survival of Burns Harbor and that they would benefit both the shipping public and the people of the State of Indiana, and that no stevedoring or other monopoly was created at Burns Harbor as a consequence of the said two agreements or their implementation.

Burns Harbor is about 70 miles from the commercial center of Chicago. It is a relatively new port somewhat removed from the established shipping lanes of the Great Lakes. When Burns Harbor was opened in 1970, it had great difficulty in obtaining stevedores, to compete with the Port of Chicago and other Great Lakes ports. Only Ceres (actually Ceres' subsidiary, Tri-State Terminals, Inc.) was interested in coming to Burns Harbor in 1971 and 1972.

Burns Harbor was not known to foreign shippers nor to domestic shippers. The new port's problems were discussed with Mr. Chris Kritikos, the principal officer of Ceres, and a man long experienced in the shipping and stevedoring businesses. Ceres since 1958 has been engaged in stevedoring cargoes at various ports, including Chicago, Ill., Duluth, Minn., Toledo, Ohio, Hamilton and Toronto, Ontario, Montreal, Quebec, and Baltimore, Md., among others. At the listed ports, Ceres has stevedored general cargoes. Ceres is considered to be the largest stevedoring and terminal operating company from Montreal and west in the area of the Great Lakes. In 1975, Mr. Kritikos acted as Chairman of the Great Lakes Association of Stevedores, for the negotiation of the master agreement with the International Longshoremen's Association. Mr. Kritikos also is a member from Illinois appointed by

the Governor, of the Great Lakes Commission, which consists of five Commissioners, one from each Great Lakes state.

Ceres specializes in the stevedoring of general cargo. It began operating out of Burns Harbor, under the name of Tri-State Terminals, in 1972.

Mr. Jack Fitzgerald, the Port Director and Chief Executive Officer of the Indiana Port Commission, so employed since 1969, came to Burns Harbor when the port was under construction. Dredging was not yet finished and there was only one berth, which was at the south end of the West Harbor area. Very little road system existed, the railroad loop was not in place, and there were no transit sheds. An ore ship made the first call in 1969, delivering material to Bethlehem Steel.

The first ship which came to the public part of the port came in 1970.

The Indiana Port Commission was faced with the problem of getting the port started. Mr. Fitzgerald discussed the port's problems with Mr. Kritikos, who advised that Ceres or its predecessor had to have exclusive rights at its berths in order to generate business at a new port.

The Port Commission accepted the views of Mr. Kritikos and granted him the exclusive use of Transit Shed No. 1. The Port Commission recognized that it needed an experienced stevedore which could draw business from the Port of Chicago and elsewhere. The first lease agreement between the Port Commission and Ceres was Agreement No. T-2602, which was approved by the Federal Maritime Commission.

As Ceres' business at Burns Harbor grew, it sought further leases. The Port Commission was able to consider Ceres' proposals only because of the financial commitment Ceres had made to the Port. Ceres and the Port agreed to enter Agreements Nos. T-3310 and T-3311, when no other general stevedore had expressed any interest in operating at Burns Harbor. When these two latter agreements were entered into the Port inadvertently neglected to submit them to the Federal Maritime Commission, although it had earlier submitted No. T-2602 for approval. The Deputy Attorney General for the State of Indiana assumed the blame for this failure to file, stating that he was unaware of section 15 of the Shipping Act and that he was the second-successor Deputy Attorney General having appropriate duties since the first of two prior Deputies filed Agreement No. T-2602 for approval.

This third Deputy never discussed with the Port whether such a filing was necessary, and in May 1976, immediately upon realizing that there existed unfiled leases which might constitute section-15 agreements, counsel for the Port submitted Agreements Nos. T-3310 and T-3311 for approval by the Federal Maritime Commission.

In contrast to Ceres, LRTC in 1976 was a stevedore of bulk commodities with no prior experience. Because of lack of guaranteed berthing space, LRTC was unable to attract, or lost certain bulk cargoes.

Luria Brothers, a dealer and processor of iron and steel scrap, was unable to use the services and facilities of LRTC because LRTC was unable to provide Luria with dock space to accommodate ocean vessels. Luria instead did business at the Port of Milwaukee. Stainless Processing Company, an exporter of stainless steel and copper by barges, would have brought ocean vessels to Burns Harbor if LRTC had the space.

Ceres, as a stevedore of general commodities, was not interested in bulk commodities such as those which LRTC proposed to handle. However, Ceres was not disposed to encourage any rival stevedore, such as LRTC, at Burns Harbor, when such a stevedore in time might seek to handle general commodities. LRTC proposed to handle slag, coal, scrap metal, road de-icing salt, etc. LRTC had a written license from the Indiana Port Commission to stevedore coal, and verbal authorization to unload other bulk cargoes.

Ceres at Burns Harbor was in direct competition with other stevedores of general commodities located at the Port of Chicago. Notice was taken previously, that at the Port of Chicago, there were lease provisions which generally gave the Chicago stevedores a type of exclusive use of terminal facilities. These noticed facts were confirmed by testimony at the last hearing. Ceres points out that its leases at Burns Harbor were "procompetitive" particularly in the sense that they enabled Burns Harbor to compete with the Port of Chicago. Obviously, the competition of Burns Harbor with the Port of Chicago was the far more important factor, rather than the factor of the exclusivity of the leases to Ceres of certain facilities at Burns Harbor. In other words, a substantial nucleus of business was generated for Burns Harbor by the leases, without which Burns Harbor probably could not have gotten established.

It was the practical and sensible thing for a new port such as Burns Harbor to encourage competition with the Port of Chicago, rather than to place undue emphasis on potential competition between two or more stevedores of general commodities at Burns Harbor, when in fact only one stevedore of general commodities had expressed any interest in serving Burns Harbor. Ceres concludes that under the circumstances its lease agreements were neither unjust or unreasonable. In fact, it is concluded that while the two leases in issue were anti-competitive as far as LRTC was concerned, on the other hand viewing the over-all competitive picture and competition with the Port of Chicago, the two leases were predominately pro-competitive.

Hearing Counsel rely on the testimony of Mr. Jack Fitzgerald, Port Director and Chief Executive Officer of the Indiana Port Commission, that there existed sufficient business at Burns Harbor for two stevedores to operate as of October, 1976. Hearing Counsel misunderstand the testimony. The testimony was amplified by Mr. Fitzgerald to mean that



he thought there was room for both Ceres and LRTC in that they were complementing each other, in their operations, because Ceres was handling general cargo, containers and breakbulk, whereas LRTC had shown interest only in bulk cargo. There is no record proof that in 1976 there had been developed sufficient business at Burns Harbor for two stevedores of general commodities.

At all times, Ceres engaged in general cargo stevedoring and LRTC in bulk stevedoring.

The hearing of January 15, 1980, sheds very considerable light on the remaining issues herein. Three witnesses testified at that time. They were officials of Kerr Steamship Company; Inter Ships, Incorporated; and Beam Shipping, Inc., all steamship agents.

The Port of Chicago in the period of 1975-1976 had about five or six stevedores, and there were other ports on the Great Lakes that had only one stevedore. Cleveland may have had two stevedores at the time. Kenosha, Wisc., Milwaukee, Wisc., and Green Bay, Wisc., each have one stevedore.

For a shipping line to make a stop at the Port of Indiana or at the Port of Chicago, certain factors would be considered. For liner operations, the factors considered would be accessibility or availability of cargo, availability of space in a terminal, guaranteed berthing, rates, equipment, the stevedore, and the general record of the performance of the stevedore, among other factors.

Should the facilities, including guaranteed berthing space be not available, for example at the Port of Indiana, it would be feasible for a steamship line to call at the Port of Chicago.

With a liner service in particular, the steamship agent has to know that a berth is there to take care of its vessel when it arrives in a port, because for economy it is necessary to get as many sailings of a vessel as is possible. If a berth is not available at a port, the vessel is delayed and its turn-around time is lengthened. Usually a designated area is necessary for containers and that means an exclusive area dedicated to the container operation.

Therefore, the steamship agent negotiates a contract with the stevedore to make sure that the stevedore commits himself to giving a berth to the steamship line when its ship calls. In the Great Lakes area, for the most part stevedores have the ability to guarantee a berth in advance, and to do this the stevedore must have exclusive use of certain terminal facilities.

If a steamship agent were to be confronted with a situation where its ship were forced to wait two or three days for a berth, it would be the recommendation of the agent to find another stevedore and another terminal.

One of the steamship agents first used Burns Harbor as an emergency solution to a problem at Chicago which resulted from a work stoppage

or crane problem. The agent continued to use Burns Harbor because it had clear clean space for containers, and the space was not congested. However, the geographical position<sup>9</sup> of Burns Harbor (the Port of Indiana) is not as good as is the Port of Chicago, and therefore it is necessary that Burns Harbor offer at least equal or better services and terms and conditions compared with the Port of Chicago, for Burns Harbor to attract general cargo. One of these terms or conditions is an assured berth.

From the steamship agent's point of view it is highly undesirable for a stevedore to handle bulk commodities at the same facilities at which are handled liner cargoes. Open-top containers and half-height containers are subject to contamination, which must be avoided. Flat and clean surfaces are essential for containers. If a facility is used for both bulk stevedoring and general cargo stevedoring, this would be unsatisfactory.

Stevedores at the Port of Chicago can guarantee berths because the stevedore has exclusive use of the berth, and the stevedore at the Port of Chicago is also the terminal operator.

As of January 15, 1980, the Port of Indiana had under contract, the construction of two additional berths. These will be public berths, not under exclusive arrangement or exclusive lease to anyone. These two additional berths will be sufficient in size to handle any ships which may navigate the St. Lawrence Seaway.

#### GENERAL CONCLUSIONS AND FINDINGS.

Considering the record as a whole, particularly the testimony of the witnesses at the last hearing as to the competitive situation between the Port of Burns Harbor and the Port of Chicago, it is concluded and found that the actions of the Port Commission of the Port of Indiana were reasonable under all the circumstances, and in fact the agreements entered into by the Port Commission (Nos. T-3310 and T-3311) with Ceres were pro-competitive and necessary in view of shipping customs and practices in the Great Lakes area, particularly at the Port of Chicago.

Agreements Nos. T-3310 and T-3311 have in time been canceled, and new agreements in lieu thereof have been entered into and approved by the Federal Maritime Commission. All the parties at interest, save Hearing Counsel, are satisfied, and contend that no violations of the Shipping Act are shown.

Ceres promoted competition in the Great Lakes area by agreeing to serve and by serving Burns Harbor.

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<sup>9</sup> The Port of Chicago is located closer to the center of the commercial zone than is the Port of Indiana. Many more truck lines service the Port of Chicago than service the Port of Indiana.

The State of Indiana, through its Port Commission, did what was necessary to establish a new port. The result was more competition than heretofore existed in the Great Lakes area. Agreements Nos. T-3310 and T-3311 were necessary and crucial to the operation of Burns Harbor at the time. The Port of Indiana at very considerable expense has expanded its facilities, so that if enough business in general cargo is developed there will be room for more than one stevedore of general commodities to serve ocean vessels at the same time. These expanded facilities also provide room for stevedores of bulk commodities, using ocean vessels.

It is concluded and found that it has not been shown that there was any violation by the Port Commission of section 16 First or section 17 of the Act; nor has it been shown that there was any violation of these same sections of the Act by Ceres. The proceeding in No. 76-59 is discontinued.

(S) CHARLES E. MORGAN  
*Administrative Law Judge*

Washington, D. C.  
December 18, 1980

FEDERAL MARITIME COMMISSION

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DOCKET NO. 79-97  
QUALITY FOOD CORPORATION

v.

TROPICAL SHIPPING CO., LTD.

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NOTICE

*January 28, 1981*

Notice is given that no appeal has been taken to the December 11, 1980 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**

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**DOCKET NO. 79-97****QUALITY FOOD CORPORATION**

v.

**TROPICAL SHIPPING CO., LTD.**

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**SETTLEMENT APPROVED; COMPLAINT DISMISSED***Finalized January 28, 1981***PRELIMINARY FACTS**

On November 28, 1979, Quality Food Corporation (Quality) filed a complaint against Tropical Shipping Co. Ltd., (Tropical), alleging that Tropical had violated sections 14 and 16 of the Shipping Act, 1916, respectively, and requesting reparations of \$1,000,000, with interest and costs, attorney's fees, a permanent restraining order, appropriate fines and such other relief as the Commission deems just and proper.

Quality is a corporation duly organized and existing under and by virtue of the laws of the U. S. Virgin Islands with its principal office in St. Thomas. It is engaged in the business of wholesale food supply. Tropical is a common carrier by water serving the trade between West Palm Beach, Florida, and St. Thomas, Virgin Islands. In its complaint Quality alleged that Tropical discriminated against it by denying service to Quality while at the same time preferring Quality's competitors by making services available to them. Tropical denies that it subjected Quality to any undue prejudice or discrimination, or that it has accorded any unfair preference to competitors of Quality. Further, Tropical makes the affirmative defense that Quality detained refrigerated containers for an inordinate amount of time and refused to pay demurrage charges set forth in the carrier's tariff.

During the pendency of this proceeding there was extensive discovery and several procedural motions, all of which were disposed of in timely fashion. A prehearing conference was held and, in accordance with the time limitation set forth in the Commission's Notice of Hearing, the taking of oral testimony was set for May 22, 1980. Before the hearing began the parties submitted an offer of settlement which they requested be approved concurrently with the dismissal of the complaint, with prejudice. While the settlement agreement was satisfactory for the most part, it did contain one provision which was objectionable. This conclusion was conveyed to the parties and after much negotiation

they agreed to and submitted a second final offer in settlement, a copy of which is attached hereto.

The settlement agreement clearly sets forth what the parties intend, and the meaning of each provision will not be belabored or repeated here. However, some clarification and explanation is warranted as to certain portions of the agreement and it is set forth below.

Paragraph 1, at page 3 of the settlement agreement refers to Quality's claim for cargo damage as to certain shipments not here in issue, and provides that the claims shall be submitted to binding arbitration. Both parties agree that this provision relates to matters not within the Commission's jurisdiction in this proceeding.

Paragraph 6, at pages 4 and 5 of the settlement agreement provides that Tropical will draft and file with the Commission as part of its tariff a forward booking arrangement whereby shippers will ship on a weekly basis and book refrigerated container space in advance. Both parties have agreed that Tropical will in good faith undertake to amend its tariff filing with the Commission staff, but that Tropical is not committing itself to defend the filing in a hearing if a formal investigation is ordered.

Finally, paragraph 10, at page 8 of the settlement agreement is a savings clause which provides that, in the event the settlement agreement is disapproved by the Commission, or is approved upon conditions which are unacceptable to either party, then the agreement "shall be null and void *ab initio* and of no effect whatsoever for any purpose." The parties agree that as to any provision in the settlement agreement which does not come within the jurisdiction of the Commission such as paragraph 1, which deals with arbitration by another authority, then recourse as to any difficulty arising as the result of the operation of the provision shall be resolved by the parties in a separate court action and does not come within the purview of the savings clause in paragraph 10. Likewise, the parties agree that the failure of the Commission to accept the new tariff filing described in paragraph 6 of the settlement agreement does not come within the purview of the savings clause in paragraph 10.

#### DISCUSSION AND CONCLUSIONS

It is well established that settlement of administrative proceedings is favored by the Congress, the Courts and the administrative agencies themselves. 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 proceedings, and the public interest permit.

In *Pennsylvania Gas & Water Co. v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972), the Court, noting its legislative history,<sup>1</sup> referred to the above provision "as being of the 'greatest importance' to the functioning of the administrative process" and stated:

The 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.

Finally, the Commission has by rule encouraged settlements<sup>2</sup> and has often favorably looked upon them as a matter of policy.<sup>3</sup>

So here, in light of the above discussion and the entire record in the proceeding it is held that the settlement agreement attached hereto is in the public interest and is approved. It is

*Ordered that:*

1. Tropical will not unfairly or unjustly discriminate against Quality in the future, and will not accord undue or unreasonable preference or advantage to any shipper or consignee to the undue or unreasonable prejudice of Quality in violation of any section of the Shipping Act, 1916, particularly as regards the booking of refrigerated cargo containers.

2. Quality will pay all demurrage bills as provided in Tropical's tariff no later than 10 days following receipt of such bills.

<sup>1</sup> 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.

<sup>2</sup> 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. . . ."

<sup>3</sup> In furtherance of this policy, the Commission has authorized settlements of administrative proceedings on the basis of a compromised reparation payment absent admissions or findings of violation of the Shipping Act. *Foss Alaska Line Inc. Proposed General Rate Increase Between Seattle, Washington and Points in Western Alaska*, Docket No. 79-54, (1979); *Com-Co Paper Stock Corporation v. Pacific Coast-Australasian Tariff Bureau*, Docket No. 71-83, (1978); *Robinson Lumber Co., Inc. v. Delta Steamship Lines, Inc.*, Docket No. 75-22, (1978); *Old Ben Coal Co. v. Sea-Land Service, Inc.*, Docket No. 78-13, (1978); *Organic Chemicals v. Atlanttrafik Express Service*, Docket Nos. 78-2, 78-3, (1979).

3. Quality will pay all demurrage bills currently outstanding in favor of Tropical.

4. Quality does not owe Tropical any monies for damage that may have occurred to Tropical's refrigerated container 6210.

5. Tropical will draft and file with the Commission, to become part of its tariff, a Forward Booking Agreement in accordance with paragraph 6 of the settlement agreement.

6. Tropical will appoint an account executive to be responsible for liaison with Quality with respect to all matters relating to the cargo which it ships via Tropical, including advance notice of any tariff changes, and Quality will appoint a representative who will be responsible for communication with Tropical on such matters.

7. Tropical will pay Quality two thousand one hundred and fifty dollars (\$2,150.00), without admitting thereby any liability for any of the allegations set forth in the complaint.

8. The claim for reparations by Quality is deemed withdrawn, and/or satisfied.

9. This proceeding is terminated with prejudice and is hereby discontinued. It is

*Further Ordered* that within thirty (30) days after this order becomes final the parties file an affidavit of compliance with the terms of the settlement.

(S) JOSEPH N. INGOLIA  
*Administrative Law Judge*

December 11, 1987



## SETTLEMENT AGREEMENT

Agreement made this 28th day of November 1980, by and between TROPICAL SHIPPING AND CONSTRUCTION COMPANY, LTD. ("Tropical"), a common carrier by water serving, *inter alia*, the trade between West Palm Beach, Florida, and St. Thomas, U.S. Virgin Islands, and QUALITY FOOD CORPORATION ("Quality"), a consignee of cargo via Tropical in said trade.

WHEREAS, Quality has filed a complaint before the Federal Maritime Commission, docketed as No. 79-97, alleging that Tropical has violated certain sections of the Shipping Act, 1916, by unreasonably and unduly discriminating against Quality in favor of certain shippers with which it competes;

WHEREAS, said complaint seeks reparations in the amount of \$1,000,000 for damages allegedly incurred by Quality by reason of such discrimination;

WHEREAS, Tropical has answered said complaint denying any liability with respect to the matters alleged therein;

WHEREAS, Quality and Tropical desire to terminate this controversy without resort to further litigation, and to settle certain outstanding grievances of both parties as described hereinafter;

WHEREAS, Quality has certain claims against Tropical for damage to refrigerated cargoes carried by Tropical under bill of lading 10, voyage 208; bill of lading 10, voyage 1407; and bill of lading 1, voyage 1418, which damage Quality alleges to be the result of a malfunction of the refrigeration units furnished by Tropical;

WHEREAS, Tropical has to date neither admitted nor denied liability for said cargo damage claims;

WHEREAS Tropical has a claim against Quality for damage to its container number 6210, which Tropical alleges to be the result of mis-treatment of the container while in Quality's possession;

WHEREAS, Quality has denied liability for the damage to container number 6210;

WHEREAS, Tropical and Quality desire to eliminate the mutually disagreeable relationship which has heretofore existed between them, and to foster a harmonious and mutually beneficial and proper relationship in future business transactions;

NOW THEREFORE, in consideration of these premises and the mutual undertakings hereinafter set forth, it is agreed as follows:

1. The parties agree that Quality's claims for cargo damage shall be submitted to binding arbitration under the rules of the American Arbitration Association, through its New York City office, or such other arbitration association as the parties may

mutually agree upon. Said arbitration shall be conducted upon written and oral presentation to be held in St. Thomas, U.S. Virgin Islands by a single arbitrator, who the parties agree shall be a person knowledgeable concerning the business of wholesale distribution of refrigerated food and the shipment of perishable refrigerated cargo by ocean carrier, and shall be selected by the process of alternate eliminations from a list of qualified arbitrators provided by the arbitration association, or such other method as the parties may agree upon. To facilitate a prompt resolution of the matter, Tropical will deliver to Quality copies of the G.A.B. survey reports on the damage to cargoes carried under bill of lading 1, voyage 1418 and bill of lading 10, voyage 1407 within one week following the execution hereof. The arbitration process shall be commenced within 30 days following the submission by Quality of a completed claim for the latter two incidents, or upon the date of approval hereof, whichever is later, and the parties agree that the arbitrator's decision and payment of any award of the arbitrator shall be expedited to the fullest extent permissible under the prevailing rules. The costs of the arbitration, including the arbitrator's fees and a court reporter, but not including attorneys' fees, shall be borne by the prevailing party, or in the event that a pretrial award is made, shall be apportioned accordingly.

2. Without admitting that it has committed any violations in the past, Tropical warrants, represents and agrees that it will not unfairly or unjustly discriminate against Quality, or accord undue or unreasonable preference or advantage to any shipper or consignee to the undue or unreasonable prejudice of Quality in violation of any section of the Shipping Act, 1916, particularly as regards the booking of refrigerated cargo containers.

3. Quality agrees that it will henceforth pay all demurrage bills as provided in Tropical's tariff, promptly and in no case later than 10 days following receipt of such bills.

4. Quality agrees that it will pay all demurrage bills currently outstanding in favor of Tropical.

5. Tropical hereby withdraws from its contention that the damage to its refrigerated container 6210 resulted from the fault of Quality, and will make no claim against Quality for reimbursement therefor.

6. Tropical agrees that it will draft and file with the Federal Maritime Commission, to become part of its tariff, a Forward Booking Agreement embodying the following principles:

(a) The agreement shall apply to the carriage of refrigerated cargo containers in the trade between West Palm Beach, Florida, and St. Thomas and St. Croix, U.S. Virgin Islands.

(b) It shall provide for the forward booking of refrigerated containers for carriage in such trade on a regular weekly basis.

(c) It shall provide for such forward booking with respect to a stated number of twenty and forty foot containers per week, which number shall constitute a reasonable proportion of the total number of such containers normally available for carriage in such trade, but in no event more than 60 percent or less than 40 percent.

(d) It shall be offered to all shippers on an equal basis, and in the event of oversubscription, the specified number of containers available for forward booking shall be prorated among the applicants therefor.

(e) It shall contain a force majeure clause, and shall provide that, where, for reasons beyond the control of Tropical, an insufficient number of containers is available, the containers which are available shall be apportioned in accordance with a specified priority wherein the shippers having the most containers booked under agreement would forego a container first.

(f) It shall require that the shipper-party confirm by telephone its booking or bookings thereunder for the following week each Friday between the hours of 9:00 and 10:00 a.m. E.D.T. or E.S.T., as appropriate. Any container not so confirmed shall be available for booking by other shippers during the regular booking period on Friday.

(g) It shall provide that the shipper may cancel a confirmed booking at any time prior to 4:00 p.m., E.D.T. or E.S.T., as appropriate, on the same Friday. Thereafter, if a confirmed container is not utilized by the shipper, he shall pay to the carrier "dead freight" in a stated amount equal to the carrier's average revenue for the size of refrigerated container booked, less 10 percent.

(h) The tariff filing shall be effective for an initial experimental period of 90 days and if workable from a practical operational standpoint, it shall thereafter be renewed on an annual basis, so long as workable.

(i) Tropical undertakes to pursue and defend such tariff filing in good faith before the Federal Maritime Commission staff. It does not, however, commit itself to defend the filing in a hearing if a formal investigation is ordered.

7. Tropical will appoint an account executive to be responsible for liaison with Quality with respect to all matters relating to the cargo which it ships via Tropical, including advance notice of any tariff changes, and Quality will appoint a representative who will be responsible for communication with Tropical on such matters, the mutual intent of the parties

being to eliminate the misunderstandings which have occurred between them in the past.

8. Tropical shall pay Quality the sum of \$2150.00 (two thousand one hundred fifty dollars) but without admission of liability for any of the allegations set forth in the complaint.

9. Quality hereby withdraws its claim against Tropical for reparations as described above and docketed as number 79-97, acknowledges that the same has been satisfied, and consents that it be dismissed with prejudice.

10. This agreement shall be submitted to the Federal Maritime Commission for approval. In the event that it is disapproved, or approved upon conditions which are unacceptable to either party, it shall be absolutely null and void *ab initio* and of no effect whatsoever for any purpose. Nor shall it be admissible before the Commission or any court or agency as evidence with respect to any matter contained herein.

IN WITNESS WHEREOF, the parties have caused this agreement to be executed by their authorized representatives, this 24th day of November, 1980.

Witness:

TROPICAL SHIPPING AND  
CONSTRUCTION COMPANY, LTD.

By:

Witness:

QUALITY FOOD CORPORATION

By:

## FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-45

AGREEMENT NOS. 10386, AS AMENDED, 10388, 10382, AS AMENDED, AND 10389 CARGO REVENUE POOLING/EQUAL ACCESS AGREEMENTS IN THE UNITED STATES ARGENTINE TRADES

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ORDER DENYING MOTION TO TERMINATE,  
VACATING THE STAY OF PROCEEDINGS, AND  
APPROVAL OF AGREEMENT NOS. 10388 AND 10389

*January 29, 1981*

This proceeding was initiated by Order of Investigation and Hearing and Conditional *Pendente Lite* Approval (Order), served June 30, 1980, to determine the approvability of certain cargo revenue pooling agreements in the United States/Argentine trades, filed with the Commission pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. 814).<sup>1</sup>

On October 20, 1980, Moore-McCormack Lines, Inc. (Mooremac), a party to Agreement Nos. 10382 and 10388, filed a Motion to Terminate the Proceeding, Or in the Alternative, Suspend Proceedings Pending Receipt of Certain Evidence. Responses were filed by the Commission's Bureau of Investigation and Enforcement (BIE), Companhia de Navegacao Lloyd Brasileiro, Companhia Maritima Nacional, Delta Steamship Line, Inc., and A/S Ivarans Rederi. The Commission, on November 6, 1980, stayed the proceeding pending resolution of the Motion to Terminate.

Mooremac's request to terminate this proceeding is based on the Deposition of Samuel B. Nemirow,<sup>2</sup> which it views as resolving the principal issues raised in this proceeding. Lloyd, Nacional and Delta generally support Mooremac's Motion. Ivarans takes the position that while there may not be a need for a full evidentiary hearing to resolve the issues raised in the proceeding, the Commission should consider

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<sup>1</sup> Agreement Nos. 10382, as amended, and 10386, as amended, provide respectively for cargo revenue pooling in the northbound trades from Argentina to United States Gulf and Atlantic Coast ports. Agreement Nos. 10388 and 10389 establish respectively a cargo revenue pooling agreement in the southbound trades from United States Gulf and Atlantic Coast ports to Argentina. (The aforementioned Agreements are collectively referred to herein as "the Agreements").

<sup>2</sup> Mr. Nemirow is Assistant Secretary of Commerce for Maritime Affairs. His deposition was taken at BIE's request. All parties to this proceeding were afforded an opportunity to examine Mr. Nemirow.

other evidence in making its decision.<sup>8</sup> BIE opposes the discontinuance of the proceeding as it relates to the investigation of the northbound Atlantic agreement, Agreement No. 10386, as amended.

The Motion and Responses reflect some misconception concerning the principal focus of the Commission's June 30th Order initiating this proceeding. As the Agreements are *per se* violative of the antitrust laws, it must be shown that they are required by a serious transportation need, necessary to secure important public benefit, or in furtherance of a valid regulatory purpose of the Shipping Act. *Federal Maritime Commission v. Svenska Amerika Linien*, 390 U.S. 238, 243 (1968). Proponents submitted supporting statements with the Agreements. However, as the Commission stated in its Order initiating this proceeding, these submissions "and the protest [which was later withdrawn] raise factual and legal issues that require further examination." (Order at page 12). These "factual and legal issues" relate primarily to the third-flag section of the Agreements. The concern here was with the Agreements' restrictive features and the apparent circumstances surrounding them which "appear to run counter to that part of the public interest reflected in the antitrust laws favoring free and open competition." (Order at 15). Specifically, these matters concern: (1) the division of the 20% share allocated to third-flag carriers; (2) the impact of the Blackwell-Guevara Memorandum of Understanding; and (3) the role of the Argentine Government in the circumstances which led to the execution of these Agreements.

Mr. Nemirow's Deposition does not squarely address or resolve the basic issues raised in this proceeding. Mr. Nemirow's Deposition primarily addresses the narrow issue:

Whether the facts surrounding the negotiation and execution of these Agreements indicate conduct inconsistent with the provisions of the United States/Argentine Memorandum of Understanding [the so-called Blackwell-Guevara Agreement] of March 31, 1978, providing for "commercial agreements." (Order at page 20).

The substance of Mr. Nemirow's responses is that Argentina *agreed* that there would be "commercial agreements" in these trades that would delineate the details of the cargo sharing arrangements and that the Agreements in issue are consistent, or not, on their face, inconsistent, with the Blackwell-Guevara Memorandum of Understanding. This testimony does not, however, address or resolve issues relating to: (1) the justification for the specific third-flag shares provided for in these Agreements; and (2) whether the role of the Argentine Government in

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<sup>8</sup> Ivarans suggests that the Commission should have the benefit of the Answers of Mr. Eric Holter-Sorensen to BIE's Written Interrogatories as well as the transcripts of the May, 1980 pool meetings dealing with the negotiations of Agreement No. 10386, as amended.

the circumstances which led to the execution of these Agreements, particularly with respect to third-flag shares, caused these Agreements not to be "commercial" agreements as required by the Memorandum of Understanding.<sup>4</sup>

Given the apparent misunderstanding as to the focus of this proceeding, the Commission is amending its June 30th Order to expressly delineate the specific issues that should be addressed in this proceeding. These issues are set forth in the Appendix to this Order and are incorporated herein by reference.

Accordingly, Mooremac's Motion to Terminate this proceeding will be denied and the November 6, 1980 Order staying this proceeding will be vacated. As a result of the delay in the proceeding occasioned by the stay, the Commission will extend the date by which the Presiding Officer shall serve his Initial Decision.

There is one final matter to be addressed. As heretofore mentioned, this proceeding includes the investigation of the two southbound agreements, Nos. 10388 and 10389. There are no third-flag carriers party to these Agreements, apparently because various Argentine laws, decrees, and resolutions generally restrict the carriage of Argentine import cargoes exclusively to Argentine-flag vessels except where there is a government or commercial arrangement with the exporting nation or its flag carriers allocating no less than 50% of the earned freight revenues to Argentine-flag carriers.<sup>5</sup> Similarly, certain United States controlled cargoes in the southbound Argentine trade are restricted to United States-flag vessels except where the importing nation does not discriminate against United States-flag vessels and permits access to their government controlled cargoes. In such event, similar to Argentine law, the United States will permit the "recipient" nation's vessels to carry up to 50% of such United States controlled cargo.

Because the principal focus of this proceeding relates primarily to third-flag issues, it is appropriate to discontinue the investigation of the southbound Agreements, Nos. 10388 and 10389, providing they are otherwise approvable under the standards enunciated in section 15, Shipping Act, 1916. Examination of the statements filed in support of these Agreements, as well as the Nemirow Deposition, leads the Commission to find that these Agreements meet the standards for section 15 approval.

The southbound Agreements provide the means for increased shipper service with respect to government controlled cargoes in these trades by permitting United States and Argentine-flag carriers equal access to

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<sup>4</sup> Mr. Nemirow was not in attendance at the meetings where these Agreements were negotiated, nor did he receive daily reports or closely monitor these meetings or the circumstances surrounding them. (Nemirow Deposition at pages 46, 47 and 48).

<sup>5</sup> Docket Nos. 78-51 and 78-52, served June 22, 1979.

these otherwise restricted cargoes. Moreover, these Agreements facilitate the free flow of the United States foreign commerce with Argentina. In the absence of these Agreements, Argentine import cargoes would be subject to the 30-day pre-waiver requirements of Argentine Resolution 507.<sup>6</sup>

Agreement Nos. 10388 and 10389 are not found to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, contrary to the public interest or otherwise violative of the Shipping Act, 1916. Moreover, the extent of the anticompetitive impact of these Agreements is not sufficient to outweigh the benefits found and warrant disapproval.

**THEREFORE, IT IS ORDERED,** That Moore McCormack's Motion to Terminate this Proceeding is denied; and,

**IT IS FURTHER ORDERED,** That this proceeding is discontinued as to Agreement Nos. 10388 and 10389 and that Agreement Nos. 10388 and 10389 are approved pursuant to section 15, Shipping Act, 1916;<sup>7</sup> and,

**IT IS FURTHER ORDERED,** That the November 6, 1980 Order staying this proceeding is vacated; and,

**IT IS FURTHER ORDERED,** That the fourth ordering paragraph of the June 30, 1980 Order initiating this proceeding be amended to include the issues set forth in the Appendix to this Order; and,

**FINALLY IT IS ORDERED,** That the eighth ordering paragraph of the June 30, 1980 Order initiating this proceeding be amended to read: "The Presiding Administrative Law Judge shall issue his Initial Decision in this proceeding on or before July 31, 1981."

By the Commission\*

(S) FRANCIS C. HURNEY  
*Secretary*

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<sup>6</sup> Resolution 507 requires that Argentine-flag carriers be given the right of first refusal on all Argentine imports controlled by Argentine Law 18.250. These cargoes amount to a substantial portion of the southbound trade and can only be carried on non-Argentine vessels if the consignee applies for and receives a waiver from the reservation laws 30 days in advance of shipment. These pre-waiver requirements do not apply to cargoes carried by parties to agreements such as Agreement Nos. 10388 and 10389. (See Docket Nos. 78-51 and 78-52, served June 22, 1979).

<sup>7</sup> The styling of this proceeding in all future pleadings and documents should not refer to the approved Agreements.

\* Vice Chairman Kanuk and Commissioners Day and Teige concur in that portion of the Order which denies the Motion to Terminate and amends the Order of Investigation. Vice Chairman Kanuk and Commissioner Teige dissent to the approval of Agreement Nos. 10388 and 10389 and will issue separate opinions. Chairman Daschbach and Commissioners Day and Moakley concur in the approval of Agreement Nos. 10388 and 10389. Chairman Daschbach and Commissioner Moakley dissent to that portion of the Order which amends the Order of Investigation. Chairman Daschbach and Commissioner Moakley would approve rather than investigate Agreement No. 10382 and would limit the scope of the investigation of Agreement No. 10386 to that contained in the June 30 Order of Investigation.



## APPENDIX

Whether fixed, individual shares for third-flag carriers in these trades are necessary to meet serious transportation needs, to achieve important public benefits, or to fulfill valid regulatory purposes of the Shipping Act and, if so, whether the specific third-flag shares fixed by these Agreements are unduly discriminatory or unfair between carriers, whether they are based on valid commercial considerations, and whether they are the result of direct or indirect coercion by the Government of Argentina or any other person.

Whether the facts surrounding the negotiations and execution of these agreements indicate conduct inconsistent with the provisions of the United States/Argentina Memorandum of Understanding of March 31, 1978, requiring that the "mechanisms and procedures necessary to the implementation", of the Memorandum be determined by "commercial agreement," either by showing imposition of the will of the Government of Argentina, directly or indirectly, or coercion by any other party.

Whether the provisions of the Agreements providing for penalties for overcarriage and undercarriage unnecessarily restrict competition among third-flag lines within the 20 percent share to these lines and, if so, whether those provisions should be amended.

Whether the provisions of the Agreements giving third-flag carriers who are parties to the Agreements control over the cargo shares assigned to any new third-flag parties are unnecessarily restrictive or unduly discriminatory among carriers and, if so, whether those provisions should be amended.

In addressing these issues, the parties to this proceeding should develop information in response to the following specific questions. They should not, however, consider the proceeding limited to these questions if circumstances indicate other areas of inquiry.

1. Does Argentine law require fixed third-flag shares and, if so, does it specify the size of any such shares?

2. Is there any evidence that the decision to renegotiate Agreements Nos. 10346 and 10349, to provide for fixed third-flag shares, resulted from requests to do so by non-Argentine carriers?

3. Are executives of the involved Argentine carriers Government officials? If not, were they appointed to their positions by the Argentine Government, or can they be disciplined or discharged by the Argentine Government?

4. Are there transcripts available of the negotiations for third-flag participation in the northbound trades?

5. What are the carryings (by shares of total revenue tons) of all third-flag carriers in the northbound trades for the period from January 1, 1975 through the most recent date for which such information is available?

6. Have any of the third-flag parties to these Agreements accepted a significantly larger or smaller share of the pooled cargo than its historical share? If so, what is the basis for the new share?

7. Did the divisions of third-flag shares in the northbound Argentine trades under these Agreements arise from any agreement or understandings, formal or informal, between the Argentine Government and any other third-flag government?

8. Is the current fixed share of northbound pool cargo held by the Argentine flag lines in the Brazil/U.S. trades the result of an agreement or understanding, formal or informal, between the Governments of Brazil and Argentina?

9. Did open competition among third-flag lines under Agreements Nos. 10346 and 10349 result in overtonnaging, unstable rates, rebating or any other malpractices in the northbound trades?

10. Were any third-flag lines discouraged from participating in the 20 percent open competition share, required by the Commission under Agreements Nos. 10346 and 10349, by any actions of the national-flag lines or the government of Argentina?

11. Is the United States a signatory to any treaties on maritime matters with any of the countries under whose flags the third-flag carriers participate in the northbound trades? If so, would approval by the Federal Maritime Commission of fixed third-flag shares conflict with the United States' obligations under those treaties?

12. Have any carriers withdrawn from the northbound trades or been unable to enter them during the period January 1, 1978 through September 30, 1980? If so, what were the circumstances surrounding such occurrences?

13. What will be the short-term and long-term effect of these Agreements (if they are approved) on U.S. importers in these trades?

14. May a carrier (national or third-flag), who is not a party to these Agreements, obtain cargo in the northbound trades? If not, what is the mechanism which excludes such a carrier from obtaining cargo?

## DISSENTING OPINION

Dissenting Opinion of Commissioner Peter N. Teige.

I dissent from the majority's conclusion that the southbound agreements, Agreement Nos. 10388 and 10389, should be approved without further investigation and hearing. Aspects of these Agreements, the southbound U.S./Argentina trades in which they operate, and their relationship to the agreements proposed for the northbound Argentina/U.S. trades raise issues which should not be decided on the basis of the record before us, and which, therefore, require further investigation before approval can be granted.

At the time these Agreements were filed with the Commission for approval, there were also filed cargo revenue pooling and equal access agreements which would apply to the northbound trades from Argentina to the U.S. Gulf and Atlantic Coasts (FMC Agreements Nos. 10382 and 10386, respectively). The Commission has determined that these northbound Agreements raise a number of serious and substantial issues which require that they be subjected to a full investigation and hearing before the question of their approvability can be resolved. Despite this action, however, the majority has also concluded that the agreements which will operate in the reciprocal southbound trades may be segregated from this investigation and summarily approved. I cannot agree with this approach.

This case raises fundamental policy questions affecting our international ocean commerce. Under heavy pressure from the Argentine Government (including threats, in part carried out, of preventing U.S. flag vessels from carrying cargo between the United States and Argentina) our Government in 1978 entered into a bilateral agreement on ocean transport between the two countries. The agreements in this case arise from that bilateral.

As bilateral agreements on ocean transport appear likely to become more commonplace in the years ahead, it will be essential for the Commission to develop some general guidelines for dealing with the supplementary commercial agreements that arise from these agreements. It would be appropriate to do that briefly here in view of the disagreement among members of the Commission on the significance of the agreements before us.

The Federal Maritime Commission does not determine whether our Government should enter into bilateral agreements. This is a policy decision to be made by the Executive Branch. It would be preferable if these sensitive agreements, affecting as they do not only our merchant marine but our shippers, our trade, our relations with other maritime countries and with the trading partner entering into the agreement,

were so complete as to make supplemental agreements to such bilaterals unnecessary. Typically these bilateral agreements have had as a principal goal assuring participation by the U.S. flag carriers in the trades concerned. If the manner in which this is to be done is not fully delineated in the bilateral, the gaps must be filled by supplemental agreements among the carriers. It is these agreements that come before the Federal Maritime Commission under our responsibility to examine agreements between carrier competitors that would violate our U.S. antitrust laws unless receiving our approval under Section 15 of the Shipping Act, 1916.

Our authority in examining such agreements is very restricted. Most importantly, we are prohibited from approving agreements that discriminate unfairly between carriers (Section 15, 1916 Act). Thus we normally are prohibited from favoring any country's carriers over those of another, even U.S. carriers. An exception to this prohibition would be a supplemental agreement that is clearly carrying out the specific intention of the bilateral. Speaking in general terms, there would appear to be four alternatives open to the Commission in dealing with these supplemental agreements. (1) The Commission, it seems to me, has a clear responsibility to approve commercial agreements between carriers implementing a bilateral agreement, if freely arrived at, that are clearly of the type contemplated by and are consistent with the bilateral understandings entered into by the Executive Branch. To do otherwise would make a mockery of the bilateral agreement process and the orderly performance of our nation's international obligations. (2) Similarly, and for the same reasons, commercial agreements between carriers that are directly inconsistent with the clear intent of a bilateral agreement should be disapproved by our Commission. (3) Where the terms of a carrier agreement purporting to implement a bilateral agreement deal with issues which the bilateral does not require to be covered or provides that certain issues should be dealt with by the carriers but does not indicate what the resolution of the issues should be, the Commission should consider the supplemental agreement under the same principles it applies to other Section 15 agreements coming before it, with the fact it is related to the bilateral agreement simply being one of the elements to be considered in reaching a decision on the matter. (4) Finally, if an agreement which purports to be a commercial agreement between carriers in implementation of a bilateral agreement is, in fact, one dictated unilaterally by the foreign government signatory to the bilateral, the Commission should neither disapprove nor approve the "agreement" but instead refuse to take jurisdiction, passing the matter back to the Executive Branch for renewed negotiation of the matter with the other country under the continuing negotiation provisions contained in most bilaterals. The Commission's jurisdiction is over

*commercial* agreements between carriers, not agreements unilaterally forced upon carriers by a foreign government.

These general principles are easy to state but not always simple to apply.

The Commission in this case has, in effect, found that the northbound agreements may not fit into the first two categories set forth above and that they must, therefore, be investigated further to determine their status and to aid the Commission in its decision on the approvability of the agreements. With this conclusion I am in complete accord.

The southbound agreements present a somewhat less clear situation. These agreements provide that substantially all of the liner cargo moving to Argentina from the United States Atlantic and Gulf Coasts will be divided between one U.S. flag carrier and two Argentine flag carriers in each of the two trades on a fifty-fifty national flag basis. There are no third flag carriers. Apparently the third flag carriers that were in the trade have withdrawn, primarily because virtually all of the liner cargo moving to Argentina has been designated "government cargo" by the Argentine Government and hence is not available to third flag vessels.

The fifty-fifty division between the U.S. and Argentine carriers results from the agreements executed by these carriers which we are considering, not the bilateral agreement. That legal document is silent as to the division to be made of the southbound traffic (or the northbound traffic for that matter) or the mechanics to be followed in the southbound division except to state that the two governments "will enter into an understanding providing for access to government-controlled cargoes in accord with the appropriate legislation in each country." The meaning of this provision is obscure. There is nothing in the record to indicate that such an intergovernmental understanding has been reached permitting virtually all southbound cargo to be treated as "government controlled cargo" by unilateral edict of the Argentine Government. One must conclude from the record presently before the Commission that the United States has not agreed with the Argentine Government to this apparently broad definition that appears to turn cargo that in most ocean trades would be ordinary commercial liner cargo into "government controlled cargo." If that has not been agreed to in the bilateral or otherwise by the United States, these supplementary agreements between the U.S. and Argentine carriers, which by their very nature accept this arbitrary, unilateral definition, would appear to be the operating force that perpetuate the exclusion of third flag carriers which would normally be active on important sea routes of this kind. While such discrimination might conceivably be in the policy interests of the United States, and hence be something a bilateral might agree to, the absence of such approval here would appear to present the Commission with agreements that on their face at least are not

consistent with the statutory restrictions under which the Commission operates.

The record covering these agreements and their predecessors is replete with indications of unilateral activity by the Argentine Government, activity which appears to have inhibited the normal competitive activities of ocean carriers. The Commission has a responsibility under the Shipping Act to disapprove agreements that unjustly discriminate between carriers. This obligation covers not only agreements specifically discriminatory by their terms but also agreements where the entire setting in which they arise inhibits carriers from participating at all in the trades in question. Thus in these U.S./Argentine trades there are third flag carriers operating in the northbound trades, none of whom are in the southbound trades. This is not a normal pattern of ocean shipping.

This possible *sub silentio* exclusion of carriers is one of the bases for my position that these southbound agreements require investigation. If the very subject matter of the agreements has been unilaterally defined by the Argentine Government so as to exclude formal participation by third flag carriers, as may be the case here, we cannot under the Shipping Act give these agreements our stamp of approval unless they reflect the execution of specific provisions of the bilateral agreement involved. In fact, if this is what has happened here, such agreements would appear to be beyond our jurisdiction and they would have to be dealt with in intergovernment negotiation, as was apparently contemplated by the bilateral. It should also be pointed out that the bilateral agreement here appears to contemplate the participation of third flag carriers in the southbound trades. Paragraph 1 of the Memorandum states:

"Each Party recognizes the intention of the other Party in carrying a substantial portion of its liner trade in vessels of its own flag in accord with appropriate legislation in each country. ... This provision, established in the light of the reciprocal interests of the two countries, does not affect the rights of flag vessels of third parties to carry goods between the ports of the two Parties..."

Thus, in addition to being contrary to ordinary commercial practice, the failure of these Agreements to provide for participation by third flag carriers may not only be unauthorized specifically by the bilateral but it may exceed the restrictions on prevention of competition in the Argentine trades negotiated by the United States.

In taking this position on these agreements I am not passing on the wisdom of the division of virtually all of the liner cargo between one U.S. flag carrier and two Argentine carriers in each of these two important southbound trades. But such a fundamental decision, affecting as it does our exporters, our foreign trade and ultimately our

economy, as well as the economic position of the U.S. carriers involved, should be negotiated by the Executive Branch using its broadest authority. It should not be made by the Argentine Government alone, or by the carriers without the sanction of bilateral approval of the two governments. Without such bilateral approval it would not appear to be an action which this Commission could properly take under the statutory constraints against discrimination that govern the Commission. Nor can we hope to work out a reasonable solution by negotiation. We are a quasi-judicial body operating under strict due process requirements. The normal informal give and take of the negotiating process is not available to us.

These southbound agreements appear to be deficient in another respect. They contain provisions that seem to prevent any new U.S. carrier from entering these trades without getting the approval of the incumbent U.S. flag carrier in each trade affected and of the Argentine Government. If this is their effect, it is difficult to believe that our negotiators intended a foreign government to be able to exclude a U.S. flag carrier from one of our trade routes or to permit one U.S. carrier to veto the competition of another.

The undercarriage provisions also appear to be potentially unfair and need investigation.

For all of the foregoing reasons, these agreements require the further scrutiny of a thorough investigation. Such an endeavor has been discouraged in a rather obvious fashion by the maritime authorities of Argentina. Strong suggestions have been made to the Federal Maritime Commission, the State Department and the Maritime Administration that our failure to approve these agreements promptly would lead to the resumption of harassment of our carriers. This has made the U.S. carriers involved understandably uneasy and it has been suggested that the Commission must approve the agreements without further ado because of these thinly-veiled threats. We cannot shirk our statutory responsibilities on such a basis, however much we may dislike such tactics and have concern for U.S. flag carriers.

It is also said by some that agreements of this kind should not be investigated or disapproved but instead should be approved perfunctorily because of the principle of comity. While as a civilized country we try to avoid unnecessary conflict with other nations, it does not mean that the Commission can ignore the statutes of the United States under which we operate simply to accommodate the unilateral wishes of another country. Should, after an investigation, our decision lead to disapproval of agreements of the kind before us in this case, the Executive Branch may undertake intergovernment negotiations with the other country on the issues at stake and, if the United States Government is of the view that comity requires acceptance of the other country's views after consideration of the totality of its impact on our economy

and our carriers, it can accede to those wishes. If, on the other hand, it does not feel that the other country's position is consistent with U.S. interests our negotiators, too, have bargaining tools that would not leave us defenseless in such a situation, tools that would be used, one would hope, fairly but vigorously.

We are also told that these agreements should be forthwith approved because they are advantageous to the two U.S. flag carriers in these trades. As stated above, our statutory authority does not give us the right to discriminate in favor of any carrier, U.S. or otherwise. Nor do we play the role in our governmental structure of the promoter of our merchant fleet. That worthy goal is for others to perform. Our task of regulation of international shipping, where many foreign nations feel we are impinging on their sovereignty, is difficult enough without adding the complication of national flag favoritism. Instead our role is to seek to maintain a balance in our commercial sealanes between completely unfettered competition and a market with some restraints on such competition such as is common in most of the maritime countries with which we share these sealanes. We must meet our statutory obligations and deal with the broad economic effect on our foreign commerce and not simply the impact on a few U.S. carriers, however much we may have personal concern for their economic wellbeing. Any harm flowing from such restraint on our part can always be corrected by negotiations by our Executive Branch with the other country involved.

I must stress that I have not made up my mind whether the northbound agreements in this case should be approved and I cannot do so until the results of the investigation we have ordered are at hand. I would have liked in the case of the southbound agreements to have had a similar opportunity for a reasoned decision based on a more complete record than we have now before us. In short, the anatomy of the entire U.S./Argentine ocean trade in both directions is at issue here. The northbound and southbound agreements are inextricably intertwined. The question of the possible unilateral interference by the Argentine government in these agreements and the background from which they spring, permeates the entire ocean transport structure between these two countries. That Government's role and the economic impact of the resultant terms of all of these agreements, both northbound and southbound, require closer scrutiny if we are to fulfill our statutory responsibilities.



# FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-3

CONTINENTAL FORWARDING, INC.

## INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND POSSIBLE STATUTORY VIOLATIONS

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Application No. B-349 denied.

Civil penalty of \$17,500 assessed for repeated and wilful violations of section 44 of the Shipping Act, 1916.

*Joseph B. Slunt, Charles C. Hunter, William Weiswasser and Paul J. Kaller, Bureau of Hearing Counsel.*

*Carlos Rodriguez for Continental Forwarding, Inc.*

### ORDER PARTIALLY ADOPTING INITIAL DECISION

*February 2, 1981*

This matter comes before the Commission on Exceptions to the Initial Decision of Administrative Law Judge William Beasley Harris filed by Continental Forwarding, Inc. A "Reply to Exceptions" was submitted by the Commission's Bureau of Hearing Counsel. Upon review of both parties' arguments and the assembled record, the Commission has determined that the findings and conclusions of the Presiding Officer were for the most part sound and correct. The Initial Decision will therefore be adopted except to the extent it assesses a civil penalty in excess of \$17,500 and is otherwise inconsistent with the following discussion of the case.

#### BACKGROUND

Continental's license to operate as an independent ocean freight forwarder was revoked on December 2, 1978, along with those of 134 other forwarders, for failure to obtain and file with the Commission the surety bond required by section 44(c) of the Shipping Act, 1916 (46 U.S.C. 841b(c)), and section 510.9 of the Commission's Rules (46 C.F.R. 510.9).<sup>1</sup> The Order of Revocation was published in the January

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<sup>1</sup> Section 44(c) states, in pertinent part, that:

... no license shall be issued or remain in force unless such forwarder shall have furnished a bond or other security approved by the Commission in such form and amount as in the opinion of the Commission will insure financial responsibility . . .

The Commission amended section 510.9 on July 24, 1978 to require a \$30,000 rather than a \$10,000 surety bond following rulemaking proceedings which sought and obtained numerous comments from the forwarding industry. *Report and Order in Docket No. 77-53*, 20 F.M.C. 892, 19 S.R.R. 723, 43 *Fed. Reg.* 32,776 (1980). No appeal was taken of this decision by Continental or any other interested party.

3, 1979, *Federal Register* (44 *Fed. Reg.* 953) and mailed to each affected licensee, including Continental.<sup>2</sup> On January 19, 1979, a follow-up questionnaire was also sent to the 135 persons named in the revocation order.

Petitions for reconsideration could be filed under the Commission's Rules of Practice and Procedure (46 C.F.R. 502.261) until February 2, 1979, but no such petition was filed by Continental. February 2, 1979 was also the deadline for appealing the Commission's December 1, 1978 revocation action to the United States Court of Appeals under 28 U.S.C. 2344, an action Continental also did not take.

Sometime in early March, 1979, Franz Zinssmeister, the President and 99% owner of Continental, telephoned the Commission's Office of Freight Forwarders and inquired as to the steps necessary to regain a license. He was told that a new application was required.<sup>3</sup> Application materials which contained a form letter warning applicants against engaging in the business of forwarding before a license is issued were sent to Continental on March 22, 1979.<sup>4</sup> On March 9, 1979, Continental was issued a \$30,000 bond with retroactive coverage to December 1, 1978 by the Investor's Insurance Company of America.<sup>5</sup>

Continental did not tender an application until June 18, 1979, and then only in incomplete condition. A revised application was submitted July 11, 1979, together with a statement that Continental had been continuously operating as an unlicensed freight forwarder since December 1, 1978. The application was finally completed on August 6, 1979, when the Commission received a statement that Mr. Zinssmeister had "read and understood" the Commission's Freight Forwarder Regulations (46 C.F.R. Part 510).<sup>6</sup> On August 14, 1979, Continental was again sent a form letter which cautioned it against unlicensed forwarding.

A Commission field investigator met with Mr. Zinssmeister on August 16 and 17, 1979 and advised Continental to cease freight for-

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<sup>2</sup> Prior to December 1, 1978, the Commission had mailed circular letters to each affected licensee, advising it of the need to obtain a \$30,000 bond. Circular Letter Nos. FF 1-78 and FF 2-78 August and November, 1978, respectively. These circular letters were summarized in a subsequent *Federal Register* notice published November 13, 1978 (43 *Fed. Reg.* 52,519). Affidavit of Robert G. Drew dated February 28, 1980 and exhibits thereto.

<sup>3</sup> Drew affidavit; Affidavit of Franz Zinssmeister dated August 21, 1979. Mr. Zinssmeister was also told that Continental's application was likely to be granted even if Continental had engaged in unauthorized forwarding since December 1, 1978. Zinssmeister affidavit, *supra*. See also Affidavit of Carlos Rodriguez dated March 31, 1980. These discussions between representatives of Continental and representatives of the Office of Freight Forwarders were limited to an informal evaluation of Continental's *past conduct*. There is no basis in the record for finding that Continental was advised that *continued* unlicensed forwarding past March, 1979 was in any way acceptable to the Commission.

<sup>4</sup> Drew affidavit and exhibits.

<sup>5</sup> Letter of Carlos Rodriguez to Charles Clow dated June 15, 1979. The Commission received notice that this bond had been issued on March 13, 1980.

<sup>6</sup> Drew affidavit and exhibits.

warding operations immediately.<sup>7</sup> This advice was not followed. Shortly after Continental received the Commission's December 10, 1979 "Letter of Intent to Deny," an arrangement was instituted whereby Continental continued to serve its forwarding clients and receive shipper handling fees by using the license and an employee of Pracht International, Inc., another licensed forwarder. At least 107 shipments were handled in this manner until the scheme was uncovered by a Commission investigator.<sup>8</sup>

Continental describes two events which allegedly contributed to its neglect of the surety bond requirements and its unauthorized forwarding operations prior to March, 1979. The first of these is the fact that Mr. Zinssmeister injured his hand during a visit to Germany in August, 1978, for which he was hospitalized for an unspecified period.<sup>9</sup> He returned to the United States and his office at Continental in September, 1978, where he was able to work "sporadically and at reduced levels."<sup>10</sup> No further information concerning the nature or extent of Mr. Zinssmeister's disability between August, 1978 and June, 1979 has been provided and the record similarly fails to describe the arrangements, if any, made to assure responsible administration of Continental's activities during Mr. Zinssmeister's absences from the freight forwarding business.<sup>11</sup>

Continental also states that its failure to meet the increased bonding requirements was due to its customary reliance upon a former bonding company's practice of automatically renewing the various bonds required by Mr. Zinssmeister's business.<sup>12</sup> There is, however, no indication that the December 1, 1978 increased coverage deadline coincided with the "renewal period" of Continental's previous surety bond. Moreover, Continental changed bonding companies before the December 1, 1978 compliance date and presumably had an opportunity to review its

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<sup>7</sup> Affidavit of Joseph M. Henderson dated February 26, 1980. Continental handled 365 shipments between December 1, 1978 and August 31, 1979 for which shipper fees totalling \$14,862.00 and carrier compensation of \$5,241.00 were received. Affidavit of Franz Zinssmeister dated August 31, 1979.

<sup>8</sup> Stipulation of the Parties dated July 3 and Appendix II thereto. Another four shipments were handled directly by Continental between September 1 and December 19, 1979 for which Orient Overseas Container Line paid brokerage to Continental. Henderson affidavit and Exhibits 12-15 thereto.

<sup>9</sup> The injury is described by Respondent's counsel as the "near loss of a hand" necessitating "surgery which included bone transfers." Letter of Carlos Rodriguez, *supra*. However, Mr. Zinssmeister testified that he had "hurt a finger on a farm in Germany . . . [and] came back and it was operated here." Transcript at 21.

<sup>10</sup> Additional surgery was performed in the United States in September, 1978. *Id.*

<sup>11</sup> Mr. Zinssmeister returned to Germany from December 18, 1978 to late February, 1979 and again from sometime in April until May 28, 1979. Additional "treatment" was performed during these visits. Letter of Carlos Rodriguez, *supra*, Transcript at 21.

<sup>12</sup> Mr. Zinssmeister is also engaged in customhouse brokering and other import/export related business for which he requires over 20 different bonds. Letter of Carlos Rodriguez, *supra*; Continental letterhead found in exhibits to Henderson affidavit. The freight forwarder portion of the business is much smaller than the import portion. Only 10% of Continental's 50-60 clients are engaged in export activities requiring forwarder services. Transcript at 20.

bonding needs and procedures with the newly retained company at this time <sup>13</sup> Again, details which might establish that Continental was unfairly overcome by circumstances beyond its reasonable control are absent from the record.

#### POSITION OF THE PARTIES

Continental contends that the Initial Decision is erroneous because: (1) the Commission's failure to conduct an evidentiary hearing before revoking licenses for noncompliance with the December 1, 1978 bonding deadline violated Continental's constitutional right to due process of law; (2) arbitrary, unpublicized and prejudicial standards were employed by the Commission in handling relicensing requests by persons named in the January 3, 1979 Order of Revocation; (3) mitigating factors which bear upon Continental's fitness to be licensed and its civil penalty liability were given inadequate consideration by the Presiding Officer; and (4) the imposition of a \$35,000 civil penalty was arbitrary and unreasonable.

Hearing Counsel, in turn, claims that: (1) the validity of Continental's December 1, 1978 license revocation is irrelevant; (2) the Commission did not employ impermissible standards for evaluating relicensing requests arising from the December 1, 1978 bonding violations; (3) the Commission's procedures for handling relicensing requests had no adverse impact upon Continental; and (4) Continental's wilful violations of section 44 were not sufficiently offset by mitigating circumstances to warrant a finding of fitness or a reduction of civil penalty liability below \$17,500. Hearing Counsel joins Continental in excepting to the Presiding Officer's rejection of the proposed \$17,500 civil penalty settlement negotiated by the parties.

#### DISCUSSION

##### THE PRIOR REVOCATION

The validity of the Commission's Order of Revocation is relevant to the present proceeding, especially with regard to possible civil penalty assessments. Although Continental's due process argument cannot be disregarded, this contention has slight substantive merit and is presented in a manner which accentuates rather than minimizes the impropriety of Continental's conduct during the period running roughly from August 1, 1978 through June 30, 1980.<sup>14</sup>

Generally speaking, license revocation does require a prior opportunity to be heard on disputed and material questions of fact or law, a principle which is reflected in section 44 of the Shipping Act, 1916 (46

<sup>13</sup> Transcript at 21-23.

<sup>14</sup> Continental has yet to institute administrative or judicial proceedings to affirmatively reinstate its prior license. Instead, it attempts to use perceived due process deficiencies as an ongoing exemption from the requirements of the Shipping Act and the Commission's regulations.

U.S.C. 841b). Yet, exceptions to this general rule can and do occur when a valid governmental interest is at stake which justifies postponing the time or altering the manner of hearing.<sup>15</sup> One such governmental interest is the maintenance of a surety bond by freight forwarder licensees to protect the financial interests of their shipper clients. By enacting Shipping Act section 44(c), which makes adequate bonding an express *precondition* to the issuance or retention of a freight forwarder license, Congress created an exception to the more broadly worded section 44(d) and authorized immediate license revocation for failure to maintain a surety bond.<sup>16</sup> This action was taken following extensive legislative hearings which, among other things, uncovered longstanding abuses in the forwarding industry.<sup>17</sup>

The automatic revocation procedures in section 510.9 of the Commission's Rules merely reflect the statutory requirement of section 44(c).<sup>18</sup> Continental's true complaint therefore lies against section 44(c) itself, and to that extent is beyond this agency's authority to adjudicate.<sup>19</sup>

Moreover, Continental was given an opportunity to be heard which was meaningful under the circumstances. Notice of the \$30,000 bond requirement was twice mailed to Continental before the December 1, 1978 deadline and twice published in the *Federal Register*. Following service of the Commission's January 3, 1979 revocation order and the January 19, 1979 follow-up questionnaire, licensees wishing to challenge the factual basis for the action taken against their license could do so upon filing a timely petition for reconsideration.<sup>20</sup> Even licensees

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<sup>15</sup> *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-680 (1974); *R.A. Holman & Co. v. Securities and Exchange Commission*, 299 F.2d 127, 131-132 (D.C. Cir. 1962), *cert. den.* 370 U.S. 911 (1962). *Cf. Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1970). Section 558(c) of the Administrative Procedure Act (5 U.S.C. 558(c)) imposes prior notice and opportunity for compliance requirements in license revocation proceedings which exceed those necessitated by due process. These statutory procedures are inapplicable, however, in cases of "wilfulness" or those in which prompt action is required by "public health, interest or safety." Although the notices sent to Continental were sufficient to have satisfied section 558(c) under the circumstances, the wilfulness and public interest exemptions both apply to revocations based upon the lapse of a surety bond.

<sup>16</sup> Note 1, *supra*, contains the pertinent portion of section 44(c). The requirement that no license "remain in force" without a bond being on file with the Commission supercedes section 44(d)'s hearing requirements.

<sup>17</sup> See, e.g., *Providing for Licensing and Compensation of Independent Ocean Freight Forwarders*, Sen. Report No. 691, 87th Cong., 1st Sess. (1961); statement of Senator Yarborough in *Hearings before a Subcommittee of the Senate Committee on Commerce*, 87th Cong., 1st Sess. (July 27, 1961) at 1-2.

<sup>18</sup> Section 510.9's proviso clause was adopted on June 12, 1967, 32 Fed. Reg. 8523, corrected 32 Fed. Reg. 9170. Objections to the rule based on an alleged right to a prior hearing were denied by the Commission at that time. No appeal was taken.

<sup>19</sup> See *Public Utilities Commission v. United States*, 355 U.S. 534, 539-540 (1958).

<sup>20</sup> Possession of a valid bond in the higher amount was the only issue which could have been examined in a prior hearing. Licensees which subsequently demonstrated that they were in compliance on December 1, 1978 were successful in obtaining orders vacating the Commission's January 3, 1979 Order of Revocation. It is undisputed that Continental did not possess a \$30,000 bond on December 1, 1978.

which were without the necessary bond on December 1, 1978 were granted reinstatement if they obtained a retroactive bond and petitioned the Commission by February 2, 1979. For reasons yet to be adequately explained, Continental neglected to take advantage of this opportunity.

#### USE OF UNLAWFUL PROCEDURAL STANDARDS

Continental finds fault with the relatively lenient procedures extended to forwarders named in the January 3, 1979 Order of Revocation which sought license reinstatement on or before February 2, 1979. Under this arrangement licenses were reinstated if a \$30,000 bond with coverage retroactive to December 1, 1978 was obtained and a request for reconsideration was made by February 2, 1979.<sup>21</sup> No inquiry was made into possible unlicensed forwarding activities by persons which met these standards. Forwarders seeking reinstatement after February 2, 1979 or which failed to obtain a retroactive bond were required to submit a new license application, pay a \$125 application fee, and undergo the background investigation routinely conducted in the case of new applicants. Continental now states that these practices were arbitrary and unfair, and have adversely affected Continental.

Continental's assertions pertaining to the procedures applied to its relicensing efforts and to those of former forwarders which acted in a more timely and conscientious fashion are difficult to follow. The "insidious secret calendar" allegedly employed by the Commission was anything but arbitrary. The February 2, 1979 cut-off date was the end of the standard 30-day reconsideration period specified in section 502.261 of the Commission's Rules. The failure to publicize the availability of a "grace period" for unlicensed forwarding activities could not have injured Continental in light of its admitted unresponsiveness to its licensing problem until "late February, 1979."<sup>22</sup> Therefore, Continental's complaint of discriminatory treatment seemingly boils down to the following notion: the Commission, by excusing possible unlicensed activities by former forwarders which were properly bonded before February 3, 1979, cannot consider the unlicensed activities of a former forwarder which did not meet the new bonding standards until March 13, 1979, neglected to tender an application until June 18, 1979 and refused to cease forwarding operations when advised of the need to do so. <sup>23</sup>

<sup>21</sup> The possibility of securing reinstatement by obtaining a retroactive bond before February 3, 1979 originated with the Bureau of Certification and Licensing and was subsequently endorsed by the Commission.

<sup>22</sup> Affidavit of Franz Zinssmeister, *supra*. Although Continental only states that Mr. Zinssmeister was unaware of the license revocation, it must be assumed that any other Continental employees authorized to obtain a higher bond or to seek license reinstatement would have been as immobile in response to the *public* announcement of a 60-day grace period as they were to the Commission's other public and private notices in this matter. See Transcript at 23-24.

<sup>23</sup> Mr. Zinssmeister was informed by Office of Freight Forwarder personnel in "early March" that it was too late to obtain reinstatement by petition and that Continental must submit a new license

Although there were procedural irregularities in the Commission's treatment of the large number of reinstatement requests received during the period immediately following the December 1, 1978 revocations,<sup>24</sup> Continental has failed to demonstrate a single instance where substantially similar applicants were treated differently in any material manner. Only three of the cases listed in the Stipulation of the Parties dated June 17, 1980 even suggest the presence of unjustified discrimination. Examination of these cases reveals that they are readily distinguishable from the current controversy.

Pouch Forwarding Corporation and Apollo International Company were former forwarders which contacted the Commission's staff by telephone before February 3, 1979, but did not obtain bonds until after the cut off date. They also failed to arrange for retroactive coverage. Both were required to submit new applications. However, both applicants also ceased all forwarding activities immediately upon receiving oral warnings from the Office of Freight Forwarders so that less than 60 days of unlicensed forwarding was involved.

Ibertresa, U.S.A., Inc., obtained reinstatement of its license without filing a new application despite its failure to request such relief until June 19, 1979. Although in letter form, Ibertresa's written request was treated as a petition for extraordinary relief (*See* 46 C.F.R. 502.69) and was granted on October 17, 1979. There were sufficient differences between Ibertresa's situation and Continental's to account for the fact that Continental was required to file a new application rather than to proceed by petition. Furthermore, the procedures followed were not determinative; the application of different procedures would not have led to a different result in either case.

Ibertresa alleged that it possessed \$30,000 bond coverage on December 1, 1978 by virtue of having paid the requisite premium to its bonding company on November 8, 1978, but that the bonding company had failed to complete the necessary paperwork. The bonding company's admission of error and other extenuating circumstances led the Commission to grant Ibertresa's request to vacate the order revoking its license.<sup>25</sup> Unlike Ibertresa, Continental was never alleged to have been properly bonded before March 9, 1979.

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application. Transcript at 25. A complete application was not filed until August 6, 1979 and no attempt was made to petition the Commission for relief from proceeding by application or for expedited consideration of Continental's cause, even though Continental was apparently represented by counsel at least as early as May, 1979. Affidavit of Carlos Rodriquez dated March 31, 1980.

<sup>24</sup> The most noticeable of these irregularities was the failure to require the submission of pleadings which met the formal requirements of 46 C.F.R. Part 502. Even oral requests may have been accepted. *See* Deposition of Charles L. Clow dated April 29, 1980 at 48-52.

<sup>25</sup> Ibertresa subsequently withdrew from the forwarding business and surrendered its license. *See* Order of Revocation served December 15, 1980.

Makeweight as Continental's claims of prejudicial treatment appear to be, it is fair and appropriate that Continental be allowed the same uncritical acceptance of its continued forwarding activities prior to February 3, 1979 that was given other former licensees. Accordingly, no civil penalties will be assessed for conduct which occurred before that date.<sup>26</sup>

#### MITIGATING FACTORS

Continental complains that the Presiding Officer gave insufficient weight to certain of the mitigating factors recognized by proposed U.S. Customs Services guidelines applicable to violations of 19 U.S.C. 1592.<sup>27</sup> These factors are: prior good behavior, contributing agency error, cooperation with investigators and immediately taking remedial action. Although the relevance of Customs Service practices to the instant controversy has not been established, each of these factors has been considered by the Commission. On balance, they provide no basis for excusing Continental from civil penalties for violations of section 44 or for finding Continental fit to perform the duties of an independent ocean freight forwarder.

Continental claims it did not "deliberately continue forwarding after December 1, 1978." The evidence plainly establishes that the contrary is true. Notice of the Commission's license revocation action was received by Continental, but was ignored by the person regularly entrusted with handling the freight forwarding aspects of Continental's import/export business.<sup>28</sup> Even if Mr. Zinnsmeister rather than the Continental corporation were the licensee, there can be no doubt that he knowingly, wilfully and deliberately continued to operate as a freight forwarder after he "discovered" the license revocation. In fact, Mr. Zinnsmeister went so far as to arrange for Continental's surreptitious use of another forwarder's license.

Continental further contends that Mr. Zinnsmeister's unawareness of the revocation action until "late, February, 1979" is itself grounds for mitigation. Under the circumstances, this fact only underscores an ap-

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<sup>26</sup> The August 31, 1979 affidavit of Franz Zinnsmeister states that Continental handled 365 export shipments between December 1, 1978 and August 31, 1979, but this statement is supported by documentary evidence detailing only 10 representative shipments. See Henderson affidavit, *supra*, and exhibits thereto. Six of the documented shipments apparently did occur after February 2, 1979, but rather than remand this matter to develop further proof concerning shipments which may have been unlawfully handled by Continental after the 60-day December, 1978 through January, 1979 "grace period" afforded other forwarders, the Commission has determined to consider none of the initial 365 shipments for civil penalty purposes. Penalties will be assessed only on the 111 shipments which occurred after Continental was personally visited -- and plainly cautioned -- by investigator Henderson. *Id.*

<sup>27</sup> These guidelines appear at 45 *Fed. Reg.* 62954 (1980) and apply to the varying penalties provided for the three types of customs offenses established by 19 U.S.C. 1592 -conduct based upon fraud, gross negligence and negligence.

<sup>28</sup> Transcript at 23-24.



parent failure on the part of Continental's officers and directors to properly administer and control their employees and to make reasonable arrangements for receiving and replying to Commission communications. In *Lesco Packing Co., Inc.*, 19 F.M.C. 132, 136-137 (1976), where a forwarder application was denied on fitness grounds, the Commission stated that licensees have a duty to "possess, read, understand and meticulously follow" agency regulations and to respond to agency communications in a timely, responsible fashion. Continental has offered no plausible excuse for its failure to take appropriate action in response to the Commission's Order of Revocation or the oral and subsequent written statements of the Office of Freight Forwarders.<sup>29</sup>

Continental argues that its continued forwarding operations were not "deliberate" because Mr. Zinssmeister believed the Commission would relicense Continental just as it relicensed other former forwarders which obtained retroactive bonds. A belief that a timely filed license application would eventually be granted and a belief that it was permissible to operate unlawfully until such time as the applicant deemed it appropriate to stop are two quite different beliefs. Continental was advised that continued forwarding was unlawful at each stage of its dealings with the Commission's staff and was expressly advised that its application was deficient by the Commission's December 10, 1979 "Letter of Intent to Deny." Yet the violations continued until June, 1980.

The Commission committed no "errors" which "contributed to" the duration or extent of Continental's unlicensed forwarding activities. Instead, the record indicates that Continental knowingly assumed the risks of ignoring the Order of Revocation based upon Mr. Zinssmeister's personal evaluation of the circumstances. The longer Continental waited to file a complete application, the larger grew the risk of license denial. Consequently, when the Commission was presented with Continental's application in November, 1979, it did not see an applicant which had striven to extricate itself from unlicensed forwarder status in a timely and straightforward fashion, but rather an applicant content to drag its feet at the expense of the regulatory scheme mandated by section 44 of the Shipping Act. Most matters presented to the Commission involve questions of degree. In deciding how much unlicensed

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<sup>29</sup> During the oral hearing, Mr. Zinssmeister indicated that a Mr. Alfred Chestnut had been entrusted with managing Continental's forwarding business during late 1978 and 1979, that the Commission's revocation notices were received by Continental and that these notices were probably seen by Mr. Chestnut. Transcript at 23-24. Continental cannot avoid responsibility for its inaction simply by throwing Mr. Chestnut into the fire. It must offer some justification for its decision to leave Mr. Chestnut -- who had a chronic health problem during this period -- in charge of the forwarding business without meaningful supervision. Moreover, Continental still lists him and Mr. Zinssmeister in its application as two of three individuals which qualify Continental as "fit, willing and able" to operate as a licensed forwarder. Transcript at 23-24; Exhibit No. 9 to Drew Affidavit.

forwarding was too much, the Commission reasonably concluded that the seven months which elapsed before Continental perfected its application was a period of sufficient length to establish doubt that the applicant had acted in good faith and was otherwise qualified for licensing.<sup>30</sup>

Continental's efforts to obtain a retroactive bond within two or three weeks after Mr. Zinssmeister learned of the license revocation does not constitute "remedial action." The offense Continental has committed is unlicensed forwarding. It can only be remedied by obtaining a valid license or by halting forwarder operations. Although proper bonding is a necessary step in the licensing process, Continental was less than diligent in filing the necessary application and did not stop its forwarding activities until June, 1980. In short, Continental's failure to take remedial action speaks against mitigation of the penalties prescribed for the unlicensed forwarding which occurred after August 31, 1979.<sup>31</sup>

Another of Continental's mitigation arguments is its alleged willingness to cooperate with the Commission's investigation of its activities, but Continental has not established that this "cooperation" consisted of anything more than that required of all licensees under section 510.24(1) of the Commission's Rules.<sup>32</sup> Moreover, Continental's failure to take remedial action until June, 1980 and its affirmative efforts to continue forwarding activities during the first half of 1980 are inconsistent with a finding that Continental warrants any special consideration for "cooperativeness" in this matter.<sup>33</sup>

Continental's final plea in mitigation is that its previous record as a freight forwarder, both before and after its licensing under section 44 in 1965, is completely free of regulatory violations or even allegations of such violations.<sup>34</sup> This factor was recognized by the Presiding Officer (I.D. at 17) and will be given appropriate consideration by the Commission.

#### PENALTY ASSESSMENT AND FITNESS TO BE LICENSED

The Commission has decided to reduce the penalty assessment to \$17,500 for two reasons. The primary basis for this action is the fact that penalties are being assessed only for the 111 violations of section

<sup>30</sup> See also pages 11-15, *supra*, regarding the procedural errors alleged by Continental.

<sup>31</sup> See, note 25, *supra*.

<sup>32</sup> 46 C.F.R. 524(1) provides that:

Each licensee shall make available promptly all records and books of account in connection with carrying on the business of forwarding, for inspection or reproducing or other official use upon the request of any authorized representative of the Commission.

<sup>33</sup> Continental's use of Pracht's license was discovered in June, 1980 as a result of third party inquiry by a Commission investigator. Transcript at 43-49.

<sup>34</sup> Continental first registered as a freight forwarder on March 24, 1958 under Commission regulations which preceded the freight forwarder licensing legislation enacted in 1961 (P.L. 87-254, 75 Stat. 522).

44(a) which occurred after August 31, 1979. A secondary consideration is Continental's prior good behavior as an ocean freight forwarder.

Finally, it is concluded that Continental is not fit to be licensed as an independent ocean freight forwarder. Except for its attempt to create the false appearance that its forwarding activities had stopped in December, 1979, no single act of Continental's may have been egregious enough to require denial of the application. Taken altogether, however, the picture that appears is one of consistent dereliction of the duty to respond to official communications and to control the activities of its agents. A person proven to be unresponsive to such fundamental regulatory interests as adherence to a widely publicized, industry-wide change in bonding amount, a license revocation order and requests to stop unlawful forwarding activities, is unfit to be licensed. This result is consistent with the Commission's action in similar instances of protracted and deliberate unlicensed forwarding by applicants. *Cargo Systems, International*, 22 F.M.C. 56, 71-72 (1979); *Concordia International Forwarding Corp.*, 21 F.M.C. 587, 592 (1978); *Alvarez Shipping Co., Inc.*, 16 F.M.C. 78, 81 (1973); *Harry Kaufman*, 16 F.M.C. 256, 271 (1973). See also *Fast International Forwarding Corp.*, 21 F.M.C. 1076, 1080-1081 (1979).

**THEREFORE, IT IS ORDERED**, That the independent ocean freight forwarder application of Continental Forwarding, Inc. (No. B-349), is denied; and

**IT IS FURTHER ORDERED**, That Continental Forwarding, Inc., pay to the Federal Maritime Commission a civil penalty of \$17,500 in accordance with the proposed agreement entered into by Continental and the Bureau of Hearing Counsel in June, 1980; and

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

By the Commission.

(S) FRANCIS C. HURNEY  
Secretary

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-3****CONTINENTAL FORWARDING, INC. - INDEPENDENT  
OCEAN FREIGHT FORWARDER LICENSE APPLICATION AND  
POSSIBLE VIOLATIONS OF SECTION 44, SHIPPING ACT, 1916**

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Application denied.

Civil Penalty assessed Respondent pursuant to section 32(e) of the Shipping Act, 1916, in the amount of \$35,000.

*Joseph B. Slunt, Charles C. Hunter, William Weiswasser, and Paul J. Kaller, Acting Director, Bureau of Hearing Counsel, for Commission's Bureau of Hearing Counsel.  
Carlos Rodriguez for Respondent.*

**INITIAL DECISION<sup>1</sup> OF WILLIAM BEASLEY HARRIS,  
ADMINISTRATIVE LAW JUDGE**

*Partially Adopted February 2, 1981*

The Commission by its Order of Investigation and Hearing,<sup>2</sup> served January 17, 1980, instituted this proceeding pursuant to sections 22 and 44 (46 U.S.C. 821, 841(b)) of the Shipping Act, 1916, and section 510.8 of the Commission's General Order 4 (46 C.F.R. 510.8) to determine:

1. Whether Continental Forwarding, Inc. violated section 44(a), Shipping Act, 1916 by engaging in unlicensed forwarding activities;
2. Whether Continental Forwarding, Inc. violated section 44(e) of the Shipping Act, 1916 by falsely certifying to ocean carriers that it was licensed as an independent ocean freight forwarder and entitled to receive ocean carrier compensation after its license was revoked and/or by accepting ocean carrier compensation it was not qualified to receive for shipments forwarded after its license was revoked;
3. Whether civil penalties should be assessed against Continental 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;

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<sup>1</sup> 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).

<sup>2</sup> Published in *Federal Register*, Vol. 45, No. 16, Wednesday, January 23, 1980, Pages 5394-5395.

4. Whether, in light of the evidence adduced pursuant to the first and second issues, together with any other evidence adduced, Continental 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;

#### BACKGROUND

Continental Forwarding, Inc. (Continental or Respondent), was licensed as an independent ocean freight forwarder, License No. 457, until its license was revoked, effective December 2, 1978, for failure to file with the Commission a surety bond in the amount of \$30,000 pursuant to the decision in *Licensing of Independent Freight Forwarders*, Docket No. 77-53, 20 F.M.C. 892, served July 24, 1978.<sup>3</sup> The instant application by Continental, dated May 30, 1979, seeks a license as an independent freight forwarder.

During the course of the Commission's investigation of Continental's application, it was learned that the firm apparently had engaged in ocean freight forwarding after the revocation of its license.<sup>4</sup> By letter dated December 10, 1979, the Commission notified Continental of its intent to deny its application for a license unless the applicant requested a hearing.<sup>5</sup>

In a letter dated December 31, 1979, Continental requested that it be given a hearing on the intended denial.<sup>6</sup>

On Friday, April 11, 1980, the parties to this proceeding requested and were granted an informal prehearing conference, which was held in the office of the Presiding Administrative Law Judge. At said prehearing conference it was revealed the parties had begun discussion of the issues.<sup>7</sup> It was agreed the parties would file a status report on or before Friday, May 9, 1980. The status report was submitted May 9, 1980, jointly by the parties; additional time to draft stipulations and review depositions taken, was sought to June 6, 1980, and was granted. If hearing is necessary, it was set to begin on June 17, 1980. Hearing in this proceeding began and concluded on Tuesday, June 17, 1980. The parties agreed (1) to file simultaneous opening briefs on or before Thursday, July 24, 1980, and (2) to file simultaneous reply briefs on or before Thursday, August 7, 1980. The briefs were filed timely.

Each party to this proceeding submitted:

- (1) Opening Memorandum of Law
- (2) Opening Brief

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<sup>3</sup> Instant Order of Investigation and Hearing served herein January 17, 1980, page 1.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, p. 2.

<sup>6</sup> *Ibid.*

<sup>7</sup> Memorandum of Prehearing Conference served April 14, 1980.

## (3) Reply Brief

Hearing Counsel in its Opening Memorandum of Law (served March 3, 1980) proposed 30 findings of fact; in its Opening Brief (served July 24, 1980)<sup>8</sup> proposed 20 supplemental findings of fact. These total 50 proposed findings of fact.

The Respondent in its Opening Memorandum of Law (served March 31, 1980) proposed 14 findings of fact; in its Opening Brief (served July 24, 1980) proposed 18 findings of fact; and, in its Reply Brief (served August 7, 1980) proposed 1 supplemental finding of fact. These total 33 proposed findings of fact. Of these 33 proposed findings of fact by the Respondent, Hearing Counsel disputed 6 (Numbers 10, 11, 12, 13 and 14 of those in Respondent's Opening Memorandum and No. 10 in Respondent's Opening Brief).

All proposed findings of fact total 83.

The Presiding Administrative Law Judge has considered all of the 83 proposed findings of fact and the disputation to 6 of them by Hearing Counsel. After consideration, the proposed findings of fact have been granted, granted in substance or denied as shown by the facts herein-after set forth. In compliance with Rule 169 referred to above and with consideration of the entire record herein the Presiding Administrative Law Judge finds the facts in this proceeding as follows:

## FACTS

Continental Forwarding, Inc. (Respondent or Applicant), formed in 1958, has been a freight forwarder since March of that year. On May 3, 1965, Respondent was issued FMC Independent Ocean Freight Forwarder License Number 457, effective as of April 30, 1965.

Respondent's License No. 457 was revoked automatically on December 2, 1978. Respondent had failed to file with the Commission, as required, a surety bond in the increased amount of \$30,000 bearing an effective date of December 1, 1978, on or before December 1, 1978. The parties stipulated the Commission issued a Notice of Revocation, published in the *Federal Register* on January 3, 1979, wherein notice was given of the independent ocean freight forwarders who failed to file with the Commission a surety bond bearing an effective date of December 1, 1978, in the amount of \$30,000 and whose licenses were revoked effective December 2, 1978<sup>9</sup> (Exhibit No. 1; Stipulation No. 1).

Prior to the December 2, 1978, revocation of Respondent's license, the Respondent was clear of any complaints as to possible violations by

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<sup>8</sup> At page 3, purports to list the material of which the record consists in this proceeding. The Presiding Administrative Law Judge in accordance with Rule 169 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.169, asserts the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for decision.

<sup>9</sup> The affidavit of Robert M. Drew has attached to it a copy of the Revocation Notice (Exhibit 6) containing a total of 148 licensees among which is listed the Respondent.

it of any of the laws applicable to independent ocean freight forwarders. Only after the December 2, 1978, revocation of Respondent's license did questions of law violations arise.

On March 13, 1979, the Commission's Office of Freight Forwarders received notice of the issuance of a surety bond in the amount of \$30,000 bearing the effective date of December 1, 1978, which covered Respondent's ocean freight forwarding activities (Affidavit of Robert M. Drew, page 4, para. 15).

On May 30, 1979, the Respondent applied for an Independent Ocean Freight Forwarder License. That application, on June 19, 1979, was returned to Respondent as incomplete. The application was resubmitted on July 11, 1979, with a covering letter from Respondent's counsel, stating, *inter alia*, that the Respondent had not interrupted its forwarding service. (Affidavit of Robert G. Drew, Attachment (Exhibit) No. 12.)

The parties stipulated that the Commission's Bureau of Certification and Licensing recommended that Continental Forwarding Inc. be issued a new license and that the apparent unlicensed forwarding activities be the subject of a civil penalty claim. The Commission decided instead to issue a letter of intent to deny Continental's application (Exh. No. 1, page 5, Stipulation No. 10 of Parties).

On July 11, 1979, District Investigator Joseph M. Henderson of the Commission's Atlantic District Office, was assigned to investigate Continental Forwarding, Inc., to ascertain whether Continental had continued to engage in carrying on the business of ocean freight forwarding after revocation of their Independent Ocean Freight Forwarder License Number 457 effective December 2, 1979. Investigator Henderson made trips to the offices of Respondent on August 16 and 17, 1979, and each time advised Respondent's President, Franz Zinssmeister that Respondent should cease its ocean freight forwarding activities immediately.

In an affidavit subscribed and sworn to August 31, 1979, Franz Zinssmeister, President, Continental Forwarding, Inc., stated, *inter alia*, that Continental has since December 1, 1978 to the present (August 31, 1979), completed three hundred sixty-five (365) shipments for export; that for these shipments approximately \$14,862.00 has been billed for forwarding fees and approximately \$5,241.00 brokerage has been collected. (Affidavit of Joseph M. Henderson, Attachment (Exhibit) 1.)

The stipulations 1 and 10 referred to above are part of 11 contained in Stipulation received in evidence herein as Exhibit No. 1. The other stipulations provide substantially as follows: No. 2 - that 8 licenses were erroneously listed in the Notice of Revocation, as they met all bonding requirements prior to December 1, 1976; No. 3 - that 36 licensees who secured valid surety bonds in the amount of \$30,000 on or before December 1, 1978, were listed in the Notice of Revocation as the bonds were not submitted to the Commission by December 2, 1978.

The Notice of Revocation as it pertained to those 36 licensees was vacated based upon evidence that the \$30,000 bonds were in effect continuously from December 1, 1978; No. 4 - that 2 licensees had their licenses reinstated after they filed the prescribed \$30,000 surety bonds with effective dates on or before December 1, 1978; No. 5 - that 7 licensees obtained surety bonds in the amount of \$30,000 after December 1, 1978, with effective dates on or before December 1, 1978, and submitted them prior to February 2, 1979. The Commission issued a Notice Vacating Revocation of those licenses; No. 6 - that 4 licensees had their licenses reissued having secured a \$30,000 surety bond effective respectively January 24, 1979, February 22, 1979, March 16, 1979, and January 1, 1979. All of these had contacted the Commission prior to February 1, 1979, about having the license reinstated; No. 7 - that no investigation was conducted to determine if any of the (57) forwarders referred to above had engaged in any unlicensed forwarding activities. They were not required to file new applications. If a former licensee whose license was revoked for failure to file a \$30,000 surety bond did not contact the Commission prior to February 2, 1979, it was required to file an application in order to obtain a new license; No. 8 - that 2 licensees have had new licenses issued using their old FMC number. Both submitted applications and investigations were conducted to determine if they had performed any forwarding after the revocation of their licenses. Both were issued new licenses after it was determined that they had not performed any unlicensed forwarding; No. 9 - that 1 Notice of Revocation as it applied was vacated on September 17, 1979, based upon evidence that its failure to submit the \$30,000 surety bond was primarily the fault of the surety. That forwarder submitted a bond on June 29, 1979, with coverage retroactive to December 1, 1978. No investigation was conducted as to whether that forwarder had performed unlicensed forwarding; No. 11 - that the depositions of Robert Drew and Charles Clow taken in connection with this proceeding may be offered in evidence.<sup>10</sup>

The parties, at the June 17, 1980, Hearing agreed to enter into further stipulations covering certain activities that have been carried on by Continental since the filing of Mr. Henderson's affidavit (Tr. 15). On July 3, 1980, the parties filed a joint stipulation, in which it is stipulated:

(1) The documents included in Appendix I attached hereto evidence twenty-six (26) of the one hundred and seven (107) ocean freight shipments which are referred to on pages fifteen (15) ad sixteen (16) of the transcript of the hearing held in this docket on June 17, 1980 and discussed on pages fifty-two (52) through fifty-five (55) of that transcript.

<sup>10</sup> Parties agreed that Drew and Clow depositions are part of this record (Tr. 65, 68).



(2) The documents included in Appendix II attached hereto are the signed statement and a subsequent clarification thereof referred to on pages sixty-one (61) and sixty-two (62) of the transcript of the hearing held in this docket on June 17, 1980.

Investigator Henderson conducted further investigation of the Respondent since February 1980. On June 5, 1980, he contacted Velco Enterprises, one of the Respondent's customers, and discovered Respondent was still being used by them as a forwarder (Tr. 45). Velco and other export clients were advised of Respondent's arrangements with Pracht International, Inc., holder of Independent Ocean Freight Forwarder License Number 1880 (Exhs. 3 and 4).

#### DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

Hearing Counsel contends that the Respondent, by engaging in carrying on the business of ocean freight forwarding after its independent ocean freight forwarder license had been revoked, violated section 44(a), Shipping Act, 1916, and by accepting compensation during the period violated section 44(e) of the Act. Hearing Counsel cites the August 31, 1979, affidavit of Respondent's President and 99% stockholder, Franz Zinssmeister, that during the period December 2, 1978 through August 31, 1979, Respondent had forwarded 365 ocean freight shipments; that subsequent to August 31, 1979, Respondent forwarded at least 4 ocean freight shipments. (H.C. Opening Memo. of Law, pp. 11, 12.) Hearing Counsel points to the July 3, 1980, stipulation to 107 violations by the Respondent and asks they be found to have been made during the period December 1977 through early June 1980 (Opening Brief, p. 12).

The Respondent, in its March 31, 1980, Opening Memorandum of Law, July 24, 1980, Opening Brief, of August 7, 1980, Reply Brief, has difficulty in coming to grips directly with Respondent having carried on the business of ocean freight forwarding without a license after December 1, 1978.<sup>11</sup> Instead, the Respondent submits that the Commission is estopped<sup>12</sup> from denying a license to the Respondent and from applying sanctions (civil penalties) for forwarding without a license after December 1, 1978. (Respondent's Opening Memo., p. 5.) Respondent contends its license was revoked permanently without benefit of a hearing and without opportunity to demonstrate that, once its principal

<sup>11</sup> Tr. 4. Attorney for Respondent: "... as far as activities are concerned, there are some activities that we have admitted to, by Mr. Zinssmeister's affidavit, however, the legal consequences of these activities we reserve till we brief again--on the legal point that perhaps there was no initial revocation. ..."

Tr. : "In my admissions we're admitting activities rather than violations. ... But as the activities, that Mr. Zinssmeister continued forwarding, that we have admitted to in Mr. Zinssmeister's affidavit. ..."

<sup>12</sup> The Presiding Administrative Law Judge, Tr. 7, could not and does not find estoppel an appropriate issue under the circumstances of this proceeding.

had actual notice of its inadequate bonding, steps were taken that both corrected the deficiency and provided the desired protection of the public against loss; that had a hearing been held prior to revocation, Respondent's property interest would have been accorded their requisite due process protection. (Respondent's Opening Brief, p. 17.)

The Respondent asks that a finding be made that the initial revocation of the license was unlawful (Respondent's Reply Brief, p. 3).

Hearing Counsel in its Reply Brief, p. 10, say it will not address the legal merits of Respondent's assertion that Respondent was denied procedural due process in the manner in which its license was revoked, as Hearing Counsel takes the position the issue so raised is both moot and not encompassed within the scope of this proceeding; also that it would be improper to consider the lawfulness of the revocation of Continental's license in this proceeding (*Ibid.* p. 11).

Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by the government's action. *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. (2d) 287, 90 S. Ct. 1011 (1970).

The Presiding Administrative Law Judge finds authority for the Commission's revocation of Respondent's license in section 510.9 (46 C.F.R. 510.9) which provides, *inter alia*:

That no license shall remain in force unless a valid surety bond is maintained on file with the Commission. A license will be automatically suspended or revoked without hearing or other proceeding, for failure of a licensee to maintain a valid surety bond on file.

Thus, it is seen that the Presiding Administrative Law Judge thinks it not improper to consider in this proceeding the lawfulness of the revocation of the Respondent's license. The record herein reflects that the Respondent was afforded the fundamental requisite of due process of law, the opportunity to be heard; the hearing was at a meaningful time and in a meaningful manner. *Goldberg v. Kelly, supra*. Thus the Respondent has been afforded Constitutional due process. The Presiding Administrative Law Judge *finds* and *concludes* the initial revocation of Respondent's license was lawful.

The Respondent (Opening Brief) argues that it should be clear that it made no deliberate decision to continue forwarding without a license after December 1, 1978; that the decision to continue forwarding after March 1979 was not one taken lightly by it, but one taken in calculated and good faith anticipation of reinstatement by the Commission retroactive to the revocation date (p. 10).

Hearing Counsel (Reply Brief, p. 3) answers that as to Respondent's activities prior to February, 1979, although Continental may not have

undertaken such conduct deliberately, that conduct was occasioned by a gross neglect of its responsibilities as a licensee. Hearing Counsel argues that a licensee cannot merely elect to ignore Commission actions and then plead that its unlawful conduct was unintentional; that Continental's protestations of good faith do not conform with the evidence in the record.

Hearing Counsel also argues that the Respondent took a calculated risk by engaging in carrying on the business of ocean freight forwarding in the hope that the reaction of the Commission to its conduct would not be adverse. The Commission issued a letter of intent to deny the license (*Ibid.* p. 4).

In considering the above, the Presiding Administrative Law Judge also considered that the Respondent stipulated (Exhibit No. 1) the Notice of Revocation herein was published in the *Federal Register* on January 3, 1979, that independent ocean freight forwarders who failed to file with the Commission a surety bond bearing an effective date of December 1, 1978, in the amount of \$30,000, on or before December 1, 1978, those licensees' licenses were revoked effective December 2, 1978. The Respondent attached as an exhibit to its March 31, 1980, Opening Memorandum a copy of the August 31, 1979, affidavit of Franz Zinssmeister, President of the Respondent, which said, *inter alia*, the Respondent since December 1, 1978 to date (August 31, 1979), completed three hundred sixty-five (365) shipments for export. A copy of the same August 31, 1979, affidavit referred to is included as an attachment (Exhibit) No. 1 to the Affidavit of Commission Investigator Joseph M. Henderson. The Respondent and Hearing Counsel in a joint stipulation, July 3, 1980, stipulated to an additional one hundred and seven (107) shipments handled by Respondent since Commission Investigator Henderson's affidavit, February 26, 1980.

The Presiding Administrative Law Judge, under the circumstances herein (affidavit, stipulation and the record) deems he is bound to *find* and *conclude* that the Respondent whose independent ocean freight forwarder license had been revoked properly on December 2, 1978, continued to carry on ocean freight forwarding without a license. Respondent subscribed and swore to 365 as well as stipulating to 107 transactions, a total of 472 (possibly 4 more) all in violation of section 44(a) of the Shipping Act, 1916, 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."

The Presiding Administrative Law Judge also *finds* and *concludes* that Respondent by accepting compensation in the admitted amount of \$5,241.00 (Franz Zinssmeister August 31, 1979 Affidavit) from ocean going carriers after Respondent's license had been revoked, violated section 44(e) of the Shipping Act, 1916, that "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, said person is licensed hereunder. . . .”

Hearing Counsel contends that Respondent by repeatedly engaging in conduct violative of the Shipping Act, 1916, has evidenced a lack of the requisite fitness to be licensed as an independent ocean freight forwarder (Opening Memo., p. 13). According to Hearing Counsel, weighing even more heavily against Respondent's fitness to be licensed as an independent ocean freight forwarder is the continuation by Respondent of its illegal activities despite warnings issued by the staff of the Commission that such conduct is forbidden by the Shipping Act, 1916 (*Ibid.*, p. 18). Hearing Counsel submits that Respondent's repeated, willful and knowing violations of the Shipping Act, 1916, would appear to constitute conduct unsuited to the profession and therefore, to necessitate swift action to remedy the misconduct by denial of Respondent's application for a license (*Ibid.*, p. 20).

Respondent contends that mitigating circumstances warrant conclusion that alleged violations do not impact on Respondent's fitness (Opening Brief, p. 8). The Respondent argues the singular fact which, it is alleged, impacts on respondent's fitness to carry on the business of forwarding is that Respondent continued to forward after its license had been automatically revoked on December 2, 1978 (to this Respondent added footnote: “The issue of the lawfulness of an automatic revocation is discussed elsewhere in this brief, but in the alternative for purposes of considering issues of fitness and mitigation only, it will be accepted that Continental's license was revoked”), for not having timely obtained and filed an appropriate bond.

The Respondent argues that the President of Respondent did not immediately become aware that its underwriter had not issued the requisite bond; the President first became aware of the problem in late February 1979 while he was in Germany continuing treatment for and convalescence from, the near loss of his hand and the subsequent surgery. Continental had in the past relied on the surety company and broker to renew the bond automatically. Continental obtained a surety bond in the required amount of \$30,000 which was filed with the Commission on March 13, 1979, with a retroactive effective date of December 1, 1978 (Opening Brief, pp. 8, 9).

Hearing Counsel (Reply Brief) counters that the Respondent blithely dismisses the massive number of willful violations of section 14 of the Act; that the mitigating circumstances cited by the Respondent clearly do not justify its numerous, willful violations of the Act (p. 2). Also, says Hearing Counsel, the absence of a corporate officer cannot absolve the corporation of its duty to abide by pertinent statutory or regulatory authority (*Ibid.*, p. 3); that Respondent's failure to direct the bonding

company to issue a bond in the required amount is a failure for which Respondent alone is responsible.

The Respondent argues that circumstances of mitigation in this proceeding are:

1. The amount of surety bond required ocean freight forwarders was increased from \$10,000 to \$30,000, effective on or before December 1, 1978.

2. Mr. Zinssweister did not become aware that the firm's bond underwriter had not issued the requisite bond until late February, 1978.

3. Respondent was severely impaired in his ability to keep abreast of the needs of his business by the near loss of his hand and the concomitant extensive medical treatment which required hospitalization on several occasions subsequent to his accident.

4. Respondent had, in the past, relied on his surety company and broker to renew the bonding requirement automatically. Unbeknownst to respondent such was not the policy of the underwriter whom he retained in December, 1978. Transfer of all Continental Shipping's bonding requirements from one company to another at the critical period resulted in the inadvertent failure to increase the requirement to the statutory amount.

5. Respondent sought to correct the deficiency as soon as it came to his attention, by giving the Commission notice that . . . bond for \$30,000 has issued to be effective December 1, 1978, a date within the deadline established by the Commission.

(Respondent's Opening Memo. of Law, p. 13, Opening Brief, pp. 8, 9).

Such arguments by the Respondent as to mitigating circumstances the Presiding Administrative Law Judge *finds* and *concludes* do not overcome the activities admitted to by the Respondent, and also *finds* and *concludes* that those activities were in violation of sections 44(a) and 44(e) of the Shipping Act, 1916. They reflect on the Respondent's fitness to be licensed as an independent ocean freight forwarder.

Hearing Counsel submit that Respondent's repeated, "willful and knowing violations of the Shipping Act, 1916, would appear to constitute "Conduct unsuited to the profession" and, therefore, to necessitate "swift action to remedy the misconduct . . . by denial of Respondent's application for a license" (Opening Memo., p. 20, citing *Independent Ocean Freight Forwarder Application--Guy G. Sorrentino*, 15 F.M.C. 127 128 (1972)). Hearing Counsel urge that Respondent does not possess the requisite fitness to be licensed as an independent ocean freight forwarder. Reasserted in its Opening Brief, p. 13 and Reply Brief, p. 21.

The Respondent argues that the Respondent's obtaining and filing with the Commission on March 13, 1979, a surety bond in the required

amount of \$30,000, with a retroactive effective date of December 1, 1978, is significant in several ways. "It highlights the purely technical aspect of Continental's original infraction--i.e., not filing the bond in a timely fashion. The ease with which the matter was corrected is completely in keeping with the principles which relate to Section 44, Shipping Act, 1916. It is well established that the emphasis is on correcting abuses in the industry, and not on punishment. *Application for License*, 8 F.M.C. 109, 117-118 (1964); *Hugo Zanelli v. Federal Maritime Commission*, 500 F. 2d 1000 (5th Cir. 1975). The public interest was made whole with the bond, which provided continuous coverage of Continental's forwarding." (Opening Brief, p. 9, Opening Memo, p. 12).

The latter part of the argument as to the emphasis being on correcting abuses in the industry, and not on punishment was made in the case of *Independent Freight Forwarder License No. 1321--Ikeda International Corporation*, 22 F.M.C. 803 (1980, Initial Decision), Partial Adoption of Initial Decision, 22 F.M.C. 799 (1980). The Presiding Administrative Law Judge and the Commission in *Ikeda* did not find support for the contentions of Hearing Counsel and the Respondent as to section 44 of the Act being remedial as opposed to punitive or that the *Zanelli* case supports those contentions. The Commission did make the 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 sanction 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.* case, Docket No. 1115, 8 F.M.C. 109 (1964), and the sanction imposed must serve such a purpose and not be punitive in character. *Independent Ocean Freight Forwarder License E. L. Mobley, Inc.*, 21 F.M.C. 845, 847.

An underlying remedial public interest purpose does not equate to the view that sanctions are to be corrective and not punitive.

The Respondent argues further that its fate is in astonishing contrast to that of several other forwarders who were re-licensed by the Commission without obtaining retroactive bond coverage to December 1, 1978, leaving the public interest in their operations unprotected (Opening Brief, p. 9).

Hearing Counsel in its Reply Brief, p. 5, says Respondent seems to imply that it was, for some unstated reason, singled out and subjected to harsher treatment than other freight forwarders who were allegedly "similarly situated." Hearing Counsel says the fallacy in Continental's assertion is that other forwarders, the revocation of whose licenses was vacated or whose licenses were reissued either with or without the submission of new applications were not "similarly situated."

The Presiding Administrative Law Judge deems the observation of Hearing Counsel that the Respondent has not shown it and other forwarders were similarly situated is correct and that perhaps is one

reason why Hearing Counsel stipulated to Exhibit No. 1. It cannot be said that the Commission is bound by anything that appears before it to deal with all cases at all times as it has dealt with some that seem comparable. The Commission must be satisfied that the public interest will be served by issuing or renewing a license. *FCC v. WOKO*, 329 U.S. 223, 91 L. Ed, 204 (1946). The number of violations by the Respondent and the period of time from December 2, 1978 through June 1980 they covered, takes away any technical aspect and becomes flagrant violations, leading the Presiding Administrative Law Judge to *find and conclude* that at this point the Respondent cannot be found fit to be licensed as an independent ocean freight forwarder.

For the many violations herein of the Shipping Act the Respondent should be assessed a civil penalty pursuant to section 32(e) (46 U.S.C. 831(e)) of the Act.

The Commission's Bureau of Hearing Counsel and Continental Forwarding, Inc., have proposed a settlement of civil penalties. The Respondent agrees to pay to the Commission the sum of \$17,500 to be made in four equal installments of \$4,375. First payment within 30 days from final approval of the settlement agreement and other installments 4, 8 and 12 months from date of final approval of the settlement agreement. Interest on unpaid balance shall be paid with each installment at the rate of 12% per annum.

The Respondent in its August 31, 1979, affidavit of its President, Franz Zinssmeister, subscribes and swears that since December 1, 1978 to August 31, 1979, the Respondent completed three hundred sixty-five (365) shipments for export; that for these shipments approximately \$14,862.00 has been billed for forwarding fees and approximately \$5,241.00 for brokerage has been collected. These two figures (\$14,862.00 and \$5,241.00) total \$20,103. The proposed settlement is \$17,500. The record does not indicate what was realized by the Respondent from the 107 shipments after August 31, 1979. In any event in this proceeding there are at least 472 shipments by the Respondent after revocation of its license, all in violation of section 44 of the Shipping Act. Section 32(e) gives authority to the Commission to assess or compromise all civil penalties provided in this chapter. Violations of section 44 of the Act subjects one to a civil penalty not to exceed \$5,000 for each such violation (section 32(a)); violations of any order, rule, or regulation of the Federal Maritime Commission made or issued in the exercise of its power, duties or functions subjects one to a civil penalty of not more than \$1,000 for each day such violation continues (section 32(c)). The Respondent has since December 1978 to June 1980 continued forwarding without a license, that is a period of about 18 months or 540 days.

Upon consideration of the above and the proposed settlement of civil penalties submitted for approval, the Presiding Administrative Law

Judge *finds* and *concludes* that the amount of settlement is insufficient and because it is, the settlement should not be approved. Approval of the proposed settlement is denied. On the other hand, if the civil penalty under the circumstances of this proceeding was doubled to \$35,000, it is the opinion of the Presiding Administrative Law Judge such a settlement should be approved, when entered into by the parties.

In a recent case before the Commission, *Rene Lopez and David Romano d/b/a United Dispatch Service--Independent Ocean Freight Forwarder License No. 1381*, 22 F.M.C. 522, 524 n.4 (1980), pointed out--Sanctions under section 44 must be tailored to the facts of each individual case. In that case Respondent admits collecting approximately \$2,000 in freight compensation for 82 shipments handled by Foreign Freight Forwarders, Inc., under Respondent's name and license number. In view of Respondent's six-year violation free history, the Commission said it was satisfied that a six-month suspension will serve a remedial interest purpose, and that a more severe sanction is unnecessary to achieve this end in this particular case.

In the instant case the Respondent has been a freight forwarder since 1958, licensed since 1965. The Respondent had a 20 year (13 year licensed) violation free history followed by the spate of violations (over 400) in this proceeding over a period of approximately 18 months.

In the opinion of the Presiding Administrative Law Judge, the Respondent can be the catalyst in determining how quickly the Respondent will be in a position to make another application for an independent ocean freight forwarder license. The Respondent should meet with Hearing Counsel again as to the settlement of civil penalty in the amount of \$35,000, which amount the Presiding Administrative Law Judge approves. Upon payment of the civil penalty in the whole amount or first installment as may be provided in the settlement, the Respondent may apply to the Commission for an independent ocean freight forwarder license.

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

(1) The Respondent violated section 44(a), Shipping Act, 1916, by engaging in unlicensed forwarding activities.

(2) Respondent violated section 44(e) of the Shipping Act, 1916, by accepting ocean carrier compensation it was not qualified to receive for shipments forwarded after its license was revoked.

(3) The Respondent at this point is not found fit to be licensed as an independent ocean freight forwarder.

(4) Civil penalties should be assessed against Respondent pursuant to section 32(e) (46 U.S.C. 831(e)), for violations of the Shipping Act, 1916, in the amount of \$35,000.



(5) The proposed settlement arrived at between Hearing Counsel and Respondent in the amount of \$17,500 is not approved.

(6) Hearing Counsel and Respondent should remake the settlement as to Civil Penalty in the amount of \$35,000 with the same schedule of payment. When that is done and the civil penalty of \$35,000 is paid or the first installment as may be provided, the Respondent may apply to the Commission for an independent ocean freight forwarder license.

Wherefore, it is *ordered* that:

1. The application of Respondent for an independent ocean freight forwarder license is denied.

2. The Respondent, pursuant to section 32(e) (46 U.S.C. 831(e)) of the Shipping Act, 1916, is assessed a civil penalty of \$35,000, which is approved to be the settlement agreement of the Civil Penalty to be set forth in documents similar to those presented herein wherein the settlement agreement was for \$17,500 but was not approved by the undersigned.

3. The Respondent upon payment of the civil penalty of \$35,000 or first payment as may be provided in its settlement agreement may apply for a license as an independent ocean freight forwarder.

(S) WILLIAM BEASLEY HARRIS  
*Administrative Law Judge*

Washington, D, C.  
September 18, 1980

FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-47

LUIGI SERRA, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE

*February 2, 1981*

Notice is given that no exceptions have been filed to the December 9, 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**

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**DOCKET NO. 80-47****LUIGI SERRA, INC.****v.****SEA-LAND SERVICE, INC.**

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Reparation denied.

*Richard L. Furman* for the Complainant.*J. M. Ridlon* for the Respondent.**INITIAL DECISION<sup>1</sup> OF JOHN E. COGRAVE,  
ADMINISTRATIVE LAW JUDGE***Finalized February 2, 1981*

Complainant, Luigi Serra, Inc., International Freight Forwarders, charges respondent, Sea-Land Service, Inc., a common carrier by water in the foreign commerce of the United States, with violations of sections 17, 18(a), and 18(b)(5) of the Shipping Act, 1916, and asks for an award of reparation in the amount of \$38,089.21. Serra's complaint is grounded on the theory that the rates charged by Sea-Land on the shipments in question were unjustly discriminatory, unjust and unreasonable, and so unreasonably high as to be detrimental to the commerce of the United States.

On May 31, 1979, Serra booked with Sea-Land a movement of four 35-foot containers of cargo consisting of empty steel ammunition boxes to be transported from Jacksonville, Florida, to Leghorn, Italy. Three of the containers moved under Sea-Land Bill of Lading No. 971-780024, dated June 4, 1979, and the remaining container moved under Sea-Land Bill of Lading No. 971-780313, dated June 10, 1979.

The four containers were carried by Sea-Land pursuant to the terms of 11th revised page 80 of the South Atlantic/Spanish, Portuguese, Moroccan and South Mediterranean Rate Agreement No. 10261, Freight Tariff No. 1-FMC-1 (Section 1), effective February 21, 1979. The tariff contained no specific commodity rate for empty steel ammunition boxes, and the shipment was rated at the Cargo NOS rate \$211.50 W/M. Total freight charges, including a bunker surcharge, were \$44,034.38. The shipment moved on a freight collect basis; and

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<sup>1</sup> 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).

during a period when the consignee, La Metalli Industriale S.p.A., refused to pick up the shipment, demurrage charges of \$2,334.83 accrued.<sup>2</sup>

Sea-Land became a member of Rate Agreement No. 10261 on August 15, 1977, when it was formed, *Approved Conference, Rate, Inter-conference and Joint Service Agreements and Selective Cooperation Working Arrangements of Steamship Lines in the Foreign Commerce of the United States*, p. 4-122. The Rate Agreement consists of eleven carriers. Prior to Sea-Land's entry into the Agreement, the trade in question was covered by Sea-Land's individual Tariff No. 168-B, FMC 73, which was in effect in June 1977.

### DISCUSSION AND CONCLUSIONS

Section 18(a) provides in relevant part:

That every common carrier by water in *interstate commerce* shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs . . . (Emphasis mine.)

Since the shipments in issue here were in the foreign commerce of the United States, section 18(a) is not applicable to them and no violation of that section can be found in this proceeding.

Section 17 of the Act provides:

That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board [Commission] finds that any such rate, fare or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

To establish a violation of this section, a complainant must show that the rate in issue unjustly discriminates between shippers or ports or that the rate is unjustly prejudicial to exporters of the United States as compared to their foreign competitors. The essential element in each instance is a comparison of the rates charged one shipper with comparable rates charged another shipper, which comparison shows that one shipper's rates were unjustly discriminatory or unjustly prejudicial to an American exporter. No such showing has been made here. In the absence of any facts indicating the existence of other shippers of similar traffic over the same line under substantially the same circumstances

<sup>2</sup> La Metalli protested what it considered the exorbitant rate and refused to pay Sea-Land until Serra agreed to reimburse La Metalli. All outstanding freight and demurrage charges have been paid to Sea-Land by La Metalli.

who paid different, more advantageous rates, no unjust discrimination in violation of section 17 can be found. *North Atlantic Mediterranean Freight Conference - Rates on Household Goods*, 11 FMC 202 (1967). Similarly, no evidence exists that a foreign competitor of an exporter from the United States received a rate which prejudiced the latter. A showing of different treatment to another similarly situated person is a prerequisite to a finding of a violation of section 17. *Commodity Credit Corp. v. Lykes Brothers Steamship Co.*, 18 FMC 49 (1974).

Complainant Serra's theory is grounded on what can be termed an historical tracking of the rates applied to empty ammunition boxes. Serra points out (1) that in June of 1977 Sea-Land had a rate of \$44.50 per 40 cubic feet on steel ammunition boxes from U.S. South Atlantic and Gulf ports to ports in France and Italy; (2) that at the time of the shipments in question, the rate was \$211.50 W/M; and finally (3) Sea-Land's present rate on empty ammunition boxes is \$130.00 per 2,240 pounds. From this Serra submits that "a variety of inferences can be drawn," the most important of which is "that the general cargo rate is uncompetitive and excessive."

Actually, the reasons for the "fluctuation" of the rates are easily found from the record. In 1977 Sea-Land had its own tariff, which contained a specific commodity rate applicable to empty ammunition boxes. However, when it joined the Rate Agreement, it was bound to apply the Rate Agreement Tariff, which did not have a specific commodity rate for the boxes; and it was compelled to apply the higher Cargo NOS rate. Finally, the present rate of \$130.00 per 2,240 pounds was put into the Rate Agreement Tariff at the specific request of Mr. E. Torres of Luigi Serra. An additional inference which can be drawn from the record here is that sometime prior to Sea-Land's entry into the Rate Agreement, Serra shipped some boxes under Sea-Land's individual tariff and then some two years later booked the present shipments assuming the rate had remained the same -- if true, a dubious assumption indeed.<sup>3</sup> In any event, section 17 simply does not address itself to "excessive" or unreasonable rates. Any attempt to use the provisions of section 17 to sustain an allegation that the rates of a carrier are unreasonable would be an attempt to have the Commission prescribe reasonable rates for foreign commerce, a power the Commission does not possess. *Heavy Lift Practices and Charges of Hapag-Lloyd* 21 F.M.C. 637 (1979).

Section 18(b)(5) provides:

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 such carriers which, after hear-

<sup>3</sup> Serra received no rate quotation from Sea-Land at the time the present shipments were booked.

ing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

While not specifically addressed to the provisions of section 18(b)(5), complainant's entire argument would seem to be in its two assertions that "it is difficult to imagine how the rates under discussion could be justified" and that "this narrow segment of commerce could not exist if freight rates bore a percentage value to the goods as calculated [by complainant]."<sup>4</sup> Unfortunately, the record contains no evidence of the elements of an 18(b)(5) violation which complainant itself, citing *Ocean Rate Structures*, 12 FMC 34 (1968), admits is necessary to its case. But even if Serra had put in any evidence, the remedy it seeks, reparation, is not available under section 18(b)(5) with the case in its present posture.

The language of 18(b)(5) does not initially prohibit any conduct by carriers. It simply requires that the Commission make the requisite finding that a rate is so high or low as to be detrimental to commerce and to order the offending rate discontinued. This order of the Commission is a prerequisite to any sanctions under the section. *Federal Maritime Commission v. Caragher*, 364 F.2d 709, 717 (2d Cir. 1966). And until a violation of that order of the Commission is found, no reparation may be awarded. *Pacific Westbound Conference Investigation of Rates Pertaining to Wastepaper*, 21 F.M.C. 834 (1979); *Commodity Credit Corp. v. American Export Isbrandtsen Lines, Inc.*, 15 FMC 171, 191 (1972); *Valley Evaporating Company v. Grace Line, Inc.*, 14 FMC 16, 26-27 (1970). Here there is no order of the Commission requiring the discontinuance of the rate in issue, thus no reparation can be awarded.

Finally a word needs to be said about complainant's reliance upon *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968), and *Wolfsburger Transport-Gesellschaft m.b.h. v. Federal Maritime Commission*, 562 F.2d 827 (1977). Serra argues that these cases stand for the proposition that the reasonableness of a rate is whether the "charge levied is reasonably related to the service rendered." Whatever the validity of complainant's analysis, the cases are inapposite. They are representative of a distinct line of cases which deal with situations which do not involve the freight rates of an ocean carrier and they are not applicable to cases such as this one. See, e.g., *Free Time Practices - Port of San Diego*, 9 FMC 525 (1966), at pages 545-547.

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<sup>4</sup> Complainant says that the freight charges on the shipment of three containers "represents 64% of the FAS value of the goods" and that the freight charges on the single container shipment "represent 65% of the value of the goods."

For the foregoing reasons, Complainant has failed to show that respondent has violated sections 17, 18(a) and 18(b)(5). The complaint is dismissed.

(S) JOHN E. COGRAVE  
*Administrative Law Judge*

Washington, D.C.  
December 9, 1980

## FEDERAL MARITIME COMMISSION

DOCKET NO. 79-59

STUTE INTERNATIONAL, INC. - INDEPENDENT OCEAN  
FREIGHT FORWARDER APPLICATION

### ORDER ADOPTING INITIAL DECISION

*February 5, 1981*

The Commission has before it the Exceptions of Stute International, Inc., to the Initial Decision of Chief Administrative Law Judge John Cograve served October 14, 1980 in the above-captioned matter. A "Reply to Exceptions" was filed by the Commission's Bureau of Investigation and Enforcement.

Stute alleges error in the following aspects of the Initial Decision: (1) it failed to find that a shipper would actually *exercise* direct or indirect control over Stute's forwarding operations and the mere possibility of shipper control should not disqualify an applicant; and (2) it applied a standard of absolute licensee/shipper separation which has been discredited by the Eighth Circuit Court of Appeals and abandoned by the Commission. The Bureau of Investigation and Enforcement disputes these contentions and argues that the Initial Decision is correct in all respects.

Examination of Stute's exceptions and the remainder of the record in this proceeding reveals that Stute is merely rearguing points raised before and fully resolved by the Presiding Officer. The critical question in dispute is one of law, that is, whether the statutory prohibition against licensing persons "directly or indirectly . . . controlled by [a shipper]" refers to: (1) the legal right to control; or (2) the actual exercise of control over the applicant's forwarding policies and activities.\* The Presiding Officer carefully examined prior Commission decisions on this subject and concluded that a person subject to a shipper's legal right to control lacked the independence required for licensing as an independent ocean freight forwarder under 46 U.S.C. 841b. The Commission believes this conclusion to be correct and consistent with established precedent and will therefore deny Stute's application and adopt the Presiding Officer's decision as its own. *Norman G. Jensen, Inc. v. Federal Maritime Commission*, 497 F.2d 1058 (8th Cir. 1974), is inapplicable to Stute's situation because in that case the court found

\* See the definition of "independent ocean freight forwarder" contained in section 1 of the Shipping Act, 1916 (46 U.S.C. 801).



STUTE INTERNATIONAL, INC. - FREIGHT FORWARDER 655  
APPLICATION

that the challenged ownership interest was not an interest in a "shipper." In this instance, it is undisputed that shipper status is properly attributable to Stute's parent organization.

THEREFORE, IT IS ORDERED, That the Exceptions of Stute International, Inc., are denied; and

IT IS FURTHER ORDERED, That the application of Stute International, Inc., for an independent ocean freight forwarder license is denied; and

IT IS FURTHER ORDERED, That the Initial Decision served October 14, 1980 in this proceeding is adopted by the Commission as its own and made a part of this Order; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY  
*Secretary*

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 79-59****STUTE INTERNATIONAL, INC. - INDEPENDENT OCEAN  
FREIGHT FORWARDER APPLICATION**

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Application for independent ocean freight forwarder license denied.

*Kenneth L. Everett* for the Respondent.

*Paul J. Kaller, Joseph B. Slunt and Deana E. Rose*, Hearing Counsel.

**INITIAL DECISION<sup>1</sup> OF JOHN E. COGRAVE,  
ADMINISTRATIVE LAW JUDGE**

*Adopted February 5, 1981*

The Commission initiated this proceeding to determine whether Stute International Inc. (Stute), is an independent ocean freight forwarder and is otherwise qualified to be licensed as required by section 44 of the Shipping Act, 1916, (46 U.S.C. 841b) and section 510.8 of General Order 4 promulgated thereunder.

The order instituting this proceeding states that Stute, acting as a forwarder, may be connected through intercorporate relationships with Chemie-Mineralien K.G. (Chemie), a consignee of shipments in the foreign commerce of the United States. Additionally it is alleged that Chemie was involved in shipments in the foreign commerce of the United States on which it received rebates.

**STIPULATED FACTS<sup>2</sup>**

Stute is a Delaware corporation with its principal place of business in New York City, and is a wholly owned subsidiary of Stute Verkehrrs GmbH. Stute has four employees and is engaged in the business of handling import shipments to the United States and acting as a consultant for export shipments. Heinrich A. Joost, a Deputy Managing Director of Verkehrrs is president of Stute. The Board of Directors of Stute is wholly composed of officers or employees of Verkehrrs. In 1978, Stute

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<sup>1</sup> 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).

<sup>2</sup> For clarity and brevity the entire stipulations entered into by Hearing Counsel and Stute have not been repeated verbatim here. Only those facts which are relevant and material to the issues presented and the resolution are set forth. The full stipulation, which is hereby made a part of this decision, is contained in the Appendix. The attachments and exhibits referred to in the stipulation are of course a part of the record.

had gross billings of \$1,040,000 and during the first nine months of 1979 it had billings of \$988,915.

Verkehrs has its principal office in Bremen, Germany, and is, among other things, an ocean freight forwarding company which is engaged in worldwide import/export trade. In addition to its ocean freight forwarding activities, it also provides warehousing, trucking, ship chartering, and customs clearance services in Germany. It also acts as a freight traffic consultant. Verkehrs is also the sole owner of subsidiaries operating as freight forwarders in London and Paris and is a 50% owner of a subsidiary which operates as a freight forwarder in Sharjah, United Arab Emirate. Verkehrs has approximately two hundred employees and its gross sales in 1978 were approximately 150 million Deutschmarks (DM) or, approximately 75 million dollars. Verkehrs is an organization known under German Law as a GmbH, which is a company, with its liability limited to the extent of its capitalization. Verkehrs is capitalized at one million DM. The Managing Directors of Verkehrs are Heinrich A. Joost, Dieter Wurmehl, and Gunter Holsing. Holsing and Joost are also directors of Stute. The three Managing Directors of Verkehrs are totally responsible for all its operations.

Kloeckner & Co. is a multinational holding and trading company with its principal place of business in Duisburg, Germany. Fifty-three companies in which Kloeckner owns more than a 5% interest are located in Germany and sixty-two companies in which Kloeckner owns more than a 5% interest are located outside Germany. Kloeckner is the sole owner of Verkehrs. Kloeckner is a partnership of three individuals who are general partners and a limited partner which is the Kloeckner family trust. The capitalization of Kloeckner is 265 million DM, 99% of which is contributed by the Kloeckner family trust and the remaining 1% is contributed by the three partners, who, unlike the family trust, have unlimited personal liability. In 1978 Kloeckner has gross sales of over 7 billion DM. Kloeckner and its subsidiaries, are active in trading in steel products, metals, ores, chemicals, coal, solid and liquid fuels, heating equipment, machine tools and construction materials and equipment. The day-to-day operations of Kloeckner are conducted by the Board of Management. In addition, there exists a Partners' Supervisory Committee which acts as adviser and consultant to the Board. This committee is comprised of persons who are not employees or partners or managers of Kloeckner.

Chemie is a trading company located in Bremen, Germany, which purchases pumice stone, common ground clays, and additives for industrial oils from sources all over the world and sells these products in Europe. Its gross international sales are approximately 15 million DM per year. Its form of organization is that which approximates a limited partnership in the United States. It has two partners, one of which is Kloeckner, and the other is Deutzer Oel K.G. Kloeckner owns 98%

of Chemie. Deutzer, which is affiliated with Kloeckner, owns the remaining 2% interest in Chemie. Chemie's operation is run by its Managing Director, L. F. W. Luksemburg, who is not an officer, director, partner, manager or employee of Kloeckner.

Stute is a wholly owned subsidiary of Verkehrrs. Its president is a Managing Director of Verkehrrs and its Board of Directors is made up solely of employees or Managing Directors of Verkehrrs. Verkehrrs, in turn, is wholly owned by Kloeckner. However, none of Kloeckner's officers or employees are officers or employees of either Verkehrrs or Stute, and none of the officers or employees of Stute or Verkehrrs are officers or employees of Kloeckner. The two directors of Chemie are the Executive Officer of Kloeckner, Dr. Gunther Meyer and L. F. W. Luksemburg. Dr. Meyer is not a partner or member of the Board of General Management or the Partners' Supervisory Committee of Kloeckner.

The business operations of both Stute and Verkehrrs are managed independently from Kloeckner, including personnel management. In both cases supervision of the business by Kloeckner is minimal. Chemie makes a monthly report to Dr. Meyer in which the monthly sales of Chemie, both in dollars and tonnage values is stated and an estimate of the gross and net proceeds made. Dr. Meyer, as a director of Chemie, visits the Chemie office once a year. Chemie maintains its own bank accounts and has independent lawyers. Kloeckner does not provide Chemie with any services, except its books are audited annually by Kloeckner. The Managing Directors of Verkehrrs function independently from Kloeckner. They have separate authority over their personnel and may commit the company to bank loans. Verkehrrs furnishes complete financial and activity reports on a monthly basis to one of the members of the Board of General Managers of Kloeckner. Kloeckner audits Verkehrrs' books on an annual basis and provides Verkehrrs with computer services for which it is charged. Kloeckner, in the case of Verkehrrs, retains veto power over the use of Verkehrrs' funds for investments in or acquisitions of new businesses. Both Chemie and Verkehrrs retain all their receipts during the year and turn over their profits to Kloeckner at the end of each calendar year. During the year either Chemie or Verkehrrs, if it has a surplus in its bank account, may lend all or part of the surplus to Kloeckner and be paid interest on the loan. Conversely, either of them may, during the year, borrow money from Kloeckner and if they do they are then charged interest on that loan. Kloeckner takes no part in the day-to-day operations of either Chemie or Verkehrrs. Verkehrrs, in some instances, has acted as a freight forwarder, in Germany, for Kloeckner. In those instances, which amount to approximately 28% of Verkehrrs' gross billings (this figure includes truck, rail and air forwarding activities, as well as ocean freight activities) Verkehrrs has submitted bids to Kloeckner for the

business in competition with other freight forwarders. Verkehrrs has never provided forwarding services to Chemie and has no connection with Chemie, nor does it have any knowledge of or control over Chemie's business activities. Neither Chemie nor Verkehrrs have any employees, officers or directors in common. Stute and Chemie have no officers, directors or employees in common.

Chemie purchases common ground clays and oil additives from suppliers in the United States and sells these products throughout Europe. It purchases approximately 7,000 tons of ground clays per year and of these purchases, approximately 500 to 700 tons per year are made for its own account. This tonnage is stored in public warehouses in Germany and used as inventory for sale in spot markets in Germany. Except when Chemie purchases for its own account, no purchases of common ground clays are made without there first being an order given to Chemie by one of their customers in Europe. In the case of oil additives, all purchases are made only after a customer's order has been received by Chemie. In the normal course of business, the common ground clays are sold to Chemie f.a.s. a designated vessel in a port in the United States. Chemie's supplier is listed as the "shipper" on the bill of lading and the consignee is "to the order of shipper." The party designated in the bill of lading as the "notify party" is either a freight forwarder designated by Chemie or the customer. Chemie sells the goods to its customers outside Germany on a c.i.f. basis with the exception of customers in Portugal who are sold on either the c.i.f. or "free factor" basis. In the case of 90 to 95% of Chemie's imports of clays from the United States the goods are delivered directly to Chemie's customer. Chemie purchases oil additives only after first receiving a customer's order. In some instances Chemie will purchase for its own account an amount required to fill a container if a customer's order is for less than a full container. Chemie purchases approximately ten full containers of oil additives per year from its supplier in the United States. These containers are shipped on an f.o.b. basis by the supplier. In the case of the common ground clay shipments, Chemie employs an American ocean freight forwarder to handle the shipments. It has employed this forwarder for more than 25 years. At no time has it employed Verkehrrs or Stute as a freight forwarder and it has no intention of doing so.

In 1973 a representative of Paul Gunther GmbH & Co., a company located in Bremen, Germany, which acts as agent for Sea-Land Service, Inc., approached Chemie in order to interest Chemie in using its ocean freight services. In the course of his sales call the representative offered to make up part of the inland freight differential which would occur if Sea-Land Service was used by Chemie by paying Chemie \$25 per container for each full container shipped via Sea-Land. Chemie, which had no knowledge of the United States laws, agreed to the offer

in order to give it more frequent service. Such an offer is not illegal under German law. Chemie admits that it received payment of the \$25 fee per container on shipments of approximately 49 full containers over a three month period during the latter half of 1973 and the first few weeks of 1974. The total amount received by Chemie was \$1,500. None of the money received by Chemie was returned to the Shipper in the United States. In fact, it was kept in a separate fund by Chemie and used to purchase Christmas presents for substantial customers of Chemie. Neither Kloeckner nor Verkehers had any knowledge of the payments received in this manner by Chemie.

### DISCUSSION AND CONCLUSIONS

The threshold issue here is whether the common ownership by Kloeckner of a consignee of goods and, through a subsidiary, of respondent Stute destroys the independence from shippers or consignees necessary to the grant of a freight forwarder license under section 44(b) of the Shipping Act, 1916 (46 U.S.C. 844).

Section 44(b) of the Shipping Act provides:

A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant is, or will be, an *independent ocean freight forwarder* as defined in this Act and is fit, willing, and able properly to carry on the business of forwarding. . . . (Emphasis mine.)

Section 1 of the Shipping Act, defines an independent ocean freight forwarder as:

. . . a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or a purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest.

In a line of cases beginning with *Application for Freight Forwarding License - Louis Applebaum*, 8 F.M.C. 306 (1964), the Commission has held that there were no exceptions to the prohibition against shipper or consignee connection and that the prohibition was absolute.

In *Freight Forwarding License - Wm. V. Cady*, 8 F.M.C. 352 (1964), Cady was an employee of A. E. Chew & Co., Inc., a shipper in foreign commerce. Cady, in an effort to avoid the prohibition against shipper connection, said he would confine his forwarding activities to shipments in which Chew was neither seller, shipper, consignee, nor purchaser. The Commission said:

The present intentions of Cady and his employer are immaterial since the statute makes licensing depend upon the existence of control and not upon its exercise. (8 F.M.C. 360).

The question of control arose again in *Application for Freight Forwarding License - York Shipping Co.*, 9 F.M.C. 72 (1965). Here again the applicant was an employee of a shipper. The examiner in his initial decision granted the license because the record before him contained no evidence anyone had actually exercised any control over the applicant. The Commission overruled the examiner and denied the license quoting the above language from *Cady*.

In *License No. 790 - North American Van Lines*, 14 F.M.C. 215 (1971), North American, the holder of a forwarder's license was purchased by the PepsiCo Co., Inc. PepsiCo owned stock in Pepsi Cola and Frito-Lay corporations, both shippers in U.S. foreign trade. North American argued that, notwithstanding Commission precedent, the prohibition against shipper connections was not absolute and the Commission should exercise its discretion and permit North American to retain its license subject to appropriate restriction, i.e., North American could not forward for PepsiCo, Pepsi Cola or Frito-Lay. The Commission rejected the argument that the prohibition was not absolute citing *Applebaum*, *Cady* and *York*, *supra*. In arguing that the Commission had the discretionary power to "amend or modify" the license so as to permit North American to retain its license despite its shipper connection, North American sought to distinguish between licenses already issued and new or initial licenses. The Commission rejected the distinction and again stated that the law contained "no proviso . . . exempting from the ban on licensing shipper-controlled forwarders who do not forward shipments for the shipper employees. . . ." (14 F.M.C. 222).

Stute concedes that up to and including the decision in *North American*, the cases hold that the prohibition against shipper connection was absolute.<sup>3</sup> However, Stute argues that beginning with the decision of the Eighth Circuit Court of Appeals in *Norman G. Jensen, Inc. v. Federal Maritime Commission*, 497 F.2d 1058 (8th Cir. 1974) the standard of absolute independence has been so modified as to permit Stute to be licensed notwithstanding Stute's intercorporate relationship with Chemie.

In *Norman G. Jensen, Inc. - Independent Ocean Freight Forwarder License No. 800*, 16 F.M.C. 370 (1973), the Commission found that the licensee (Jensen) was through its relationship with International Traders & Counselors, shipper connected and could retain its license only if it severed all connections with ITC. Jensen appealed the Commission's decision to the Eighth Circuit Court of Appeals which reversed that decision. Stute argues that the Court in reversing the Commission so

<sup>3</sup> Stute does however attempt to distinguish the factual situation in those cases from its own. The attempt however depends for its validity upon its argument that subsequent decisions have modified the conclusion that the prohibition against shipper connection is "absolute".

changed the concept of "control" as to permit (indeed require) the licensing of Stute.

On appeal, the Court stated the issue as ". . . whether Jensen is sufficiently independent to come within the definition of 'independent ocean freight forwarder' set forth in 46 U.S.C. 801." Since there was no doubt that Jensen was engaged in the business of forwarding, and there was in fact a connection between Jensen and ITC,<sup>4</sup> the only question remaining was whether ITC was a shipper. The Court found that ITC:

. . . functions as a service enterprise for, primarily, only four clients. The services performed by ITC consist of making arrangements for transportation to port, preparing export declarations, consular invoices and related documents, translating documents, receiving purchase orders and payments, preparing commercial invoices and inventory reports, investigating credit and selecting freight forwarders. Whenever any of ITC's clients need the services of an ocean freight forwarder, ITC selects Jensen unless its client or consignee has some contrary preference. ITC is paid for its services either as a fee on a retainer basis, an amount equal to 10% of the price of the goods shipped, or a transactional service charge plus the 10% fee.

The Court concluded that ITC was not a "shipper" as that term was commonly understood, i.e., "the owner or person for whose account the carriage of the goods is undertaken." *Compagnie Generale Transatlantique v. American Tobacco Co.*, 31 F.2d 663 (2d Cir.) cert. denied, 280 U.S. 555 (1929). Since ITC was not the owner of the shipments involved the *York, Cady* and *Applebaum* cases, *supra*, were clearly distinguishable and the Court concluded that ITC was not a shipper as used in section 801 of the Shipping Act. The Court next rejected the Commission's contention that ITC had a beneficial interest in the shipments of its clients. The Commission's argument was two-pronged: (1) Since ITC was compensated for its services on the basis of a percentage of the value or proceeds of the goods exported ITC had a beneficial interest in the shipments; and (2) The authority given to ITC by its shipper clients in the handling of their shipments was a proprietary right which also constituted a beneficial interest.

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<sup>4</sup> When the Commission began its investigation Jensen's 150 shares of stock were owned as follows: Norman G. Jensen--74 shares; Gordon W. Jensen and wife--74 shares; Bent Jensen (unrelated to the other shareholders)--2 shares. Jensen's officers were Gordon W. Jensen, President and Treasurer, and Bent Jensen, Vice President and Secretary. ITC was owned 50% by Bent Jensen and wife and 50% by Gordon Jensen. Bent Jensen was president and Director of ITC and Gordon W. Jensen a Director and its Secretary and Treasurer. Subsequently these relationships altered so that the only remaining connection between Jensen and ITC was via Bent Jensen. Bent Jensen became the sole shareholder of ITC. He also retained the two shares of Jensen and continued to serve as an Officer and Director of Jensen.



The Court concluded the proscribed beneficial interest was only that interest in a shipment which could give rise to an indirect rebate, e.g., where a forwarder acquires by purchase or otherwise the right to share in the profit from a shipment and at the same time receives a brokerage fee from the carrier. The Court found that ITC's relationships with its clients were not such as could give rise to an indirect rebate and therefore that ITC had no beneficial interest in its clients shipments.

Since the Court concluded that ITC was neither a shipper nor had a beneficial interest in its client's shipments, it found it unnecessary "to review the Commission's conclusion that Jensen controlled or was controlled by, ITC."

Stute contends that the Court in Jensen rejected the Commission's standard of absolute independence and "held that in a common ownership situation one of the parties may be shipper connected." Moreover, Stute says that the Commission itself has recognized this in its report in *Independent Ocean Freight Forwarder Application--Sequoia Forwarders Company*, 19 F.M.C. 182 (1976).

In *Sequoia* the Commission concluded that "neither the language of section 1, its legislative history nor judicial interpretations of that section require that an applicant for a forwarder's license be free of *all* shipper connections." The *Sequoia* case involved the common ownership of an applicant and a licensed produce broker which acted as a purchasing agent for American Foods A.B., a consignee and purchaser of shipments moving in foreign commerce. The question presented was whether the broker (Cal-West) because of its relationship with American Foods was a shipper, consignee or a person with a beneficial interest in shipments to be forwarded by the applicant. The Commission concluded that Cal-West was not. Cal-West was clearly not a shipper or a consignee and the Commission found that Cal-West's relationship with American Food A.B. (the shipper, etc. in question) was not such as to give rise to a beneficial interest in American Foods' shipments. Finally the Commission concluded that American Foods did not "directly or indirectly" control Cal-West.<sup>5</sup>

Stute contends that the "rationale" of *Jensen* and *Sequoia* is such that the only question to be answered is whether Stute "directly or indirectly is controlled by a consignee." Since *Jensen* did not even take up the question of "control" one might, at first blush, wonder why Stute lavished so much attention to the case on brief. A closer examination of Stute's "rationale" of its position in this case reveals that *Jensen* is a necessary ingredient of Stute's ingenious attempt to mix two distinct principles of law and in the mixing have a portion of one of the principles blend so well that it disappears.

<sup>5</sup> "Cal-West and American Foods neither have employees in common, nor do they own stock or have a proprietary interest in, or a corporate connection with one another." (19 F.M.C. 188).

To Stute, when *Jensen* rejected the Commission's standard of "absolute independence" it established in its place the principle that not all shipper connections are prohibited, i.e., it is only those connections which lead to indirect rebates which are proscribed. Stute goes on to say:

Thus on the basis of *Jensen*, respondent would argue that the Shipping Act will permit shipper-connected or consignee-connected affiliations so long as those connections do not lead to forwarder situation of illegal rebate which the Shipping Act was intended to preclude.

So far, so good. In dealing with *Sequoia*, Stute sets up something in the nature of a syllogism. First, the Commission adopted the rationale of *Jensen* saying that the independence requirement was intended to prohibit only "those categories of relationships which give rise to an illegal rebate." Second, the Commission based upon its interpretation of the legislative history concluded that "it is the conduct of the particular person or entity involved and not its mere characterization as 'purchasing agent,' which raises the statutory bar."<sup>6</sup> Still so far, so good. However, Stute goes on to supply their "Rationale" of *Jensen* and *Sequoia* which is:

Thus, the conclusion that can be drawn from the two cases is that a shipper-connected applicant may qualify as an independent ocean freight forwarder if it complies with the requirement of independence as defined in the statute. The statute established the independence requirement to prohibit those categories of relationships which in and of themselves could be presumed to give rise to an illegal rebate. Thus, if the applicant does not fall within one of the prohibited categories it is presumed, without more to satisfy the independence requirements of the statute. The prohibited categories are shippers, consignees, sellers or purchasers of shipments to foreign countries or persons having any beneficial interest therein or persons directly or indirectly controlled by a shipper, consignee or by a person having a beneficial interest in shipments to foreign countries. (Emphasis mine.)

Having thus analyzed *Jensen* and *Sequoia*, Stute says that since it (Stute) is not a shipper, consignee, seller, purchaser of shipments, or a person having a beneficial interest in those shipments, "The only question [to be answered] is whether respondent directly or indirectly is controlled by a consignee." The progression from analysis to conclusion is so artfully done that it is quite easy to overlook the fatal flaw in the

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<sup>6</sup> This dealt with an argument that simply as "purchasing agent" American Foods was shipper connected.

reasoning. To reveal this flaw it is necessary to take up Stute's rationale step by step.

*Jensen* did not deal with the question of control. Stute itself admits this. What *Jensen* did deal with was the question of what relationship was necessary to establish a beneficial interest in shipments in foreign commerce. The Court concluded that the relationship had to be one which would give rise to an illegal rebate. From this it naturally followed that all shipper connections were not prohibited to forwarders.<sup>7</sup> With this principle firmly in hand, Stute shifts its attention to *Sequoia* and it is here that Stute blurs an essential distinction. *Sequoia* dealt with *both* beneficial interest and control.

Cal-West was obviously not a shipper, consignee or purchaser of the goods shipped so the question became whether Cal-West had a beneficial interest in a shipper, etc. It was in resolving this question that the Commission made the statement cited by Stute that "it is the conduct of the particular person or entity and not its mere characterization . . . which raises the statutory bar." The question of control was dealt with separately and exclusively in terms of corporate relationships.<sup>8</sup> The question was not treated as one involving *control* and a course of conduct which demonstrated that the *control* had never been exercised. But this is really what Stute is attempting to establish as a principle, i.e. that control if not exercised is not a bar to licensing. Stute has confused what it takes to establish the proscribed relationship with what are the consequences of that relationship once it is established.

It is not enough to "name" somebody a "shipper," "consignee" or a "person with a beneficial interest." What is required is that the person, named actually engage in conduct which makes him in fact a shipper, etc. However, once it has been established that the person is a shipper, the question of control over the forwarder does not depend upon a course of conduct, whether it be actual past conduct or intended future conduct. It is the *possibility* of control that "raises the statutory bar," and there is no jump high enough to clear that bar. See *Application for Freight Forwarder License--Louis Applebaum*, 8 F.M.C. 306 (1964); *Freight Forwarding License--Wm. V. Cady*, 8 F.M.C. 352 (1964); *Application for Freight Forwarding License--York Shipping Co.*, 9 F.M.C. 72 (1965), and *License No. 790--North American Van Lines*, 14 F.M.C. 215 (1971).

Stute would distinguish these cases by arguing that in each of them the possibility of control was "a probability based upon facts or admissions showing actual control." According to Stute these cases "stand for the proposition that once there is a finding or admission of control

<sup>7</sup> It should be remembered, however, that *Jensen* dealt not with the forwarder itself, but with ITC, the "man in the middle" standing between the forwarder and the shippers.

<sup>8</sup> See footnote 5, *supra*.

of an applicant by a shipper or consignee, the statute does not permit the granting of a qualified or conditional license allowing an applicant to operate as an independent ocean freight forwarder only in those situations where he is free from shipper control." The obverse of this argument is, of course, that where control even though possible has not been actually exercised, the possibility of future control does not preclude licensing.

To read these cases as Stute does is to make a shambles of the statutory scheme for licensing forwarders. The principle Stute advances when carried just one step further would allow the licensing of the clearly proscribed "dummy" forwarder. All a shipper would have to do is create a corporation which could operate as a broker, then apply for a forwarder's license and simply refrain from actually exercising the power which it clearly possesses to control its own corporation. Under Stute's theory, since actual control could not be shown, the license would have to be granted. The consequences are easily foreseen. With license in hand, control is exercised and the shipper begins receiving illegal rebates from its dummy forwarder. The point need not be labored. Neither the statute nor the Commission's decisions can be read to allow such an absurd result.<sup>9</sup> The question, then, becomes whether there exists the possibility of the control of Stute by Chemie.

As Stute concedes the control would have to be exercised through Kloeckner, i.e., "that Kloeckner and Co. exercises control in such a manner over Chemie-Mineralien and Verkehrrs and Verkehrrs, in turn, exercises control over Stute in such a manner that the activities of Chemie-Mineralien control the activities of Stute." It is Stute's position that such control would not be exercised because, "If it were, the concept of subsidiary companies of a multinational conglomerate operating as independent profit centers would be obliterated."

This somewhat simplistic view of multinational conglomerates glosses over the purpose of holding companies like Kloeckner. Thus:

The dominant characteristic of a "holding company" is the ownership of securities by which it is possible to control or substantially to influence policies of one or more operating companies in [a] particular field of enterprise. *North American Company v. Securities and Exchange Commission*, 327 U.S. 686 (1946).

The interrelationship here is much like that at issue in the *North American Van Lines* case *supra*. There PepsiCo a holding company

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<sup>9</sup> The lengths to which Stute finds it necessary to go to construct its theory are illustrated by its analysis of the *North American Van Lines* case. There Stute had to go to the briefs where for the purpose of argument, North American admitted that Pepsi Co. was a shipper and that North American was controlled by PepsiCo. In fact the Commission found that since the purchase of North American by PepsiCo, North American had refrained from forwarding activity until the potential conflict posed by the affiliation with PepsiCo was resolved.

owned North American (the forwarder) and Pepsi Cola and Frito Lay (both shippers) and the Commission had no difficulty in finding that North American "is or can be controlled by Pepsi Co." (14 F.M.C. 221). Here Kloeckner can just as readily control both Stute (through Verkehrrs) and Chemie. This possibility precludes the licensing of Stute as an *independent* ocean freight forwarder, and the application is denied.

An additional issue raised in the Commission's order instituting this proceeding was whether the receipt by Chemie of rebates rendered Stute unfit to be licensed. The facts as stipulated show the following.

At the suggestion of a U.S. flag carrier's agent in Germany, Chemie entered into an agreement whereby the agent paid Chemie \$25 per container for every full container carried. Chemie agreed to the proposition because it gave Chemie more frequent service from the United States. At that time the price of goods purchased by Chemie in the United States was based upon delivery to the pier in Savannah, Georgia. The carrier did not call at that port, and the payment was intended to make up part of the increase in price due to delivery of the goods to ports other than Savannah. There were 49 payments made over a three month period during the latter half of 1973 and the first days of 1974 for a total of \$1,500. No entity in the United States received any of the payments.<sup>10</sup> Neither Kloeckner nor Verkehrrs knew of the payments.

Stute's argument is that since Stute's connection with Chemie is such that Stute has the independence necessary to be licensed, the actions of Chemie cannot be imputed to Stute. In Stute's view, "The question of fitness is moot." On this issue Hearing Counsel agrees more or less with Stute. They contend that since Stute fails to meet the required standard of independence the question of rebates need not be reached. However, if the Commission finds that Stute and Chemie are not so closely related as to bar licensing Stute, then, Hearing Counsel contends, the activities of Chemie have no bearing on the fitness of Stute. I agree.

The only circumstances under which the rebates to Chemie can become a real issue would be if it was determined that Stute was independent of Chemie. That finding would, it seems to me, preclude imputing the illegal conduct to Stute for the purpose of rendering Stute unfit for licensing.

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<sup>10</sup> Stute questions the application of section 16 of the Shipping Act to the payments made to Chemie but does not make any argument on the question.

On the basis of the above I conclude that Stute fails to meet the standard of independence required for licensing as a freight forwarder and that the license should be denied.

(S) JOHN E. COGRAVE  
*Administrative Law Judge*

Washington, D. C.  
October 14, 1980

APPENDIX

STIPULATION BETWEEN HEARING COUNSEL  
AND STUTE INTERNATIONAL, INC.

This stipulation is entered into between Hearing Counsel and Stute International, Inc. ("Stute"), the only parties to this proceeding.

1. The sole issues presented in this proceeding are as follows:

- (a) whether Stute is independent of shipper connection in view of the relationships between Stute and Kloeckner, between Stute and Chemie-Mineralien K.G. ("Chemie"), and between Kloeckner and Chemie;
- (b) whether Stute is "otherwise fit to be licensed as an independent ocean freight forwarder" because of the acceptance by Chemie of payments totalling \$1,500 during the latter half of 1973 until the first days of 1974.

2. The facts in regard to the above issues - i.e., the control exercised by the parent company, Kloeckner & Co.; whether there exist interlocking officers and/or directors among Stute and Kloeckner and Chemie; current shipping activities conducted by Chemie; and the possible involvement of Chemie and/or Kloeckner with regard to the question of rebating - are contained in the accompanying affidavits of L.F.W. Luksemburg and Heinrich A. Joost, with the exception of the additional fact set forth in paragraph 3 below.

3. Kloeckner & Co. ("Kloeckner") is a multinational conglomerate, having affiliate concerns throughout the world and a parent company located in Germany. A listing of the Kloeckner parent and affiliate companies is attached hereto.

## AFFIDAVIT OF L.F.W. LUKSEMBURG

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FREE STATE OF BREMEN

ss.:

FEDERAL REPUBLIC OF GERMANY

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L.F.W. LUKSEMBURG, being duly sworn, depose and say as follows:

1. I am the Managing Director of Chemie-Mineralien K.G. ("Chemie"); which is located in Bremen, Germany.

2. I am personally familiar with the history and operations of Chemie. The facts set forth in this affidavit are based on personal knowledge and are true and correct to the best of my knowledge and belief.

3. Chemie's form of business organization is that which is known under German law as a Kommanditgesellschaft (K.G.) which I am informed and believe is somewhat comparable to a limited partnership in the United States. In Chemie there are two partners. The partner with unlimited liability is Kloeckner & Co. and the limited partner is Deutzer Oel K.G. ("Deutzer"). Kloeckner & Co. is located in Duisburg, Germany and Deutzer in Cologne, Germany. The capital contribution of Kloeckner & Co. to Chemie is 18,000 DM and that of Deutzer is 2,000 DM. Deutzer is a company affiliated with Kloeckner & Co.

4. Kloeckner & Co. purchased a 100% interest in Chemie in 1958 and in 1973 changed the organization of Chemie from that of a company with limited liability (GmbH) to that of a limited partnership. In order to comply with German law, which requires a K.G. business organization to have at least two partners, Deutzer became a partner and made a nominal capital contribution to the company. At the time that Kloeckner purchased Chemie I became general manager. The company, prior to purchase, had been privately owned by one individual. He sold the business to Kloeckner & Co. because he was in ill health and I, who was the assistant manager, continued on as general manager.

5. Chemie has a total of 15 employees, including bookkeepers, receptionists and secretaries. It has seven (7) operating employees. It is a trading company which buys pumice stone, common ground clays, additives for special fuels, such as rocket fuel and colorants for various



industrial oils from sources all over the world and sells them in Europe. Its gross annual sales are approximately 15 million DM per year.

6. In the course of its business Chemie purchases a portion of its requirements of common ground clays and a small quantity (approximately 120 tons per year) of oil additives from suppliers in the United States and sells them throughout Europe. Chemie's source of supply for common ground clays purchased from the U.S. is from processors located in the State of Georgia, U.S.A., represented by Engelhard Minerals of Chemicals Corp. ("Engelhard"). Chemie has done business with Engelhard for 50 years or more and Engelhard is its only source of supply in the United States for common ground clays. Chemie purchases approximately 7,000 tons of common ground clays per year from Engelhard. Of the purchases of common ground clays approximately 500 - 700 tons per year are made for Chemie's account. This tonnage is stored in public warehouses in Germany and used as inventory to supply the spot market in Germany. Chemie does not own, lease or operate any warehouse. The inventory on hand in Germany varies at any one time from 300 to 700 tons.

7. Except in those cases where Chemie is purchasing common ground clays for sale in the spot market, no purchases of common ground clays are made in the United States without there first being an order given to Chemie by one of its customers in Europe. In the case of the oil additives all purchases are made only after the customer's order has been received. In the normal course of business the common ground clays are sold by Engelhard to Chemie f.a.s. a designated vessel in the ports of Jacksonville, Florida or Savannah, Georgia. The shipper on the Bill of Lading for these shipments is Engelhard. The consignee on the Bill of Lading is "to the order of shipper" and the party designated in the Bill of Lading as the "Notify Party" is, either a freight forwarder designated by Chemie or the customer. The freight forwarder in each instance is a freight forwarder in Europe who has received orders from Chemie as to the ultimate destination of the goods. Chemie sells the goods to its customers outside Germany on a c.i.f. basis (with the exception of customers in Portugal, who are sold on a f.o.b. basis). Customers in Germany are sold on either a c.i.f. or "free factory" basis. Thus, on the transactions which constitute approximately 90% - 95% of Chemie's imports from the United States the goods are delivered directly to Chemie's customer. In no instance (including those instances when Chemie purchases for its own account) is Chemie the end user of the product. It acts in every instance only as a trading company.

8. In the case of the oil additives Chemie's purchases are made only after a customer's order has been received. If the customer's order is for an amount less than a full container, Chemie will purchase the amount required to fill the container for its own account, and store it in

a warehouse for sale in small lots. Chemie purchases 10 full containers per year of oil additives from its supplier Ethyl Corporation. The containers are shipped on a f.o.b. basis by Chemie's supplier. The freight forwarder on these shipments is employed by the supplier.

9. Chemie employs an American freight forwarder, Amersped Inc., located in New York City to handle the shipments of common ground clays after they have been delivered to the pier by Engelhard. It has dealt with Amersped for 25 years or more. It employs various freight forwarders in Europe, but it has never at any time employed Stute Verkehrs GmbH as a freight forwarder in Europe and has no intention of doing so either in Europe or in the United States.

10. Chemie does not have officers such as a president, or vice president, as it has been explained to me, exist in an American corporation. I am the managing director or general manager of Chemie. I am not an employee, officer or director of Kloeckner & Co. All of its operations are managed and overseen by me including the hiring, firing and promotion of employees. I am authorized to act on behalf of the company in all respects. My assistant, Horst Martin, has limited authority to act on behalf of Chemie under my direction and only in the ordinary course of Chemie's business. Dr. Gunther Meyer, the executive officer of Kloeckner & Co. in charge of Kloeckner's chemical and oil division is the only other director of Chemie. I make a monthly report to Dr. Meyer in which I give him the monthly sales of Chemie both in DM value and in tonnage and an estimate of the gross and net profit. Dr. Meyer visits the Chemie office in Bremen once a year and at that time we discuss the company's past performance and its prospects. Chemie maintains its own bank accounts and has independent lawyers. Chemie does not utilize any Kloeckner personnel to provide any services, except that its books are audited annually by Kloeckner & Co. At the end of each year the profit that Chemie has made during the year is turned over to Kloeckner & Co. Chemie has never had a loss. Pursuant to arrangements with Kloeckner & Co. Chemie may borrow money from Kloeckner and if it does so it is charged interest on the loan. Conversely Chemie, if it has a surplus in its account at any time prior to the end of the year, may lend that surplus to Kloeckner & Co. and be paid interest on that loan. Kloeckner & Co. serves as a guarantor on a 100,000 DM line of credit which Chemie maintains with a local Bremen bank. This line of credit was opened ten years ago and has never been used. All day to day operations of Chemie are managed by me without reporting to Kloeckner & Co. which serves as a silent owner of the business. This is so because the business is an esoteric one which demands a highly specialized knowledge of the products, its sources of supply and of the market. No one at Kloeckner & Co. has this specialized knowledge or experience.

11. I have read the letter, dated February 26, 1979, addressed to Stute International Inc.. and signed by Mr. Arthur Pankopf, Managing Director, Federal Maritime Commission, in which Mr. Pankopf on behalf of the Commission notified Stute International Inc. of the Commission's intent to deny Stute's application for an independent freight forwarder's license. In that letter, Mr. Pankopf states that Chemie "may have received rebates from an ocean-going common carrier in violation of Section 16, Shipping Act, 1916."

12. Chemie is a German company having its only place of business in Bremen, Germany. It has no offices in the United States. Nor does it have any representatives, agents or employees in the United States. In fact, Chemie's business in the United States is wholly done by telex, telephone or mail. I visit the United States on the average of once every two years to visit our suppliers and exchange sales and product information. Since Chemie has no place of business or operations in the United States, it is difficult for me to see how the provisions of the Shipping Act can be applied to Chemie.

13. At the request of Stute International Inc., I and my assistant, Mr. Horst Martin, have reviewed the documents which were given to Stute International by representatives of the Federal Maritime Commission. It is my understanding that these documents were obtained by the Commission during the investigation of the Sea-Land Service Inc. ("Sea-Land"). It is also my understanding that the Commission's claim that Chemie took rebates from Sea-Land is based upon these documents. I would like to set forth the facts and circumstances relating to those documents.

14. In 1973, there was a large surplus of containers available for the shipment of goods from the United States to Europe. Sometime during that year, a representative of Paul Gunther GmbH & Co. ("Gunther") a German company which acts as agent for Sea-Land in Bremen, approached either me or Mr. Martin. He was making a sales call and was trying to interest us in using Sea-Land, which at that time, operated from Charleston, South Carolina or Jacksonville, Florida for our shipments. We told him that Engelhard's price for the common ground clays ordered by Chemie from the United States varied in accordance with the port from which the goods were shipped because of the inland freight differential. At that time the purchase price was increased if the goods were shipped from any port other than Savannah, Georgia. Sea-Land did not call at Savannah, Georgia, but did call at Jacksonville, Florida and Charleston, South Carolina. Recognizing the problem, the Gunther representative offered to make up a part of that inland freight differential by paying Chemie 25 dollars per container for every full container shipped via Sea-Land from Jacksonville or Charleston. Chemie agreed to the proposition in order to give Chemie more fre-

quent service. Such an offer is not illegal under German law. Of course, we had no knowledge of the United States law.

15. A review of our files shows that we were paid the 25 dollar fee on shipments of approximately 49 full containers over a three month period. At that time, Chemie was importing approximately 50 containers per month.

16. The representative of Gunther told us that for Gunther's book-keeping purposes he wanted Chemie to bill Gunther in the amount of 25 dollars per container for services rendered by Chemie in returning the empty container from Chemie's customer to the container port. This charge was normally included in the shipping charge. Chemie complied with Gunther's instructions.

17. This practice continued during the latter half of 1973 until the first days of 1974 when suddenly, because of the oil crisis, there came a great shortage in the supply of containers and no containers were available for low tariff goods, such as those classified with the common ground clay tariff. Because of the shortage of containers, Gunther was no longer interested in soliciting Chemie's business for Sea-Land. In fact, Chemie has not used the Sea-Land service since 1974, except for some shipments made from the United States to its customers in the Mediterranean Area.

18. The last payment of 25 dollars for a container was made by Gunther to Chemie in January 1974. The money which was received by Chemie from Gunther representing the aforementioned payments was kept in a separate fund by Chemie and used to purchase Christmas presents for substantial customers of Chemie. At no time was any of the money returned to the United States. At no time, until I read the letter of Mr. Pankopf, did I know or understand that the payments made by Gunther to Chemie were in violation of United States law. Kloeckner & Co. had no knowledge of the payments because the payments were deposited in a special account unknown to Kloeckner & Co. to be used for the aforementioned purpose, and because Kloeckner & Co. did not then and does not now participate in the management or operations of Chemie.

AFFIDAVIT OF HEINRICH A. JOOST

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FREE STATE OF BREMEN

ss.:

FEDERAL REPUBLIC OF GERMANY  
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HEINRICH A. JOOST, being duly sworn, deposes and says as follows:

1. I am the president of Stute International Inc. the applicant in the above-entitled proceeding. I am also deputy managing director of Stute Verkehrs-GmbH.

2. I am personally familiar with the history and operation of Stute International Inc. and Stute Verkehrs-GmbH, as well as the general organization and operations of Kloeckner & Co. The facts set forth in this affidavit are based on personal knowledge and are true and correct to the best of my knowledge and belief.

3. Stute International Inc. is a Delaware corporation having its principal place of business at 405 Lexington Avenue, New York, N.Y. It is a wholly-owned subsidiary of Stute Verkehrs-GmbH, which has its principal office in Bremen, Germany.

4. Stute International Inc. has four employees. It is engaged in the business of handling import shipments from foreign countries to the United States and acting as a consultant for export shipments. In 1978 it had gross billings of 1,040,000 Dollars and during the first nine months of 1979 it had gross billings of 988,915 Dollars.

5. I am the only officer of Stute International Inc. who is also employed in the management of Stute Verkehrs-GmbH. The Board of Directors of Stute International is composed of three persons - myself, Gunter Holsing, managing director of Stute Verkehrs-GmbH and Rüdiger Dettmann a "prokurist" and employee of Stute Verkehrs GmbH.

6. Stute Verkehrs-GmbH, the parent company of applicant, is a freight forwarding company operating out of Bremen, Germany, in worldwide import/export trade. It is active as a rail, air, truck and ocean freight forwarder. It was organized in 1957 as J.A.C. Stute GmbH and its name was changed in 1971 to Stute Verkehrs-GmbH. In addition, Stute Verkehrs-GmbH provides warehousing, trucking, ships-chartering, and customs clearance services in Germany and acts as a freight traffic consultant. It is the sole owner of subsidiary companies

operating as freight forwarders in London and Paris and the 50% owner of a subsidiary which operates as a freight forwarder in Sharjah, United Arab Emirate. Stute Verkehers-GmbH has approximately 200 employees. Its gross sales in 1978 were approximately 150 million DM.

7. The business organization of Stute Verkehers is known as a GmbH and is that of a limited liability company. Under German law the business organization known as a GmbH has its liability limited to the extent of its capitalization. The capitalization of Stute is 1 million DM.

8. Stute Verkehers-GmbH is wholly-owned by Kloeckner & Co., whose activities will be described below. It operates, however, independently and separately from Kloeckner & Co. The management of Stute Verkehers-GmbH consists of three persons. Myself and Dieter Wurmehl, are deputy managing directors and Gunter Holsing, is the managing director. All three of us are wholly responsible for all Stute Verkehers-GmbH operations and either one of us has authority to act in all respects on behalf of the company. None of us is an employee, officer, or director of Kloeckner & Co. and none of us have any authority for or on behalf of Kloeckner & Co.

9. Kloeckner & Co. is a holding and trading company, with its head office in Duisburg, Germany. Kloeckner & Co. was founded in 1906. It is active in trading in steel, and steel products, metals, ores, chemicals, coal, solid and liquid fuels, heating equipment and construction materials. It also has a subsidiary which finances turn-key construction projects.

10. Kloeckner & Co. is a partnership in which the general partners with unlimited liability are Messrs. Peter Henle, Jorg A. Henle and Karl A. Thoenke. The limited partner with limited liability is the Kloeckner family trust (Peter Kloeckner-Familien-stiftung). The capitalization of Kloeckner & Co. is .265 Mill. DM. 99% of the capital is contributed by the Kloeckner family trust and the remaining 1% by the three individual partners, who have unlimited personal liability.

11. In the year 1978 Kloeckner & Co. had gross sales of 7,798 billion DM. Attached hereto as Exhibit 1 is a concise statement of the financial structure of Kloeckner & Co.

12. The general partners, as the owners of Kloeckner & Co., are responsible for overseeing the general operations of Kloeckner & Co. All three of the general partners together with Messrs. Otmaz Franz, Heinz Wolf and Georges Grumieaux are members of the Board of General Management which is responsible for all day-to-day operations of Kloeckner & Co. Messrs. Franz, Wolf and Grumieaux are employees of Kloeckner & Co. and not partners in the company. In addition Kloeckner & Co. has a Partners' Supervisory Committee, which acts as an advisor and a consultant to the partners. This Committee is made up of four persons, none of them are employees or partners of Kloeckner & Co. None of the partners and none of the members of the Board of

General Management or Supervisory Committee are officers, managers, or directors, of Stute Verkehrs-GmbH or Stute International Inc.

13. The managers or directors of Stute Verkehrs-GmbH function independently from Kloeckner & Co. They gave the authority to hire, fire and promote employees and may commit the company to bank loans. Kloeckner & Co. does, however, retain veto power over use of Stute funds for investment in or acquisition of new businesses. Stute Verkehrs-GmbH furnishes complete financial and activity reports to Georges Grumieaux, a member of the Board of General Management of Kloeckner & Co. As in the case of Chemie Mineralien, Stute Verkehrs-GmbH turns over its profit at the end of each calendar year to Kloeckner & Co. Since it was founded in 1957 Stute has never had a loss. Stute has the same arrangement with Kloeckner & Co. as Chemie Mineralien, in that it may borrow money from Kloeckner & Co. and it may lend the money to Kloeckner. In each instance interest is charged on the loans. Kloeckner & Co. does not guarantee a bank line of credit on behalf of Stute International Inc. Kloeckner audits Stute's books on an annual basis and provides Stute with computer services for which Stute is charged. The books and records of Stute International Inc. are audited by Joseph Graf & Co., Certified Public Accountants, 1212 Avenue of the Americas, New York, New York.

14. In some instances Stute Verkehrs-GmbH acts as a freight forwarder for Kloeckner & Co. Approximately 28% of Stute Verkehrs-GmbH gross billings are for freight forwarding services rendered to Kloeckner or its affiliated companies. Since Stute is a full line freight forwarder this percentage figure includes truck, rail and air forwarding activities, as well as ocean freight activities. In order to be employed as a freight forwarder by Kloeckner & Co., Stute must submit bids to Kloeckner & Co. in competition with other freight forwarders. Each department or subsidiary of Kloeckner & Co. is free to employ any freight forwarder it wishes.

15. As can be seen from the facts stated above, the statement in the memorandum dated May 21, 1979, to the Federal Maritime Commission from Arthur Pankopf, Managing Director of the Commission that I am a joint officer/director of Kloeckner & Co. and Stute International Inc., the applicant herein is erroneous.

16. Although Stute Verkehrs-GmbH and Chemie Mineralien KG are located in the same city in Germany, Stute Verkehrs-GmbH has never acted as a freight forwarder for Chemie Mineralien and has no connection with that company and neither I nor any of my colleagues who comprise the management of Stute have any knowledge of or control over Chemie's business activities.

# FEDERAL MARITIME COMMISSION

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SPECIAL DOCKET NO. 744

APPLICATION OF SEA-LAND SERVICE, INC. FOR THE  
BENEFIT OF STONE AND DOWNER CO.

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Application for permission to refund a portion of freight charges collected in the amount of \$617.15 granted.

*Frank A. Fleischer* for Sea-Land Service, Inc.

## REPORT AND ORDER

*February 6, 1981*

BY THE COMMISSION: (RICHARD J. DASCHBACH, *Chairman*;  
LESLIE KANUK, *Vice Chairman*; JAMES V. DAY, THOMAS F.  
MOAKLEY AND PETER N. TEIGE, *Commissioners*)

Pursuant to Rule 92(b) of the Commission's Rules (46 C.F.R. 502.92(b)), Sea-Land Service, Inc., filed an application for permission to refund \$617.15 to Stone and Downer Co. This amount represents rail yard (RY) service charges of \$1.00 per revenue ton on three shipments of vinyl luggage transported from Kaohsiung, Taiwan to Boston, Massachusetts. Sea-Land alleged that it intended to delete this RY delivery charge from its tariff prior to these shipments, but that, because of an administrative/clerical error in the preparation of the applicable tariff page, the page was initially rejected by the Commission, thereby resulting in the previous page (containing the RY charge) being applicable.<sup>1</sup>

Administrative Law Judge William Beasley Harris issued an Initial Decision in which he denied Sea-Land's application on two separate grounds. First, he found that the deletion of the RY charge was conditioned on a prior event - Sea-Land's resignation from certain conferences - but that the record did not reveal whether this had occurred. In addition, the Presiding Officer found nothing in the record from which to conclude that the carrier had advised the shipper of its intention to file the reduction.

Sea-Land has filed Exceptions to the Initial Decision, stating that the Presiding Officer erred in finding that the record failed to reveal that ". . . the shipper was charged more than he understood the rate to be."

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<sup>1</sup> The tariff page which was submitted by Sea-Land contained both increases and decreases (including the RY charge). It was rejected because the intended increases were not made effective 30 days from the date of issue. Upon learning of the rejection, Sea-Land published a new page, which became effective March 29, 1980.



Sea-Land claims that its decision to delete the RY charge was a "marketing decision," and, as that term is used in the transportation industry, it connotes prior carrier and shipper negotiations and shipper awareness of the intended rate. In addition, Sea-Land claims that "various shippers" had been advised of its intention to delete the RY charge, but offers no evidence that this particular shipper was aware of the intended change.

#### DISCUSSION

With respect to the Presiding Officer's first basis for denying Sea-Land's application, it does not matter whether the record contains evidence concerning Sea-Land's resignation from certain unspecified conferences. This was not a "condition precedent" for the deletion of the RY charge, but rather related to other anticipated rate changes. The tariff in question is Sea-Land's independent intermodal tariff (F.M.C. No. 148). The tariff page which contained the deletion of the RY charge was clearly intended to become effective on a date certain, February 22, 1980, irrespective of Sea-Land's membership *vel non* in various ocean conferences.

The more difficult question is whether, in all cases, there must be shipper reliance on a carrier's intention to charge a lesser amount to warrant relief under section 18(b)(3). The Presiding Officer answered this question in the affirmative while finding that there was no evidence ". . . that the shipper was charged more than he understood the rate to be, or that the carrier advised the shipper of the carrier's intention to file a reduced rate and therefore failed to file the reduced rate with the Commission." (Initial Decision at 5). Our review of the legislative history of section 18(b)(3) leads us to a somewhat different conclusion with regard to the necessity for showing shipper reliance.

The purpose of section 18(b)(3) is to permit common carriers by water to make voluntary refunds to shippers or waive the collection of a portion of freight charges in two specific situations: (1) where there is an error in a tariff of a clerical or administrative nature, or (2) where, through inadvertence, there has been a failure to file a tariff reflecting an intended rate. S. Rep. No. 1078, 90th Cong., 2d Sess. 1 (1968). Both the legislative history of section 18(b)(3) and subsequent Commission precedent indicate that there must be shipper reliance in the latter situation. As the House Report accompanying the 18(b)(3) legislation makes clear, Congress was there concerned that ". . . through a *bona fide* mistake on the part of the carrier, the shipper is charged more than *he understood the rate to be.*" H.R. Rep. No. 920, 90th Cong., 1st Sess. 4 (1967) (underscoring added); *see also Munoz Y Cabrero v. Sea-Land Service, Inc.*, 20 F.M.C. 152, 153 (1977). However, there are other situations where shipper knowledge of and reliance on a carrier's intention is not critical. These are generally situations where there has been

an error in a tariff of a clerical or administrative nature. Two illustrations are provided in the Senate Report: (1) a typographical error (*e.g.*, transposing an intended \$37 rate to \$73) and (2) the unintentional deletion of a specific commodity rate resulting in the imposition of a higher cargo N.O.S. rate. S. Rep. No. 1078 *supra*, at 4. In neither case is there shipper awareness of the carrier's intention, but in both cases Congress intended that relief would be granted.

The present case is yet another example of an error in a tariff of a clerical or administrative nature. Sea-Land's failure to state that the increases contained on its relevant tariff page were to become effective in thirty days was an error in Sea-Land's tariff publishing procedures of an administrative nature. As a result, the unrelated deletion of the RY charge, which otherwise would have been immediately effective, was postponed.

Sea-Land's application meets all statutory and regulatory requirements and its approval will not result in discrimination among shippers. Under the circumstances Sea-Land could properly refund to Stone and Downer that portion of the charges collected representing RY charges of \$617.15.

**THEREFORE, IT IS ORDERED,** That permission is granted to Sea-Land Service, Inc. to refund to Stone and Downer Co. a portion of the freight charges in the amount of \$617.15; and

**IT IS FURTHER ORDERED,** That Sea-Land Service, Inc. publish the following notice in its Hong Kong & Taiwan/Atlantic & Gulf Coast Joint Container Freight Tariff No. 325, F.M.C. No. 148:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 744, that from February 22, 1980 to March 29, 1980, paragraph 2 of Rule No. 130, Destination Services Charges, shall not apply. This Notice is effective for purposes of refund or waiver of freight charges on any shipments affected by this provision during the specified period of time; and

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

(S) FRANCIS C. HURNEY  
*Secretary*

**FEDERAL MARITIME COMMISSION**

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**SPECIAL DOCKET NO. 752**  
**COORDINATED CARIBBEAN TRANSPORT, INC.,**  
**TO BENEFIT MORISAENZ, S.A.**

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**ORDER OF REMAND***February 6, 1981*

On November 24, 1980, the Commission determined on its own motion to review the Initial Decision of Administrative Law Judge William Beasley Harris in the above-captioned matter. This decision denied special docket relief because the carrier-applicant failed to furnish sufficient information to establish that the July 13, 1980 shipment of 11 motor vehicles from Miami to Manta, Ecuador was affected by a "clerical or administrative" tariff error or an "inadvertent" failure to file a new tariff within the meaning of 46 U.S.C. 817(b)(3), or that the requested relief would not result in discrimination between shippers.

Upon examination of the record, the Commission concludes that the Presiding Officer's findings regarding the application's insufficiency under 46 C.F.R. 502.92 were correct. Nonetheless, given the nonadversarial, remedial nature of the special docket process, it would have been appropriate that this special docket applicant be provided at least one opportunity to correct perceived deficiencies before final judgment was rendered. It does not appear that the Presiding Officer made such a request for further information. Accordingly, the matter will be remanded for the purpose of developing a full and complete picture of the arrangements between the carrier and shipper which led to the filing of the July 14, 1980 project rate relied upon in the application, including the nature of the "project" which qualified the subject shipment of motor vehicles for carriage at a rate other than that stated for other Passenger Automobiles at Third Revised Page 46 of Coordinated Caribbean Transport, Inc.'s, Tariff FMC No. 14. Of course, if Applicant fails to respond within a reasonable period of time to a request for further information, it would be appropriate for the Presiding Officer then to deny the special docket application.

By the Commission.

(S) FRANCIS C. HURNEY  
*Secretary*

**FEDERAL MARITIME COMMISSION**

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**INFORMAL DOCKET NO. 420(1)  
STOP AND SHOP COMPANIES, INC.  
BRADLEES DIVISION**

v.

**BARBER BLUE SEA LINE AND  
BARBER STEAMSHIP LINES, INC.**

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**ORDER REMANDING PROCEEDING**

*February 11, 1981*

This proceeding is before the Commission upon its determination to review the Decision of Settlement Officer James S. Oneto, denying Stop and Shop Companies, Inc.'s request for reparation under section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817). The basis of the Settlement Officer's decision is that Complainant's submissions presented contradictory evidence of the weight and measurement of the shipment in issue, and that it had, therefore, failed to meet its burden of proof.

While the Commission agrees that Complainant's presentation does not support an award of reparation, the Complainant nevertheless should have been afforded, especially in an informal proceeding of this kind, an opportunity to explain or correct the inconsistencies in its submissions. The Commission therefore remands this proceeding to the Settlement Officer with instructions to give Stop and Shop a reasonable opportunity to clarify this information, and then to issue an appropriate decision.

**THEREFORE, IT IS ORDERED**, That this proceeding is remanded to the Settlement Officer for further action consistent with this Order, and for issuance of a supplemental decision within 45 days of the date of this Order.

By the Commission.\*

**(S) FRANCIS C. HURNEY**  
*Secretary*

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\* Chairman Daschbach did not participate and issues a separate statement.

STOP AND SHOP COMPANIES, INC., BRADLEES DIVISION 683  
V. BARBER BLUE SEA LINE AND BARBER STEAMSHIP  
LINES, INC.

*Separate Opinion of Chairman Daschbach.*

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The settlement officer's decisions in informal dockets do not have precedential value, Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

**FEDERAL MARITIME COMMISSION**

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**TITLE 46 - SHIPPING****CHAPTER IV - FEDERAL MARITIME COMMISSION****SUBCHAPTER B - REGULATIONS AFFECTING MARITIME  
CARRIERS AND RELATED ACTIVITIES****[GENERAL ORDER 13, REVISED, AMENDMENT NO. 6;  
DOCKET NO. 80-33]****PART 536 - PUBLISHING AND FILING TARIFFS BY COMMON  
CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED  
STATES**

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*February 12, 1981***ACTION:** Final Rule**SUMMARY:** Tariff material covering the through movement of cargo between foreign countries transshipped at a U.S. port is not required by Part 536 of the Commission's Rules. This action was taken in response to requests for clarification of Part 536's scope and is intended to lessen the regulatory burden on ocean carriers.**DATE:** Effective February 18, 1981**SUPPLEMENTAL INFORMATION:**

The Federal Maritime Commission solicited comments on a proposed rule to exempt the through transportation of cargo from one foreign country to another which is merely transshipped at a U.S. port from the tariff filing requirements of 46 C.F.R. Part 536.<sup>1</sup> The transshipment could be from one ocean vessel to another (including vessels of the same carrier) or from an ocean vessel to an inland carrier by rail, motor, water or air.

The comments mainly expressed the view that the movement of foreign-to-foreign cargoes is beyond the jurisdiction conferred upon the Commission under sections 1 and 18(b) of the Shipping Act, 1916 (46 U.S.C. 801, 817(b)).<sup>2</sup>

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<sup>1</sup> Section 35 of the Shipping Act, 1916 (46 U.S.C. 833a) provides that the Commission may by rule exempt activities of common carriers by water in the foreign commerce from statutory and administrative requirements provided the exemption would not impair effective regulation by the Commission, be unjustly discriminatory, or be detrimental to commerce.

<sup>2</sup> Sea-Land Service, Inc., urged the Commission to identify precisely the types of foreign-to-foreign transportation which would be exempted under the rule. In Sea-Land's view, a through movement which involves a United States inland point of origin or destination and contact with a United States

The threshold question is whether a carrier's status as a person subject to the Shipping Act when carrying U.S. trade cargo is sufficient, when coupled with the physical presence of the foreign-to-foreign cargo at a U.S. port, to establish jurisdiction over the foreign-to-foreign transportation for purposes of section 18(b). This question is best answered in the negative. Careful review of the legislative history of section 18(b) has led the Commission to conclude that section 18(b)(1) was intended to have the same general geographic scope as section 1 and does not require the routine filing of tariffs for foreign-to-foreign cargo transshipped at United States ports.<sup>3</sup>

Accordingly, the Commission will adopt a rule which states, for the sake of clarification, that Part 536 does not cover foreign-to-foreign transportation.

THEREFORE, pursuant to sections 18(b) and 43 of the Shipping Act, 1916 (46 U.S.C. 817, and 841a), and section 4 of the Administrative Procedure Act (5 U.S.C. 533), IT IS ORDERED, That, effective upon publication in the *Federal Register*, Title 46, Code of Federal Regulations section 536.1 is amended as follows:

Part 536.1 Exclusion and Exemptions

Present paragraphs (a) and (b) are redesignated as paragraphs (b) and (c), respectively.

A new paragraph (a) is added which states that:

- (a) This part does not apply to transportation of cargo between foreign countries, including that which is transshipped from one ocean carrier to another (or between vessels of the same carrier) at a U.S. port or transferred between an ocean carrier and another transportation mode at a U.S. port for overland carriage through the United States, where the ocean carrier accepts custody of the cargo in a foreign country and issues a through bill of lading covering its transportation to a foreign point of destination.

By the Commission.

(S) FRANCIS C. HURNEY  
*Secretary*

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port should not be exempted from the Commission's tariff filing requirements. The Commission agrees, and the instant proposal does not deal with cargo originating in or destined to points *within* the United States, but covers only those situations where cargoes move *through* the United States from a foreign origin to another foreign destination under the continuous custody of the carrier(s) issuing the shipping documents.

Matson Navigation Company suggested that nonexclusive transshipment agreements pertaining to the subject cargo movement be completely exempted from regulation. Whatever the merits of this suggestion, it is beyond the scope of this proceeding.

<sup>3</sup> This conclusion does not preclude the Commission from exercising regulatory authority over foreign-to-foreign traffic under other sections of the Shipping Act in appropriate circumstances, however.

# FEDERAL MARITIME COMMISSION

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## TITLE 46 - SHIPPING

### CHAPTER IV - FEDERAL MARITIME COMMISSION

#### SUBCHAPTER B - REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[GENERAL ORDER 13, REVISED, AMENDMENT NO. 7;  
DOCKET NO. 80-40]

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

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*February 13, 1981*

**ACTION:** Final Rule

**SUMMARY:** These final rules implement certain provisions of Public Law 95-483, 92 Stat. 1607, which provide for the regulation of the rates and charges of certain state-owned or controlled carriers operating as "cross traders" in the United States foreign commerce. These rules amend the foreign tariff filing requirements to provide for the publication, filing, justification and suspension of controlled carrier tariff matter.

**DATE:** Effective March 23, 1981

#### **SUPPLEMENTAL INFORMATION:**

The Commission previously gave notice (46 F.R. 42721-24) that it proposed to amend 46 C.F.R. 536 to prescribe the technical requirements for the publication, filing, justification and suspension of controlled carrier tariff matter. The amendments are necessary to implement portions of the requirements of section 18(c) of the Shipping Act, 1916, which took effect November 17, 1978, pursuant to the Ocean Shipping Act of 1978 (Pub. L. 95-483, 92 Stat. 1607). Comments from the public were invited with respect to the proposed rules, and one set of comments was received from Baltic Shipping Company, Black Sea Shipping Company, Far Eastern Shipping Company and Murmansk Shipping Company (Baltic). The following is a section-by-section analysis of the commentator's position on specific sections of the proposed rules.

#### 1. Section 536.1

Baltic states generally that the exemptions proposed in the rules differ from the statute. Baltic specifically asserts that paragraph (c)(1)(iii) is



more restrictive than that provided in the statute and that the Commission lacks the authority to make such a substantive change.

The Commission believes that the proposed rule accurately reflects the intent of the statute. The proposed change in paragraph (c)(1)(iii) merely clarifies the statutory language, "covered by an agreement approved by section 15 of the Act" in a way which is consistent with the legislative history. As published on page 28 of the Senate Committee on Commerce, Science and Transportation Report No. 95-1260, clarification of the statutory words "covered by" is provided by the following Committee statement:

. . . [the Ocean Shipping Act is intended] to exempt the rates, charges, classifications, rules or regulations of a controlled carrier which are *established* pursuant to an *agreement* among carriers such as a conference agreement. Rates set independently by a controlled carrier whether in connection with a section 15 agreement or otherwise, should remain subject to the regulatory provisions of these bills. Sen. Rep. No. 1260, 95th Cong., 2nd Sess. 28 (1978).

Paragraph (c)(1)(iii) requires that for a rate of a controlled carrier to be exempt it must be set by the duly authorized action of a ratemaking body approved under section 15 of the Act.

Baltic's view that the proposed paragraph c(1)(iii) is more restrictive than the statute requires may have originated with a statement in the Notice of Proposed Rulemaking under Supplementary Information wherein it was stated in paragraph Number 1 thereof that the proposed section 536.1(c)(1)(iii) "more clearly indicates that only rates actually set by the concerted action of an agreement's membership are exempt." This language was neither contained in the proposed rule nor is it intended to interpret the language actually contained in the proposed rule.

It appears, however, that a reference to "the *vessels* of the controlling state" was inadvertently omitted from proposed paragraph (c)(1)(i) which could be viewed as altering the intended meaning of the statute. This was not the Commission's purpose, and appropriate revisions have therefore been made in the final version of this paragraph.

The proposed exemption requirement makes no predetermination of the authority encompassed by any particular ratemaking body's section 15 agreement. Therefore, the Commission believes that the proposed rule conveys the precise meaning of the statutory language: "covered by."

## 2. Section 536.3(d)

Baltic states that the extra costs incurred in filing three copies of tariff pages, rather than two, would be very substantial, but fails to

provide any estimate of the additional burden.<sup>1</sup> The Commission believes that the extra copy is an administrative necessity to ensure proper and timely monitoring of controlled carrier tariff filings. We also note that no other classified controlled carrier has chosen to comment on this proposal. Therefore, the Commission will retain the triplicate filing requirement in the final rule.

### 3. Section 536.5(a)(i)

Baltic states that this designation serves no useful purpose and is an unwarranted attempt to stigmatize certain carriers. To the contrary, the Commission believes that this designation is useful to the general public to alert them that certain carriers are subject to rules which differ from the general tariff filing rules. That difference is important to the shipping public and tariff users who would benefit from knowing that reductions in a certain carrier's tariff are subject to 30 days' notice.

The Commission does not believe that this identification requirement unduly stigmatizes certain carriers. An identification requirement already applies to NVOCCs and carriers party to an approved section 15 agreement primarily for the purpose of alerting the tariff user to important distinctions between common carriers.

The Commission, in addition, has published lists of carriers found to be controlled carriers subject to the provisions of section 18(c) which likewise, do not unduly stigmatize certain carriers, but merely put the public on notice as to which carriers are subject to the requirements of section 18(c). Therefore, the Commission adopts the requirement as proposed.

### 4. 536.11(g)(3)

The Commission has determined to amend the rule as proposed to avoid the establishment of any single, rigid standard for rejection of replacement rates. However, the lowest comparable charges of U.S. flag or reciprocal flag carriers will continue to be considered as a factor in determining whether to reject such rates.

Under the statute, replacement rates for rates suspended may be filed to be effective during the suspension period. If filed during the suspension period, the rates become effective immediately. Therefore, it is necessary for the Commission to establish a method to expeditiously evaluate and act upon these replacement rates. The lowest total charges then in effect for a U.S. flag or reciprocal flag carrier provide one important factor to assist the Commission in coping with the evaluation and time problem, without establishing minimum levels of rates in the U.S. foreign commerce.

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<sup>1</sup> The Commission notes that the volume of filings made by the companies, on whose behalf the commentator seeks elimination of this requirement, has been severely curtailed in recent months due to the withdrawal of their service from certain U.S. trades.

It should be noted that under the statute, the replacement rate concept was primarily designed to allow the controlled carrier to have a set of rates in effect during the suspension period. Any replacement rates filed under the statute can be effective for the duration of the suspension period. However, the controlled carrier is not precluded from filing other rates (at higher or lower levels) during the suspension period, on 30 days' statutory notice. These rates would "replace" the replacement rates, which may have been filed on immediate notice. In such cases, the Commission would have the benefit of the notice period to evaluate the justness or reasonableness of the new rate level. The Commission could then either act to suspend such rates before they become effective, or allow them to go into effect if it is believed that they are just and reasonable.

The final rule, therefore, would require the Commission to consider the lowest charges then in effect by U.S. or reciprocal flag carrier as proposed, but would not require the rejection of any replacement rate solely upon that criterion.

The commentator notes finally that the concept of "total transportation charge" is improper when considering rate levels. We refer the commentator to *Rates of Far Eastern Shipping Company*, 22 F.M.C. 651, 655-656 (1980), where the Commission held that rate comparisons conducted pursuant to section 18(c)(2)(ii) should include not only the applicable freight rate, as stated in the carrier's respective tariffs, but also any differences in surcharges, accessorial charges and tariff rules which may affect the total transportation charge to the shipper. The total transportation concept was also utilized in *Specific Commodity Rates of Far Eastern Shipping Co. in the Philippines/U.S. Pacific Coast Trade*, 23 F.M.C. 406 (1980), and in instituting Docket No. 80-6, *Specific Commodity Rates of Far Eastern Shipping Co. in the Philippines/U. S. Pacific Coast Trade and U.S. Gulf/Australia Trade* (served 1/31/80). Commissioner Kanuk's dissenting opinion in *Rates of Far Eastern Shipping Company*, cited by the commentator, was based on opposition to the introduction of the total charge concept after the proceeding was instituted, and not on opposition to the concept itself.<sup>2</sup>

The Commission notes that a controlled carrier may have a rate published at a level which is higher than that of any other carrier in a trade but that it may apply a surcharge in such a manner that the resulting total transportation charge to the shipper is considerably lower than that of any other carrier in the trade. For this reason the Commission will retain the total charge concept in the final rule.

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<sup>2</sup> Commissioner Kanuk's dissenting opinion stated: "I concur with the majority that consideration of 'total charges' may well be a matter of great importance in a controlled-carrier proceeding." 19 S.R.R. at 1543.

The Commission has also amended section 536.8 *Tariffs containing through rates and through routes* to include a reference to 18(c). This amendment was not included in the Notice of Proposed Rulemaking and appears as part VIII of the attached appendix.

Accordingly, pursuant to the provisions of 5 U.S.C. 553 and sections 18(b), 18(c), and 43 of the Shipping Act, 1916 (46 U.S.C. 817(b), 817(c) and 841(a)), the Federal Maritime Commission hereby amends 46 C.F.R. 536 in the manner set forth in the attached appendix.

By the Commission

(S) FRANCIS C. HURNEY  
*Secretary*

## APPENDIX

46 C.F.R. Part 536 is amended as follows:

I. *Authority:*

References to section 18(c) and 46 U.S.C. 817(c) are added.

II. *536.0 Scope.*

The second sentence of paragraph 536.0(b) is amended to read:

These regulations implement this requirement and, in addition, the requirements of sections 14(b) and 18(c) of the Act.

III. *536.1 Exemptions and exclusions.*

A new paragraph (d) is added to section 536.1 to read as follows:

(d) *Controlled Carriers*

- (1) A controlled carrier shall be exempt from the provisions of this part exclusively applicable to controlled carriers when: (i) the vessels of the controlling state are entitled by a treaty of the United States to receive national or most-favored-nation treatment; (ii) the controlling state subscribed, as of November 17, 1978, to the shipping policy statement contained in note 1, Annex "A" of the Code of Liberalization of Current Invisible Operations, adopted by the Council of the Organization for Economic Cooperation and Development; (iii) as to any particular rate, the controlled carrier's tariff contains an amount set by the duly authorized action of a ratemaking body approved under section 15 of the Act; *Provided, however,* that this exemption is inapplicable to rates established pursuant to an agreement in which all the members are controlled carriers not otherwise excluded by paragraph (d) of this section; (iv) the controlled carrier's rates, charges, classifications, rules or regulations govern transportation of cargo between the controlling state and the United States (including its districts, territories and possessions); and (v) the controlled carrier operates in a trade served exclusively by controlled carriers.
- (2) The Commission will notify any carrier of its classification as a controlled carrier.
- (3) Any carrier contesting such a classification may within 30 days after the date of the Commission's notice, submit a rebuttal statement. The Commission shall review the rebuttal and notify the carrier of its final decision within 30 days from the date the rebuttal statement was filed.

IV. *536.2 Definitions.*

Present paragraphs (f) through (n) are redesignated as (g) through (o) and a new paragraph (f) added to read as follows:

(f) *Controlled Carrier.*

A carrier which is, or whose operating assets are, directly or indirectly owned or controlled by the government under whose registry the vessels of the controlled carrier operate. Ownership or control by such government shall be deemed to exist if a majority interest in the carrier, or its operating assets, is owned or controlled in any manner by such government, an agency of such government, or any person, corporation, or entity controlled by such government. Ownership or control shall also be deemed to exist if the government of registry has the right to appoint or veto the appointment of a majority of the carrier's directors or its chief operating or executive officer.

V. 536.3 *Filing of tariffs; general.*

Paragraph (d) is amended to read:

- (d) All tariffs published in a foreign language shall be accompanied by two true copies translated into the English language when submitted for filing, except that controlled carriers shall submit three true copies translated into the English language.

Paragraph (f) is amended to read:

- (f) All tariff matter, including temporary filings by mail pursuant to section 536.10(c)(1) of this part, shall be filed in duplicate, except by controlled carriers who shall file all tariff matter in triplicate; *Provided, however,* that temporary filings made by telegraph or cable pursuant to section 536.10(c)(1) need not be submitted in duplicate or triplicate.

Paragraph (k) is amended to add a final sentence reading:

*Provided further,* that a controlled carrier newly admitted to membership in a conference shall, 30 days prior to admission, file notice of cancellation of any applicable independent tariff effective upon the date of admission to conference membership, unless special permission has been granted by the Commission pursuant to section 536.15 of this part.

Paragraph (1) is amended so that the first sentence reads:

Any tariff submitted for filing which fails to conform with sections 14b, 18(b), or 18(c) of the Act, or with the provisions of this part, is subject to rejection by the Commission and, upon rejection, shall be void and its use unlawful. Rejection will be accomplished pursuant to paragraph 536.10(d).

VI. 536.5 *Tariff contents.*

Paragraph (a)(1) is amended to add a final sentence to read as follows:

A controlled carrier subject to section 18(c) of the Act shall so identify itself under the carrier name on the title page.

VII. 536.6 *Statement of rates and charges.*

Paragraph 536.6(n) is amended to add a final sentence which reads as follows:

Controlled carriers filing open rates are subject to the 30-day controlled carrier notice requirement of section 536.10(a)(3) of this part, except when special permission is granted by the Commission under section 536.15 of this part.

VIII. *536.8 Tariffs containing through rates and through routes.*

The third sentence in paragraph 536.8(b) is amended to read:

Such tariffs will be filed and maintained in the manner provided in section 18(b) and 18(c) of the Act, and rules of this part.

IX. *536.10 Amendments to tariffs.*

Paragraph 536.10(a)(3) is amended to add a final sentence which reads as follows:

*Provided, however,* that all changes to controlled carrier tariffs shall not become effective earlier than 30 days from the date of filing, unless special permission has been granted by the Commission under section 536.15 of this part, or the change affects tariff matters which are the subject of a suspension proceeding, in which case section 536.11(g) of this part shall apply.

Paragraph 536.10(a)(4) is amended by adding a subdivision (iii) which reads as follows:

and (iii) the carrier is not a controlled carrier and has not received special permission authorizing the amendment.

Paragraph 536.10(b)(2) is amended to add a final uniform symbol "K," defined as follows:

(K) To denote a rate or charge that is filed by a controlled carrier member of a conference or rate agreement under independent action.

Paragraphs 536.10(b)(4), 10(d)(1) and 10(d)(2) are amended to include a reference to section 18(c).

X. *536.11 Supplements to tariffs.*

Paragraph 536.11(a) is amended to add a new subparagraph (6), as follows:

(6) To indicate controlled carrier rates which have been suspended by the Commission.

Section 536.11 is amended to add a new paragraph (f), as follows:

(f) General rate increase/decrease supplements filed by controlled carriers are subject to the 30-day notice requirements of section 536.10 of this part, unless special permission has been granted pursuant to section 536.15 of this part or the change affects tariff matter which is the subject of a suspension proceeding, in which case section 536.11(g) of this part shall apply.

Section 536.11 is amended to add a new paragraph (g), as follows:

- (g) Treatment of suspended tariff matter (controlled carriers).
- (1) Tariff matter filed by a controlled carrier may be suspended at any time before its effective date. Tariff matter already in effect may be suspended upon issuance of a show cause order on not less than 60 days' notice to the carrier. In either instance, the suspension period shall not exceed 180 days.
  - (2) Upon receipt of a suspension order the controlled carrier shall immediately file a supplement which: (i) contains the specific rates, charges, classifications or rules suspended; (ii) cites the date upon which the suspension becomes effective; and (iii) states that all use and application of the suspended tariff matter is deferred for 180 days.
  - (3) Controlled carrier tariff matter filed to become effective during a suspension period in lieu of the suspended matter may become effective immediately upon filing or upon the effective date of the suspension, whichever is later. In determining whether to reject replacement rates, the Commission shall consider whether such rates result in total charges (e.g., rate plus applicable surcharges), that are lower than the lowest comparable charges effective for a U.S. flag or reciprocal flag carrier serving the same trade.
    - (i) The filing carrier shall identify the specific U.S. flag or reciprocal flag carrier's rates, charges, classifications, or rules resulting in total charges which equal or are lower than its own.
    - (ii) All replacement filings shall state on the appropriate tariff page the following:  
Filed pursuant to 46 U.S.C. 817(c)(4) and 46 C.F.R. 536.11(g).

XI. *536.14 Transfer of operations, transfer of control, changes in carrier name, and changes in conference membership.*

Section 536.14 is amended to add a new paragraph (c), as follows:

- (c) Whenever a carrier transfers operations, control or ownership which results in a majority portion of the interest being owned or controlled in any manner by a government under whose registry the vessels of the carrier are operated, the carrier shall immediately notify the Commission in writing of the details of the change.

XII. *536.15 Applications for special permission.*

Paragraph 536.15(a) is amended to add a second sentence, as follows:

. . . Section 18(c)(3) of the Act authorizes the Commission to permit a controlled carrier's rates, charges, classifications, rules or regulations to become effective within less than 30 days of filing.



Paragraph 536.15(b) is amended so that the first sentence reads as follows:

- (b) Applications for special permission to establish rate increases or decreases on less than statutory notice. . . .

Paragraph 536.15(f) and footnote 2 thereof is amended to read:

- (f) Every tariff or tariff amendment filed pursuant to a Special Permission granted by the Commission shall contain the following notation:

“Issued under authority of Federal Maritime Commission  
Special Permission No. <sup>2</sup>”

XIII. The statement of General Accounting Office reporting clearance is amended to read as follows:

The reporting requirements contained in sections 536.3, 536.11(g)(2), 536.14 and 536.15 have been approved by the U.S. General Accounting Office under B-180233 (R0226).

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<sup>2</sup> “The filing carrier(s) shall fill in the blank with the special permission [letter and] number assigned by the Commission,” (for example: No. F-1212 or No. CC-1212).

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 78-6****ADEL INTERNATIONAL DEVELOPMENT, INC.**

v.

**PUERTO RICO MARITIME SHIPPING AUTHORITY AND  
STAR LINES, INC.**

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**REJECTION OF PETITION FOR RECONSIDERATION***February 23, 1981*

By petition filed January 15, 1981, complainant, Adel International Development Inc., requests that the Commission reconsider and clarify certain portions of its Order Adopting Initial Decision served December 30, 1980. Respondent, Puerto Rico Maritime Shipping Authority, responded in the form of a motion to reject the petition or alternatively to deny it. Complainant replied.

Rule 261 of the Commission's Rules of Practice provides that a petition for reconsideration will be summarily 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. 46 C.F.R. 502.261(a).

Complainant's petition meets none of the criteria of Rule 261 and essentially consists of a restatement of material already considered by the Commission. Accordingly, the petition for reconsideration is rejected.

By the Commission.\*

(S) FRANCIS C. HURNEY  
*Secretary*

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\*Chairman Richard J. Daschbach's concurring opinion is attached. Commissioner James V. Day did not participate.

*Chairman Richard J. Daschbach, concurring.* Adel's Petition for Reconsideration and Clarification fails to allege any change in material fact or applicable law since the issuance of the Commission's order of December 30, 1980, nor does it identify substantive errors in that order. Adel's petition further fails to request clarification of any specific aspect of the Commission's order. It must therefore be denied pursuant to Rule 261 of the Commission's Rules of Practice and Procedure.

However, Adel's petition does raise the issue of the relevancy of its equitable claims, which was not an appropriate consideration within the context of the Commission's narrow statutory proceeding but should ultimately be addressed by the U.S. District Court for the Northern District of Texas in order to ensure resolution of the dispute between Adel and PRMSA.

**FEDERAL MARITIME COMMISSION**

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**INFORMAL DOCKET NO. 716(I)  
WARNER-LAMBERT CO.**

**v.**

**FLOTA MERCANTE GRANCOLOMBIANA, S.A.**

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**NOTICE OF ADOPTION**

*February 24, 1981*

Notice is given that upon completion of its review, the Commission has determined to adopt the decision of the Settlement Officer in this proceeding.

By the Commission.

(S) FRANCIS C. HURNEY  
*Secretary*

**FEDERAL MARITIME COMMISSION**

INFORMAL DOCKET NO. 716(I)

WARNER-LAMBERT COMPANY

v.

FLOTA MERCANTE GRANCOLOMBIANA, SA.

DECISION OF NORMAN D. LEE - SETTLEMENT OFFICER<sup>1</sup>*Adopted February 24, 1981**Reparation Awarded*

By complaint dated July 19, 1979, and received in the Office of the Secretary, Federal Maritime Commission, on July 27, 1979, Warner-Lambert Company (Claimant) claims an overcharge of \$355.47 from Flota Mercante Grancolombiana, SA. (Carrier). Claimant is a manufacturer of various pharmaceutical and consumer products with corporate headquarters in Morris Plains, New Jersey. The claim results from a shipment made by Parke-Davis & Company, a division of Warner-Lambert Company, of 23 packages described on the carrier's Bill of Lading No. Z-5, dated March 15, 1978, as chemicals, NOIBN harmless and transported from New York, N.Y., to Buenaventura, Colombia on the vessel RIO MAGDELENA.

The shipment described as "chemicals, NOIBN harmless" weighed 2858 pounds and occupied 168 cubic feet. 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, at \$188.25 per 40 cubic feet for the entire shipment based upon a description supplied by the shipper. According to the claimant, the commodities shipped were inadequately described and 10 packages contained Magnesium Stearate while another 10 was, in fact, Kaolin, leaving only three packages to be rated under the description of "chemicals, NOIBN harmless." The Atlantic and Gulf/West Coast of South America Freight Conference Freight Tariff S.B. SA-12, FMC 1, at the time of shipment, published a class 15 rate of \$109.75 per ton of 40 cubic feet or 2000 pounds, whichever produced the greater revenue, which was applicable to Magnesium Stearate. Kaolin, which is a refractory clay,

<sup>1</sup> Both parties having consented to the informal procedure of Rule 19(a) 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.

also had available to it a rate of \$94.25 cents per ton of 2000 pounds under Tariff Item No. 265.

The shipment was rated as follows:

168 cubic feet at \$188.25 per 40 cubic feet	=	\$790.65
Terminal Charge	\$ 1.25	
Congestion Surcharge	6.00	
Port Charge	<u>5.58</u>	
	\$12.83 x 4.2 cu.tons	=
		<u>53.89</u>
		\$844.54

Charges that would have been assessed if specific rates were applied to Magnesium Stearate and Kaolin:

Magnesium Stearate - 112 cubic feet at \$109.75 per 40 cubic feet	=	\$307.30
Kaolin - 1,412 pounds at \$94.25 per 2000 pounds	=	66.54
Chemicals NOIBN - 14 cubic feet at \$188.25 per 40 cubic feet	=	65.89
Terminal Charge	\$ 1.25	
Congestion Surcharge	6.00	
Port Charge	<u>5.58</u>	
	\$12.83 x 3.15 cu.tons	=
	x .706 wt.tons	=
		<u>40.41</u>
		<u>9.06</u>
		\$489.20

Although claimant does not allege a violation of the Shipping Act, 1916, it is presumed that where a carrier assesses rates and charges in excess of those lawfully applicable at the time of shipment, that section 18(b)(3) of the Act has been violated.

Claim for refund was submitted to the carrier by Warner-Lambert's freight auditor on February 2, 1979. The claim was ultimately denied by the carrier on March 19, 1979, citing Item 7(b) of Tariff No. S.B. SA-12, FMC 1. This item reads as follows:

Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment. Adjustment of freight based on alleged error in weight, measurement, or description will be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before the cargo leaves the carrier's possession, any expense incurred to be borne by the party responsible for the error or by the applicant if no error is found.

It is well established by the Commission that carrier's so-called "six-month" rules cannot act to bar recovery of otherwise legitimate overcharge claims, if a claim is filed by the shipper within the two (2) year statutory time period.<sup>2</sup> The question remaining to be decided is what were the actual commodities shipped. The test this Commission applies on claims of reparation involving alleged errors of commodity tariff classification is what the claimant can prove, based on the evidence as to what was actually shipped, and how it differed from the bill of lading description.<sup>3</sup> The claimant, however, has a heavy burden of proof once the shipment has left the custody of the carrier.<sup>4</sup> In support of the claim, claimant has submitted a freight bill, bill of lading, invoices and packing lists. A statement in the claim provides that the freight charges were collect and paid by Parke-Davis in Columbia. Examination of these documents provides satisfactory identification for identical weights, measurements, invoice and shipping numbers. Comparison results in my being able to readily determine that the shipment in question did contain 10 Packages of Magnesium Stearate and 10 packages of Kaolin which is a refractory clay. This left three packages described as Polivinilpirrolidona for which the chemicals, NOIBN rate would be assessed.

It is my opinion that the supportive documentation has satisfied the burden of proof placed upon the claimant, the actual commodities shipped have been identified as required by the Commission, and therefore a violation of section 18(b)(3) is involved.

Reparation in the amount of \$355.34, plus 12 percent interest from the date freight charges were paid, is awarded to Warner-Lambert Company based on the computation previously indicated.<sup>5</sup>

(S) NORMAN D. LEE

September 23, 1980

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<sup>2</sup> The claim was filed with the Commission well within two (2) years of the date on which the cause of action occurred.

<sup>3</sup> *Western Publishing Company, Inc. v. Hapag-Lloyd A.G.*, 12 S.R.R. 1065 (1972).

<sup>4</sup> *Colgate Palmolive Co. v. United Fruit Co.*, 11 S.R.R. 979, 981 (1970).

<sup>5</sup> 46 C.F.R. 530.12.

**FEDERAL MARITIME COMMISSION**

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**INFORMAL DOCKET NO. 717(1)  
WARNER-LAMBERT CO.**

v.

**FLOTA MERCANTE GRANCOLOMBIANA, S.A.**

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**NOTICE OF ADOPTION**

*February 24, 1981*

Notice is given that upon completion of its review, the Commission has determined to adopt the decision of the Settlement Officer in this proceeding.

By the Commission.

(S) FRANCIS C. HURNEY  
*Secretary*



**FEDERAL MARITIME COMMISSION**

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**INFORMAL DOCKET NO. 717(I)  
WARNER-LAMBERT COMPANY**

v.

**FLOTA MERCANTE GRANCOLOMBIANA, SA.**

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**DECISION OF NORMAN D. LEE - SETTLEMENT OFFICER<sup>1</sup>**

*Adopted February 24, 1981*

*Reparation Awarded*

Warner-Lambert Company (Claimant) is a manufacturer of various pharmaceutical and consumer products and maintains corporate headquarters in Morris Plains, New Jersey. Claimant filed a complaint with the Office of the Secretary, Federal Maritime Commission, on July 27, 1979, against Flota Mercante Grancolombiana, SA. (Carrier), who is a common carrier engaged in the transportation of goods by water from New York, N.Y., to Buenaventura, Colombia. The claim results from a shipment made by Parke-Davis & Company, a division of Warner-Lambert Company, covered by the carrier's Bill of Lading No. Z-5, issued December 9, 1977, and transported from New York, N. Y., to Buenaventura, Colombia on the vessel CIUDAD DE BOGOTA.

The shipment in question consisted of 56 packages, weighed 7083 pounds, and had a total cube of 213 feet. Ocean freight charges were assessed and paid<sup>2</sup> pursuant to Atlantic and Gulf/West Coast of South American Freight Conference Freight Tariff S.B. SA-12, FMC 1. Claimant states that 40 drums described on the bill of lading as "chemicals, NOIBN harmless" was, in fact, Lactose in powdered form. The 40 drums of Lactose were rated by the carrier at \$170.75 per measurement ton, while according to the claimant a rate of \$124.50 per ton was effective in Item No. 870 of the aforementioned Conference tariff. According to the claimant, another 10 cartons on the bill of lading were described as "chemicals NOIBN harmless (Kaolin NF/Whittaker 372)" which the carrier rated at \$137.25 per measurement ton and Item No. 265 of the Conference tariff published a rate on clay of \$94.25 per

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<sup>1</sup> Both parties having consented to the informal procedure of Rule 19(a) 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.

<sup>2</sup> The claim states that freight charges were collect and paid by Parke-Davis in Cali, Colombia. Respondent in its answer to claim verifies that ocean freight charges were collected by Flota Mercante Grancolombiana.

weight ton which should have been applied to the Kaolin. The total freight charged the claimant on this shipment, including applicable surcharges was \$959.41 calculated as follows:

40 Drums Chemicals NOIBN Harmless - 135 cubic feet at \$170.75 per 40 cubic feet	=	\$576.28
10 Cartons Chemicals NOIBN Harmless (Kaolin NF/Whittaker 372) - 41 cubic feet at \$137.25 per 40 cubic feet	=	140.68
6 Drums Drugs or Medicines NOIBN (Benadryl Hydrochloride) - 37 cubic feet at \$188.25 per 40 cubic feet	=	174.13
Terminal Charge	\$ 1.25	
Congestion Surcharge	6.00	
Port Charge	5.58	
	<u>\$12.83</u> x 5.325 cu. tons	= <u>68.32</u>
		\$959.41

Although claimant does not allege a violation of the Shipping Act, 1916, it is presumed that where a carrier assesses rates and charges in excess of those lawfully applicable at the time of shipment, that section 18(b)(3) of the Act has been violated.

Claimant states that they were overcharged by the carrier a total of \$234.92<sup>8</sup> and claim for refund was submitted to the carrier by their freight auditor on February 2, 1979. The claim was ultimately denied by the carrier on March 19, 1979, citing Item 7(b) of Tariff No. S.B. SA-12, FMC 1, which reads as follows:

Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment. Adjustment of freight based on alleged error in weight, measurement, or description will be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before the cargo leaves the carrier's possession, any expense incurred to be borne by the party responsible for the error or by the applicant if no error is found.

It is well established by the Commission that carrier's so-called "six-month" rules cannot act to bar recovery of otherwise legitimate overcharge claims, if a claim is filed by the shipper within the two (2) year statutory time period. In its response, the carrier states this claim should be time barred, since it was brought to their attention two years and two months after sailing. The carrier has erred in their consideration of

<sup>8</sup> Statement in Part III K of the claim uses the figure \$234.92, however, calculations in this part show a total overcharge of \$234.42.

this time frame, the shipment took place on December 9, 1977, was brought to the attention of the carrier by claimant's freight auditor on February 2, 1979, and claim was filed with this Commission on July 27, 1979, well within the two (2) year statutory time period.

The test this Commission applies on claims of reparation involving alleged errors of commodity tariff classification is what the claimant can prove, based on the evidence as to what was actually shipped, and how it differed from the bill of lading description.<sup>4</sup> The claimant, however, has a heavy burden of proof once the shipment has left the custody of the carrier.<sup>5</sup> Evidence available for review includes a dock receipt, bill of lading, freight bill, invoices and packing lists. Examination of these documents enables me to readily identify quantities, weights, measurements, invoice and shipping numbers, and it can be determined that the shipment contained 40 drums of Lactose, 10 cartons of Kaolin, which is a refractory clay, and 6 drums of Benadryl Hydrochloride. At the time of shipment, Item No. 870 in the Atlantic and Gulf/West Coast of South America Freight Conference Freight Tariff S.B. SA-12, FMC 1, published a rate of \$124.50 per ton of 40 cubic feet or 2000 pounds, whichever produced the greater revenue, which was applicable to "Sugar, viz.: Milk (Lactose)." A rate applicable to "Clay, viz.: common, ceramic or refractory" was also published at \$94.25 cents per ton of 2000 pounds under Tariff Item No. 265 of the same tariff. Utilizing the information as to actual commodities shipped and applicable rates in the governing rate tariff at time of shipment, it is my opinion charges should appear as follows:

40 Drums Lactose - 135 cubic feet at \$124.50 per 40 cubic feet	=	\$420.19
10 Cartons Kaolin (refractory clay) - 1410 pounds at \$94.25 per 2000 pounds	=	66.45
6 Drums Benadryl Hydrochloride - 37 cubic feet at \$188.25 per 40 cubic feet	=	174.13
Terminal Charge	\$ 1.25	
Congestion Surcharge	6.00	
Port Charge	5.58	
	\$12.83	
	x 4.3 cu. tons	= 55.17
	x .705 wt. tons	= 9.05
		<u>\$724.99</u>

Supporting documentation has satisfied the burden of proof placed upon the claimant, the actual commodities shipped have been identified as required by the Commission, and a violation of section 18(b)(3) is involved.

<sup>4</sup> *Western Publishing Company, Inc. v. Hapag-Lloyd A.G.*, 12 S.R.R. 1065 (1972).

<sup>5</sup> *Colgate Palmolive Co. v. United Fruit Co.*, 11 S.R.R. 979, 981 (1970).

Reparation in the amount of \$234.42, plus 12 percent interest from the date freight charges were paid, is awarded to Warner-Lambert Company based on the computation indicated.<sup>6</sup>

(S) NORMAN D. LEE

October 1, 1980

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<sup>6</sup> 46 C.F.R. 530.12.

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-9****ELLENVILLE HANDLE WORKS, INC.****v.****FAR EASTERN SHIPPING COMPANY**

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**NOTICE***February 25, 1981*

Notice is given that no appeal has been taken to the January 21, 1981 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**

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**DOCKET NO. 80-9****ELLENVILLE HANDLE WORKS, INC.**

v.

**FAR EASTERN SHIPPING COMPANY**

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**SETTLEMENT APPROVED; COMPLAINT DISMISSED***Finalized February 25, 1981*

Complainant, Ellenville Handle Works, Inc., and respondent, Far Eastern Shipping Company, have filed a joint motion requesting approval of a settlement and dismissal of this proceeding. In support of their motion, the parties have attached the text of their settlement agreement, a letter from complainant explaining the background to the settlement and the request for dismissal of the complaint, and an affidavit signed by both parties attesting to the *bona fides* of the settlement. As more fully described below, I find that termination of this case by means of the settlement which the parties have reached is warranted and grant the motion.

This case began with the service of a complaint on February 20, 1980. Complainant, an importer and manufacturer of various types of wooden products, alleged that respondent FESCO overcharged it on eight shipments of what complainant alleged to be "machine processed timber," which shipments were carried by FESCO during the period December 1978 through February 1979. Complainant alleged that respondent rated the commodity as "laminated board" in violation of section 18(b)(3) of the Shipping Act, 1916, and sought reparation in the amount of \$11,272.51, which complainant alleged to be the aggregate amount of overcharges. Respondent denied each and every material allegation and claimed that it had correctly rated the commodity as "laminated board."

After issue was joined, both parties began to use the Commission's discovery processes set forth in 46 C.F.R. 502.201 *et seq.*, in an effort to obtain relevant facts concerning the nature of the commodity and to identify the specific issues to be resolved. In this regard, respondent served interrogatories and requests for production of documents and both complainant and respondent exchanged requests for admissions at various times during March, May, August, and September 1980.

During the course of discovery, which consumed more time than would be expected because relevant documents and critical affidavits

were being sought from overseas locations, complainant ascertained that significant amendments to its original complaint were necessary. An amended complaint was thereafter filed and served on August 26, 1980. The most significant amendment concerned the amount of overcharges which complainant now alleged to be only \$5,738.58 on the basis of new facts which had been revealed to complainant. Respondent again denied that it had misrated the eight shipments and contended that they consisted of "laminated board" rather than "machine processed timber," as complainant alleged. After the final exchange of discovery information prior to the settlement now reached, the parties were still at issue concerning the true nature of the commodity shipped.

#### THE NATURE OF THE SETTLEMENT

According to the documents attached to the motion, complainant originally raised the issue of overcharges on the eight shipments by means of a counter-claim in an action which FESCO's agent, Moram Agencies, Inc., had begun in Federal District Court in New York for freight due on completely unrelated shipments. Thereafter, complainant filed its complaint directly against FESCO with the Commission. During the pendency of this case before the Commission, however, complainant reached an agreement with Moram in New York to settle both Moram's claim and complainant's counter-claim in the court action. Moram agreed to credit complainant in the amount of \$4,700.00 against Moram's claim for freight due in exchange for the release of Moram and FESCO from complainant's counter-claim for overcharges.

After complainant had obtained further information in the course of discovery, as noted above, complainant found that its original complaint had to be amended so as to reduce the amount of alleged overcharges substantially, to \$5,738.58. By obtaining a credit of \$4,700.00 in its counter-claim against Moram in the court action, complainant believes that it has obtained a just and reasonable settlement and that it would not be economically reasonable for it to continue litigation in the hopes of obtaining a greater amount. Therefore complainant wishes to have this proceeding terminated so that full effect can be given to its settlement in this and the court case.

#### EVALUATION OF THE SETTLEMENT UNDER APPLICABLE PRINCIPLES OF LAW

It is well settled that both the law and Commission policy encourage settlements and engage in every presumption which favors a finding that they are fair, correct, and valid. See *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 505 (1978), and the many cases cited therein. See also Commission Rules 91 and 94, 46 C.F.R. 502.91 and 502.94, and the Administrative Procedure Act on which Rule 91 is

based, 5 U.S.C. 554(c)(1).<sup>1</sup> The general policy favoring settlements is summarized in the following passage drawn from a recognized legal authority, which language was adopted by the Commission in the *Old Ben Coal Company* case, 21 F.M.C. at 512:

The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy. 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976). (Footnote citations omitted.)

Consistent with these policies, the Commission has in recent years approved a wide variety of settlements and discontinued numerous complaint cases under various provisions of the Shipping Act, 1916. See list and description of settled cases recited in *Del Monte Corporation v. Matson Navigation Company*, 22 F.M.C. 364, 368-69 (1979). As those cases show, it is possible to settle cases without admissions of violations of law and for amounts of reparation less than those originally sought in the complaint. Moreover, although there had been some doubt at one time whether the Commission would permit settlements in cases involving alleged overcharges under section 18(b)(3) absent findings of violations of that law, the Commission has held that settlements in such cases are indeed permissible provided that there is a showing that the settlement is *bona fide* and not a device for rebating. See *Organic*

<sup>1</sup> The APA, 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 proceedings, and the public interest permit;

The courts view this provision and its legislative history "as being of the 'greatest importance' to the functioning of the administrative process." *Pennsylvania Gas & Water Co. v. Federal Maritime Commission*, 463 F. 2d 1242, 1247 (D.C. Cir. 1972). Congress encouraged agencies to make use of settlements and wished to advise private parties that "they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations." Senate Judiciary Committee, APA--Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess., at 24.



*Chemicals (Glidden-Durkee) Division of SCM Corporation v. Atlanttrafik Express Service*, 18 S.R.R. 1536a (1979); *Celanese Corporation, Inc. v. The Prudential Steamship Company*, 23 F.M.C. 1 (1980).

As explained in *Old Ben*, cited above, the Commission recognizes the advantages to settlements but exercises some judgment before approving them. Mainly the Commission is concerned that the settlement not contravene any law or public policy, for example, that it not be the result of fraud, duress, or mistake, that it not constitute a discriminatory device or consummate a desire to contravene tariff law embodied in section 18(b)(3) of the Shipping Act, 1916, and that if it falls under section 15, the settlement be filed for approval under that law and pertinent regulations. *Old Ben*, 21 F.M.C. at 513.

In considering settlements which parties submit with requests that their cases before the Commission be dismissed, the Commission has followed the traditional view that the settlement deserves approval if it avoids wasteful litigation and if it appears that the parties have correctly made an economical judgment that continued litigation would cost more to each side regardless of who ultimately prevailed on the merits than the amount of money which complainant had agreed to accept and respondent had agreed to pay in exchange for a release. *Old Ben*, 21 F.M.C. at 514. Moreover, the Commission has given its approval to settlements which, like the present one, are offshoots of court actions and which serve to bring both the Commission and court proceeding to amicable conclusions. *See, e.g., Robinson Lumber Company, Inc. v. Delta Steamship Lines, Inc.*, 21 F.M.C. 354, (1978); *Del Monte Corporation v. Matson Navigation Company*, 22 F.M.C. 364 (1979); Docket No. 72-20, *Clipper Carloading Company v. Trans-Pacific Freight Conference of Japan, et al.*, Order of Dismissal, July 21, 1975 (unreported).

The present settlement appears to be reasonable and to represent the considered judgment of the parties. First, it settles both a court case and the proceeding brought before the Commission. Therefore, the purpose of settlements regarding termination of expensive litigation would appear to be doubly served. Secondly, the amount of settlement, \$4,700.00, seems to be within a zone of reasonableness in which complainant has not undervalued its case and respondent has not conceded too much. Had the case proceeded to full litigation, it would have been necessary to resolve a critical factual dispute, namely, whether the commodity shipped was "machine processed timber" or "laminated board," since both parties have steadfastly adhered to different positions on this question. Complainant, an importer, has had difficulty obtaining affidavits from distant overseas suppliers and respondent apparently believes that certain documentary evidence favors its position. Resolution of a factual dispute of this nature might well have required an oral, trial-type hearing, not to mention post-hearing briefs, exceptions and replies to exceptions following my Initial Decision, etc. In view of the

costs of litigating in such manner, a settlement for \$4,700.00 would appear to be more economical to both parties than full litigation to a conclusion in which complainant might have been awarded the full amount of the alleged overcharges, \$5,738.58 plus interest, or in which respondent might have been required to pay nothing. In other words, the parties have decided that it is in their own economic best interests to settle upon a particular amount of money which they believe to place them in a better position than they would be in had they pursued litigation fully with all of the attendant expenses and uncertainties. Therefore, the present settlement conforms to traditional principles governing all settlements. *See Old Ben*, 21 F.M.C. at 512-14.

The only remaining problem with approval of the settlement and discontinuance of the Commission proceeding involves the Commission's concern that settlements concerning tariff issues under section 18(b)(3) of the Act be *bona fide* attempts to terminate controversies rather than devices to circumvent tariff law. In this regard, the Commission enunciated certain conditions to be met when parties submit settlements and request discontinuance of litigation. In *Organic Chemicals (Glidden-Durkee) Division of SCM Corporation v. Atlanttrafik Express Service*, 18 S.R.R. at 1539-1540, the Commission, as noted, decided that settlements in tariff overcharge cases were permissible but, to ensure that tariff law was not being abused, required the parties to do three things: 1) submit a signed agreement to the Commission; 2) file an affidavit setting forth the reasons for the settlement and attesting that the settlement is a *bona fide* attempt by the parties to terminate their controversy and not a device to obtain transportation at other than applicable tariff rates in contravention of law; and 3) show that the complaint on its face presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable. The parties have complied with these requirements. They have filed their signed agreement, submitted an affidavit attesting to the fact that the settlement is a *bona fide* attempt to terminate the controversy and not a device to obtain transportation at other than applicable rates, and have shown that there is a genuine dispute concerning the nature of the commodity shipped which, if litigation were to continue, would most likely require trial-type hearings with time-consuming cross-examination. In a previous settlement which was approved, the fact that further litigation of that type was required was considered sufficient reason to conclude that the facts critical to resolution of the dispute were not reasonably ascertainable. *See Celanese Corporation, Inc. v. The Prudential Steamship Company*, cited above, 23 F.M.C. at 7. Moreover, the fact that this settlement is part of another settlement which brings a court proceeding to an amicable conclusion is not only another reason favoring approval of the settlement but also additional evidence that the settlement is a good-faith effort to terminate litigation rather than a

device to circumvent tariff law.<sup>2</sup> There is, therefore, no reason to withhold approval of the proffered settlement nor any legal impediment to its approval.

Accordingly, the settlement is approved, the complaint is dismissed with prejudice, as requested by complaint, and the proceeding is terminated.

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

January 21, 1981

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<sup>2</sup> It should be noted that although the formal affidavit attesting to the good faith of the settlement was filed in this case, the formal requirement that such an affidavit be filed has been relaxed when there is independent evidence that the settlement was reached without intent to circumvent tariff law. See *Cutter Laboratories Overseas Corporation v. Maersk Lines*, 23 F.M.C. 525 (1981).

**FEDERAL MARITIME COMMISSION**

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**SPECIAL DOCKET NO. 748****APPLICATION OF WATERMAN STEAMSHIP CORPORATION  
FOR THE BENEFIT OF STOP-SHOCK, INC.**

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**ORDER REMANDING INITIAL DECISION***February 25, 1981*

This proceeding is before the Commission upon its determination to review the Initial Decision of Administrative Law Judge Paul J. Fitzpatrick, granting Waterman Steamship Corporation permission to waive collection of \$20,784.75 in freight charges for the benefit of Stop-Shock, Inc., pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)). Waterman had alleged that it had agreed to rate a shipment of fabric softener at \$140 w/m plus bunker fuel surcharge, and that it would not charge the 30% port congestion surcharge prescribed in Rule 190 of its tariff. Waterman claims it inadvertently filed a tariff rate of "140 w/m plus surcharges." As a result, Stop-Shock was charged, in addition to the freight charges, \$20,784.75 as a port congestion surcharge, the amount for which a waiver is sought.

Upon review, the Commission determines that two matters require clarification before it can approve a waiver in this proceeding. First, the agreement entered into between Waterman and Stop-Shock does not indicate that the parties intended to *exclude* the port congestion surcharge. Mere absence of mention of the surcharge in the telex agreement does not alone indicate that the parties had agreed not to apply it. This rationale, carried to its logical conclusion, would also exempt terminal, heavy lift, container demurrage and similar charges unless each such charge was also specifically mentioned in such an agreement.

Secondly, to exempt only liquid fabric softener from the tariff rule imposing a port congestion surcharge would appear to discriminate against shippers of other commodities within the meaning of the provision in section 18(b)(3). It is difficult to imagine what type of transportation factors might justify the applicability of a port congestion surcharge to some commodities and not to others. It would be useful for this matter to be more fully explored by the parties.

The Commission therefore remands this proceeding to the Administrative Law Judge with instructions to attempt to develop the record on these two areas, and then to issue an appropriate decision.

**WATERMAN STEAMSHIP CORP. FOR THE BENEFIT OF 715  
STOP-SHOCK, INC.**

**THEREFORE, IT IS ORDERED,** That this proceeding is remanded to the Administrative Law Judge for further action consistent with this Order, and for issuance of a supplemental decision within 60 days of the date of this Order.

**By the Commission**

**(S) FRANCIS C. HURNEY**  
*Secretary*

**FEDERAL MARITIME COMMISSION**

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**INFORMAL DOCKET NO. 774(F)**

**EXIM, LTD.**

**v.**

**KUEHNE & NAGEL**

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**NOTICE**

*March 6, 1981*

Notice is given that the time within which the Commission could determine to review the February 2, 1981 dismissal of the complaint in this proceeding has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

**(S) FRANCIS C. HURNEY**  
*Secretary*

## FEDERAL MARITIME COMMISSION

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INFORMAL DOCKET NO. 774(F)  
EXIM, LTD.

v.

KUEHNE & NAGEL

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- (1) SETTLEMENT AGREEMENT APPROVED  
(2) REQUEST TO WITHDRAW MOTION TO DISMISS  
GRANTED  
(3) PROCEEDING DISCONTINUED

*Finalized March 6, 1981*

This proceeding involves a complaint for alleged overcharges which was originally considered by a Settlement Officer. The rather involved chronological and procedural events necessitating the holding in abeyance of a Motion to Dismiss filed by Kuehne & Nagel Overseas Corp. are detailed in my Ruling on Motion to Dismiss served June 19, 1980.

The exact role of both "Kuehne & Nagel Overseas Corp." of New York City, N.Y., and "Kuehne & Nagel, S.A.," of Barcelona, Spain, in this proceeding has been the subject of concern to the Commission, the Settlement Officer, and this Judge. The Settlement Officer dismissed the original claim before him on the basis that Kuehne & Nagel, S.A. was a nonvessel common carrier. This Judge sought information concerning both entities and then considered it necessary to request this Commission to order a staff investigation in order to determine the "proper party" respondent. (Memorandum to Commission dated July 10, 1980.) The Commission, in turn, referred the proceeding back to this Judge for "such further proceedings as he deems appropriate." (Order served November 13, 1980.) In the Order the Commission stated:

The Commission agrees that the role of both "Kuehne & Nagel, S.A.," and "Kuehne & Nagel Overseas Corp." requires further exploration. However, a staff investigation is not necessary to answer the basic question of whether the proper party is before the Commission. It would appear that the Presiding Officer has the authority and the means under the Commission's Rules to explore these questions and dispose of the matter before him.

Following the issuance of the Order and at my request, the Secretary of the Commission served a copy of the complaint upon Kuehne & Nagel, S.A., at its address in Barcelona and also enclosed materials (my

Memorandum and a copy of the Order) showing the history of this proceeding to date. By motions served December 16, 1980, and January 13, 1981, counsel for Kuehne & Nagel, S.A., requested extensions of time to file an answer to the complaint based upon a request to pursue settlement negotiations with the complainant. In my granting the extensions, I noted that any proposed settlement of the claim "should be fully responsive to the Commission's Order of November 13" and specifically referred to the Commission's language to the effect that the role of both entities requires "further exploration." On January 26, 1981, counsel for Kuehne & Nagel, S.A., filed (1) Agreement of Settlement and Mutual Release; (2) Joint Affidavit; and (3) Memorandum in Support of Settlement Agreement. For convenience, the documents are attached hereto (Attachment A - the Agreement; Attachment B - the Affidavit; and Attachment C - the Memorandum). Also a request was made on behalf of Kuehne & Nagel Overseas Corp., (1) to withdraw its Motion to Dismiss served May 14, 1980; and (2) that its time to answer the complaint be extended for twenty-one days beyond the date of service of any final Commission ruling on the settlement agreement. The request to withdraw the motion will be granted and the extension will be necessary only if the Agreement is ultimately disapproved.

Basically, the complaint seeks \$1,621.87 and \$897.45, or a total of \$2,519.32, for claimed overcharges on two shipments from Barcelona to Charleston, South Carolina during January and March 1978. The shipments were transported aboard the vessels *S/S Italia* and *Americana 1001*. The basis for the claim is that the applicable freight rate should have been applied to laminated compressed wood rather than plywood pursuant to the provisions of a tariff of the "Med. Gulf Conference." Under the terms of the Agreement, Kuehne & Nagel, S.A., agrees to pay and the claimant agrees to accept \$2,000 in full settlement of the complaint. According to the Memorandum, the Agreement represents "a reasonable commercial settlement" to an already lengthy proceeding. And it is claimed that there is "difficulty in ascertaining the data necessary to resolve the dispute without further litigation." In addition, it is stated that:

The settlement is for the purpose of dealing similarly with Exim's averment that Kuehne & Nagel "is a nonvessel operating common carrier engaged in transportation by water." Although Kuehne & Nagel would, if it filed an answer to the complaint deny that it was such a carrier and assert that it is a Spanish freight forwarding company, this issue, also, is disposed of by virtue of the settlement agreement. The necessity of litigating this issue is thus avoided in the face of a "bona fide attempt to avoid the time and expense of such litigation and to terminate this controversy." (Attachment C, p. 725; footnote omitted.)



In short, it is submitted that the resolution of the issue relating to the role of both entities is now unnecessary since the parties have agreed by settlement to avoid further litigation. Nevertheless, counsel for Kuehne & Nagel, S.A., has offered information "for such aid as it may provide in the final disposition of this proceeding" (Attachment C, p. 726). In any event, the approval of the settlement here would effectively remove from further consideration that issue in this proceeding. The import of the pleadings submitted now constitutes a judgment by the parties to reach an amicable solution with due consideration to the unsureness of a prolonged and expensive proceeding. And to withhold approval from an otherwise acceptable settlement for further contemplation of certain issues would be unwarranted under the circumstances.<sup>1</sup> This is especially appropriate considering the claim is solely for alleged overcharges and the consideration of the other "major issue" is probably of little practical concern to this shipper. The settlement itself represents those traditional considerations utilized by the Courts and this Commission in encouraging resolution of controversies. See, *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 505, 512 (1978).

Although an approval of the settlement removes the issue relating to the role of both Kuehne & Nagel Overseas Corp. and Kuehne & Nagel, S.A., from further consideration by me, the matter need not end here. This Commission can consider the record (including the additional explanation submitted) and determine what future course, if any, it wishes to pursue. The Commission has the appropriate procedures (i.e., a staff investigation, Order To Show Cause, Order of Investigation, etc.) to explore the issue, if it is considered necessary. On the other hand, to disapprove or delay the settlement under the existing circumstances and compel the parties to treat this issue and others in this proceeding would negate entirely the considerations posed by the settlement.

Accordingly, the Agreement of Settlement is approved and the complaint is dismissed.

(S) PAUL J. FITZPATRICK  
*Administrative Law Judge*

February 2, 1981

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<sup>1</sup> Complainant is not represented by counsel and there is pending a Motion to Dismiss as well as the answer to the complaint. Some of the other issues raised also involve jurisdiction and a claim that service of the complaint upon Kuehne & Nagel Overseas Corp. was defective.

ATTACHMENT A  
BEFORE THE FEDERAL MARITIME COMMISSION

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EXIM, LTD.

v.

Docket No. 774(F)

KUEHNE & NAGEL

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**AGREEMENT OF SETTLEMENT AND MUTUAL RELEASE**

IT IS HEREBY AGREED, by and between the undersigned, Exim, Ltd., Complainant in Federal Maritime Commission Docket No. 774(F) and Kuehne & Nagel, S.A., Respondent in said Docket that Docket No. 774(F) shall be terminated by mutual accord on the terms and conditions hereinafter set forth and for the reasons stated in the accompanying Memorandum in Support of Settlement Agreement and Motion to Dismiss:

1. Kuehne & Nagel, S.A. shall pay to Exim, Ltd. the sum of Two Thousand 00/100 (\$2,000.00) Dollars.

2. Exim, Ltd. shall, in consideration of the action of Kuehne & Nagel, S.A. as provided in paragraph "1" above, withdraw its Complaint in Federal Maritime Commission Docket No. 774(F) and shall refrain from further pursuing its claim in this proceeding.

3. Neither Exim, Ltd., Kuehne & Nagel, S.A., nor any successor in interest of either such party, shall initiate any new claim against the other party arising in connection with the complaint in this proceeding except for enforcement of any provision of this Agreement; and Exim, Ltd. and Kuehne & Nagel, S.A. each hereby releases the other from, without limitation, all sums of money, accounts, actions, suits, proceedings, claims, and demands whatsoever which either of them at any time had or has up to the date of this Agreement of Settlement against the other for or by reason of any act, cause, matter, or thing arising from the transactions giving rise to this proceeding.

4. It is understood and agreed that this Agreement of Settlement and Mutual Release is in full accord and satisfaction of all disputed claims in the proceeding.

5. This Agreement shall be submitted for any necessary approval to the appropriate governmental authorities, and shall become effective and binding upon the parties when such final approval is obtained.

6. It is further understood and agreed that this Agreement of Settlement and Mutual Release is in no sense to be understood as constituting

any admission of liability of any party or of any admission of any violation of law by any party.

7. This Agreement of Settlement and Mutual Release, constitutes the entire Agreement between the parties.

8. In the event this Settlement Agreement is disapproved by the Commission, or is approved on conditions which are unacceptable to either party, then this Settlement Agreement will be null and void *ab initio* and of no effect whatsoever for any purpose.

Dated: January 18, 1981

EXIM, LTD.

(S) BY: CHARLES F. TRAVIS

*Title: President*

KUEHNE & NAGEL, S.A.

(S) BY: ELIOT J. HALPERIN

*Title: Attorney in Fact*

**ATTACHMENT B  
BEFORE THE FEDERAL MARITIME COMMISSION**

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EXIM, LTD.

v.

Docket No. 774(F)

KUEHNE & NAGEL  
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**JOINT AFFIDAVIT**

The undersigned Charles F. Travis and Eliot J. Halperin, being respectively the President of Exim, Ltd. and the Attorney in Fact of Kuehne & Nagel, S.A., depose and state as follows:

(1) This affidavit is made in connection with the Agreement of Settlement and Mutual Release in this proceeding, a copy of which is attached hereto.

(2) Said Agreement of Settlement in FMC Docket No. 774(F) is a reasonable commercial settlement of this proceeding.

(3) The complaint in this proceeding, on its face, presents a genuine dispute, raising genuine issues, and the facts and information critical to the resolution of the dispute are not reasonably ascertainable without further lengthy and costly litigation.

(4) The above-mentioned Agreement of Settlement is a bona fide attempt to avoid the time and expense of such litigation and to terminate this controversy; and said Agreement is not a device to obtain transportation at other than the proper rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, as amended.

(S) NAME: CHARLES F. TRAVIS  
*Title: President*

Sworn to before me, a Notary Public,  
this 20th day of Jan., 1981.

Notary Public

My Commission expires: June 4, 1981 (S) NAME: ELIOT J. HALPERIN  
*Title: Attorney in Fact*

Sworn to before me, a Notary Public,  
this 15th day of January, 1981.

Notary Public

My Commission Expires: 2/14/82

ATTACHMENT C  
BEFORE THE FEDERAL MARITIME COMMISSION

-----  
EXIM, LTD.

v.

Docket No. 774(F)

KUEHNE & NAGEL  
-----

MEMORANDUM IN SUPPORT OF  
SETTLEMENT AGREEMENT  
AND  
MOTION TO DISMISS

Kuehne & Nagel, S.A. offers this Memorandum in support of Agreement of Settlement and Mutual Release entered into between Kuehne & Nagel, S.A. ("Kuehne & Nagel") and Exim, Ltd. ("Exim") and submitted contemporaneously herewith. Kuehne & Nagel also moves that the complaint in this proceeding be dismissed in consideration of approval of the Agreement of Settlement.

I. INTRODUCTION

This proceeding already has been lengthy, the complaint having been received by the Commission in January 1980<sup>1</sup> (docketed as No. 774(I)); and settlement of this proceeding is mutually desired as evidenced by the accompanying Agreement of Settlement and Joint Affidavit.

Exim's complaint was first served on Kuehne & Nagel Overseas Corp. which company declined to consent to determination of the complaint under Subpart S (46 C.F.R. §§ 502.301-502.304) and filed a Motion to Dismiss. In that Motion, Kuehne & Nagel Overseas Corp. asserted that the "claim is jurisdictionally defective for failure to name a common carrier as respondent,"<sup>2</sup> and that service of the complaint was defective.<sup>3</sup> This Motion is still pending. Exim's complaint was subsequently served also on Kuehne & Nagel, S.A. by Commission letter of November 24, 1980. In response thereto Kuehne & Nagel requested<sup>4</sup> and was granted<sup>5</sup> an extension of time to answer. As

<sup>1</sup> It should be noted that Exim's claims herein were first considered in consolidated Docket Nos. 731(I), 732(I), 733(I) and 734(I). Those cases were dismissed by the Settlement Officer by order served November 29, 1979.

<sup>2</sup> Motion to Dismiss, May 14, 1980, at 1.

<sup>3</sup> *Id.*, at 2.

<sup>4</sup> Motion for Extension of Time to Answer, December 16, 1980.

<sup>5</sup> Motion for Extension of Time to Answer Granted, served December 17, 1980.

grounds for that request, Kuehne & Nagel asserted that discussions had been undertaken to settle this proceeding.<sup>6</sup>

Such settlement discussions have been held resulting in the accompanying Agreement of Settlement.

In granting Kuehne & Nagel's request for extension of time to answer, the Administrative Law Judge admonished that the settlement be responsive to a November 13, 1980 Commission interim Order which stated that "the status of 'Kuehne & Nagel, S.A.' and 'Kuehne & Nagel Overseas Corp.' is somewhat unclear."<sup>7</sup>

Accordingly, set forth hereinafter is an analysis of the settlement and an explanation of the status of Kuehne & Nagel Overseas Corp. and Kuehne & Nagel, S.A. It must be stated, however, that the Agreement of Settlement can and should be considered solely on the basis of Commission criteria for the approval of settlement agreements,<sup>8</sup> and not on the basis of extraneous considerations of the status of certain persons involved in the shipping transactions at issue. These latter considerations are not raised as issues by the complaint except as may be necessary to resolve the specific claims. Settlement of the claims having been reached, however, in order to avoid litigating any such other issues, their resolution is unnecessary since to litigate them would vitiate the purpose and objective of settlement which is favored by the Commission.<sup>9</sup>

## II. THE SETTLEMENT

Accompanying this Memorandum is the Agreement of Settlement and Mutual Release and the Joint Affidavit of Kuehne & Nagel, S.A. and Exim, Ltd. These documents are submitted, as explained below, for the purpose of terminating this proceeding by Settlement in accordance with the Commission's criteria favoring settlement, as set forth in *Organic Chemicals, supra*. We believe that this settlement comports in all respects with the Commission's guidelines, and therefore warrants Commission approval.

In its complaint Exim seeks \$2,519.32 in alleged freight overcharges for two shipments from Barcelona, Spain to Charleston, South Carolina in early 1978. These shipments were carried aboard the vessels ITALICA and AMERICANA, neither of which is owned or operated by Kuehne & Nagel. The freight allegedly assessed to Exim was \$4,368.75 and \$2,427.30 respectively. The correct freight assessment claimed is \$2,746.88 and \$1,529.85, resulting in the total overcharge claim of

<sup>6</sup> *Id.*, at 2.

<sup>7</sup> Order, Docket No. 774(F), served November 13, 1980, at 1.

<sup>8</sup> See, e.g., *Organic Chemicals v. Atlantrafik Express Service*, Docket Nos. 78-2, 78-3 served January 25, 1979 (18 S.R.R. 1536a).

<sup>9</sup> See, *Old Ben Coal Co. v. Sea-Land Service, Inc.*, Docket No. 78-13, I.D., October 11, 1978 (18 S.R.R. 1085); adopted by Commission December 29, 1978.

\$2,519.32, which Exim claims is due from Kuehne & Nagel, S.A. as a nonvessel operating common carrier. The basis of the two claims is that the applicable rate should have been that for "laminated compressed wood per T.S.U.S. item No. 203.1000 (densified wood and/or articles thereof, compression, modified densified wood, blocks, plates sheets and strips) ... Not plywood per T.S.U.S. item No. 240.1000" pursuant to a tariff of the "Med. Gulf Conference"<sup>10</sup> (of which Kuehne & Nagel is not a member).

As noted above, Kuehne & Nagel has not filed an answer to these claims, and if the Agreement of Settlement is approved no answer will need to be so filed. Rather, by agreement between Exim and Kuehne & Nagel, and to avoid the necessity of litigating at length the genuine issue raised by the complaint,<sup>11</sup> Kuehne & Nagel agrees to pay and Exim agrees to accept \$2,000.00 in full settlement of the complaint. As already explained, this has already been a lengthy proceeding, and it is asserted that this settlement represents "a reasonable commercial settlement of this proceeding"<sup>12</sup> in view of the difficulty in ascertaining the data necessary to resolve the dispute without further litigation.<sup>13</sup>

The settlement is for the purpose of dealing similarly with Exim's averment that Kuehne & Nagel "is a nonvessel operating common carrier engaged in transportation by water."<sup>14</sup> Although Kuehne & Nagel would, if it filed an answer to the complaint deny that it was such a carrier and assert that it is a Spanish freight forwarding company, this issue, also, is disposed of by virtue of the settlement agreement. The necessity of litigating this issue is thus avoided in the face of a "bona fide attempt to avoid the time and expense of such litigation and to terminate this controversy."<sup>15</sup>

### III. OTHER ISSUES

As noted above, the Administrative Law Judge requested that the settlement include information as to the "status" of Kuehne & Nagel Overseas Corp. and Kuehne & Nagel, S.A. By letter of June 26, 1980 counsel responded to certain questions posed by the Administrative Law Judge to counsel<sup>16</sup> concerning these two entities (copy attached hereto as Attachment "A"). It is submitted that pursuit of this issue is unnecessary to the resolution of this case since the parties have agreed by settlement to avoid further lengthy litigation. Nevertheless, we offer

<sup>10</sup> Complaint, Brief Attachment No. 11 to Claim.

<sup>11</sup> Joint Affidavit, Docket No. 774(F), paragraph "(3)," at 1.

<sup>12</sup> *Id.*, paragraph "(2)," at 1.

<sup>13</sup> *Id.*, paragraph "(3)," at 1.

<sup>14</sup> Complaint, paragraph "II."

<sup>15</sup> Joint Affidavit, paragraph "(4)," at 2. See, *Latin America/Pacific Coast Steamship Conference v. Cia. Sud Americana de Vapores*, Docket No. 80-58, Settlement Approved; Complaint Dismissed, I.D. served December 17, 1980, at 3.

<sup>16</sup> Ruling on Motion to Dismiss, served June 19, 1980, at 5-6.

the information below for such aid as it may provide in the final disposition of this proceeding.

Kuehne & Nagel, S.A. is a freight forwarder acting as a transportation agent. In the shipping transactions at issue here, Kuehne & Nagel acted as freight forwarder, as is apparent from the documents submitted with the complaint. These include an October 1, 1979 letter from Exim to "Kuehne & Nagel Overseas, Inc." wherein Exim sought the latter's assistance in filing these claims with "the shipping lines involved," and also the dates Kuehne & Nagel paid over the freight to those carriers.<sup>17</sup> Exim was therefore aware that the "shipping lines" were in fact the carriers, and that Kuehne & Nagel, S.A. was the forwarder. Confirming that those shipping lines were the carriers under whose tariff Exim's cargo was carried, Exim states that "agents for the Med. Gulf Conference in Barcelona have misled Kuehne & Nagel" as to the applicable conference rates.<sup>18</sup>

Furthermore, the Kuehne & Nagel invoices attached to the complaint state that Exim was billed for "All charges as from Fob Brc up to C&F Charleston,"<sup>19</sup> including in a lump sum price the ocean freight and a \$75 or \$150 fee for freight forwarder handling.<sup>20</sup> No separate specification of the handling charges was made or required for these inbound shipments.

It is thus apparent that Kuehne & Nagel, S.A., with Exim's full knowledge, acted as the freight forwarder only. Kuehne & Nagel, S.A. was not perceived as the carrier until the Settlement Officer rejected Exim's claims against the shipping lines on the ground that Kuehne & Nagel, S.A. was a nonvessel operating common carrier.<sup>21</sup> The sole basis for that conclusion was that the cargo moved under Kuehne & Nagel's "bills of lading."<sup>22</sup> Kuehne & Nagel, of course, was not a party to those proceedings and had no opportunity to rebut that finding; and as shown herein a complete review of Exim's complaint shows that Kuehne & Nagel, S.A. acted as freight forwarder, employing its form "bills of lading" as nothing more than receipts for the shipments.

Kuehne & Nagel Overseas Corp. acted in these transactions merely as agent for Kuehne & Nagel, S.A. for the purpose of assisting Kuehne & Nagel in assuring delivery of the cargoes to Exim and in collecting the freight to be paid over to the shipping lines. Exim's freight payments were directed to this company<sup>23</sup> because it was selected by

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<sup>17</sup> Complaint, Attachment 2.

<sup>18</sup> Complaint, Brief Attachment No. 11 to Claim.

<sup>19</sup> Complaint, Attachments 9 and 10.

<sup>20</sup> Although they are difficult to read, the carrier bills of lading (Complaint, Attachments 3 and 5) show total charges (freight plus surcharges) totalling \$150 and \$75 less than the invoice amounts for the ITALICA and AMERICANA shipments respectively.

<sup>21</sup> See footnote 1, *supra*.

<sup>22</sup> *Id.*

<sup>23</sup> Complaint, Attachments 7 and 8.



Kuehne & Nagel, S.A. as its agent in the United States for receipt of such payments. There is no basis whatsoever for ascribing any other attributes to Kuehne & Nagel Overseas Corp. regarding the transactions at issue.<sup>24</sup>

#### IV. CONCLUSION

For the foregoing reasons it is respectfully requested that the Agreement of Settlement between Kuehne & Nagel, S.A. and Exim, Ltd. be approved and that the complaint in this proceeding be dismissed.

RESPECTFULLY SUBMITTED,

JOHN P. MEADE

(S) ELIOT J. HALPERIN

*Attorneys for Kuehne & Nagel, S.A.*

Graham & James  
Suite 1200  
1050 17th Street, N.W.  
Washington, D.C. 20036  
(202) 296-0505

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<sup>24</sup> It is understood that contemporaneously with the filing of this Memorandum, the earlier filed Motion to Dismiss of Kuehne & Nagel Overseas Corp. is being withdrawn for the sake of good order in considering the Agreement of Settlement.

## CERTIFICATE OF SERVICE

I hereby certify that I have this 26th day of January 1981 served the foregoing Memorandum in Support of Settlement Agreement and Motion to Dismiss on all parties of record by first class mail, postage prepaid.

(S) JOHN P. MEADE

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-71****IN RE: ROYAL HAWAIIAN CRUISES, INC.**

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**ORDER TO DISCONTINUE AS MOOT***March 18, 1981*

On October 27, 1980, the Commission directed Royal Hawaiian Cruises, Inc. to show cause why its Certificate (Performance) No. 201 should not be revoked pursuant to the Commission's General Order 20, (46 C.F.R. 540.8 and 540.9).<sup>\*</sup> Subsequently, Royal Hawaiian returned its Certificate and moved the Commission to dismiss the proceeding as moot. The Bureau of Investigation and Enforcement supports the Motion to Dismiss.

The return of Royal Hawaiian's Performance Certificate effectively moots the issues presented in this proceeding.

**THEREFORE, IT IS ORDERED,** That this proceeding is discontinued.

By the Commission.\*\*

(S) **JOSEPH C. POLKING**  
*Acting Secretary*

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<sup>\*</sup> Royal Hawaiian was issued a Certificate (Performance) on January 18, 1980 pursuant to section 3 of Public Law 89-777, 46 U.S.C. 817(e) and the Commission's regulations, 46 C.F.R. Part 540. The statute and the Commission's regulations provide that no person in the United States may arrange, offer, advertise or provide passage on a vessel, with accommodations for 50 or more passengers, unless the Commission has issued that person a Certificate evidencing financial responsibility for non-performance.

<sup>\*\*</sup> Commissioner Teige did not participate.

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-49**

**BULTACO INTERNATIONAL, LTD. AND  
JOHN GRACE - POSSIBLE VIOLATIONS OF  
SECTION 16, INITIAL PARAGRAPH, SHIPPING ACT, 1916**

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**NOTICE**

*March 24, 1981*

Notice is given that no appeal has been filed to the bench ruling of the Administrative Law Judge dismissing this proceeding and the Commission has not determined to review. Accordingly, the order of dismissal is administratively final.

**(S) JOSEPH C. POLKING**  
*Acting Secretary*

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-25****EMMETT I. SINDIK D/B/A****EMMETT I. SINDIK, CUSTOMS BROKER****INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE  
APPLICATION AND POSSIBLE VIOLATION OF SECTION 44,  
SHIPPING ACT, 1916**

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**NOTICE***March 31, 1981*

Notice is given that no exceptions have been filed to the February 25, 1981 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  
*Acting Secretary*

## FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-25

EMMETT I. SINDIK D/B/A

EMMETT I. SINDIK, CUSTOMS BROKER

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE  
APPLICATION AND POSSIBLE VIOLATION OF SECTION 44,  
SHIPPING ACT, 1916

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Respondent found to have violated section 44(a) of the Shipping Act, 1916, by engaging in unlicensed forwarding activities related to three shipments.

Respondent is found fit to be licensed and is fined \$1,000 in civil penalties. Application granted.

*Emmett I. Sindik, pro se.*

*Joseph B. Slunt, with whom Paul J. Kaller and John Robert Ewers were on brief for the Bureau of Investigation and Enforcement.*

INITIAL DECISION<sup>1</sup> OF PAUL J. FITZPATRICK,  
ADMINISTRATIVE LAW JUDGE

*Finalized March 31, 1981*

By its Order of Investigation and Hearing served April 25, 1980, this Commission instituted a proceeding to determine whether, Emmett I. Sindik (respondent), a sole proprietor operating under the trade name Emmett I. Sindik, Customs Broker: (1) violated section 44(a) of the Shipping Act, 1916, by engaging in unlicensed forwarding activities; (2) whether civil penalties should be assessed for such violations, and if so, the amount of any such penalty; and (3) whether the respondent possessed the requisite fitness to be licensed as an independent freight forwarder.<sup>2</sup>

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<sup>1</sup> 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).

<sup>2</sup> The Commission's Order posed the following issues:

1. whether Emmett I. Sindik d/b/a Emmett I. Sindik, Customs Broker, violated section 44(a), Shipping Act, 1916, by engaging in unlicensed forwarding activities;
2. whether civil penalties should be assessed against Emmett I. Sindik d/b/a Emmett I. Sindik, Customs Broker, pursuant to section 32 and Part 505.3 of the Commission's regulations (46 C.F.R. 505.3) 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 penalties; and
3. whether in light of the evidence adduced pursuant to the first issue, together with any other evidence adduced, Emmett I. Sindik d/b/a Emmett I. Sindik, Customs Broker, possesses the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, to be licensed as an independent ocean freight forwarder.

The Order also provided for the submission of affidavits of fact and memoranda of law by the Bureau of Investigation and Enforcement (formerly the Bureau of Hearing Counsel) and by respondent. Initially the Bureau argued that: (1) respondent engaged "in at least three instances of forwarding" without a license; (2) a penalty of \$5,000 should be assessed; and (3) respondent is not fit to properly carry on the business of forwarding and that the application be denied.<sup>3</sup> Respondent, acting in his own behalf, filed an "Affidavit of Fact" claiming that, among other things, "I don't feel we did freight forwarding without a license, since the export declaration was signed by a licensed forwarder, however, if ruled otherwise, certainly not flagrantly nor an attempt to circumvent the law or evade regulation, I am an honest man and know I am fit, willing and able to properly conduct the business of freight forwarding in the manner prescribed."<sup>4</sup> The Bureau's reply reflected a change of position as initially submitted in that they considered respondent establishing that the violations were "inadvertent" and that "he should be licensed to engage in the business of forwarding." However, the Bureau also noted that "we disagree with Mr. Sindik on the question of whether he violated section 44(a) by forwarding three shipments" and urged that the civil penalty be reduced from the initial recommendation of \$5,000 to \$3,000. The recommended penalty reduction represented consideration of the "apparent unintentional and limited nature of the violations and at the same time serves to deter future violations. . . ."<sup>5</sup> The Commission's Order also required statements identifying any unresolved issues of fact and the specifying of the type of procedure best suited to resolve such issues. In response to that procedural requirement, the Bureau indicated that respondent "did not believe there were any factual disputes" but that respondent desired to submit financial information regarding his ability to pay any civil penalty.<sup>6</sup> Also the Bureau added that "we do not believe there are any factual disputes." Respondent then submitted a financial statement describing his company as "very small and [with] profits down."<sup>7</sup>

<sup>3</sup> Bureau's Opening Memorandum of Law filed June 9, 1980.

<sup>4</sup> Respondent's Affidavit of Fact, p. 2, received July 3, 1980.

<sup>5</sup> Bureau's Reply Memorandum of Law, p. 4, filed July 24, 1980.

<sup>6</sup> Letter addressed to undersigned dated August 5, 1980.

<sup>7</sup> The exact text of respondent's letter of August 11, 1980, is as follows:

Attached please find financial statement as per agreement with Hearing Counsel and as it reflects my company is very small and profits are down, it would seriously jeopardize my business if I have to pay the civil penalty asked by the Hearing Counsel, I realize I used very bad judgement concerning the three exports, and Hearing Counsel agrees that my affidavit establishes that the three violations do not demonstrate a pattern of flagrant violations or an attempt to circumvent the Shipping Act.

I assure Your Honor that I am a honest law abiding citizen and would if granted my FMC license would be most aware of the law, the Hearing Counsel has done its job in this regard, perhaps Your Honor could see to remit the penalty and place me under probation for a period of time. The penalty would be very hard on me.

In the Procedural Order served September 2, 1980, it was noted that, among other things, since the violations were considered "inadvertent" and the financial condition of the respondent less than robust, a chance of a settlement existed. The parties were provided an opportunity to explore that possibility. Respondent replied that he "freely plead(s) guilty" to violating "Commission regulations" and again asked that no penalty be imposed.<sup>8</sup> The Bureau responded by indicating that numerous discussions were held with the respondent in attempting to settle but that the parties were unable to agree "on the terms of a settlement."<sup>9</sup> The record at this point lacked, among other things, an agreed to statement of facts detailing the claimed violation and an appropriate discussion concerning the imposition of a civil penalty, if any, to be imposed. As a consequence, a Second Procedural Order was issued providing an opportunity for a narrowing of issues or a procedural schedule for a hearing if necessary. On October 8, the Bureau responded that the parties were unable to agree upon a statement of facts and that respondent had requested a hearing in order to present a number of witnesses. Hearing was held in New Orleans, LA, on November 6, 1980. The Bureau filed a Memorandum of Law urging that: (1) respondent be found to violate section 44(a) by engaging in unlicensed forwarding activities on three occasions; (2) respondent be assessed a civil penalty in the amount of \$3,000; and (3) respondent be found fit and the application be granted. Respondent, in his reply, claims that: (1) he did not violate section 44(a); (2) he should not be assessed a civil penalty; and (3) his application should be granted.

#### FACTS

On October 24, 1978, the respondent contacted the Commission's Gulf District Office for the purpose of obtaining the necessary forms for an application for a license to be an independent ocean freight forwarder. Also at the time of filing his application, the Commission's letter to respondent clearly indicated the prohibition against engaging

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The financial statement referred to is the FMC's General Counsel's Office "Corporate Form - Financial Statement of Corporate Debtor" supplied by the Bureau to the respondent.

<sup>8</sup> The exact text of the respondent's letter of September 19, 1980, is as follows:

Your Honor, Hearing Consul has convinced me I violated the Commissions regulations, therefore I freely plead guilty. However I am deeply concerned about the degree of my guilt, Hearing Consul has agreed in their July 24, 1980 reply memorandum of law, that I established that the violations were inadvertent yet to me it seems the civil penalty Hearing Consul is asking for is of an amount that would cover premeditated violations, they state that a \$3000.00 penalty gives adequate consideration to the apparent unintentional and limited nature of the violations, I disagree, \$3000.00 is very much more than adequate for unintentional and limited violations.

Your honor, I have now paid my tax in full, and have a balance in my savings account of \$ 647.53, please take this into consideration when making your decision. Again I ask that any civil penalty be remitted since I have learned a lesson well, and have been penalized by not having been able to do freight forwarding for the last 12 months or so.

<sup>9</sup> Memorandum to this Judge dated September 22, 1980.



in the business of forwarding without a license and the potential penalties and adverse affect upon the issuance of the license if such activities took place.<sup>10</sup> When he filed the application he was a sole proprietor and licensed customs broker d/b/a Emmett I. Sindik Customs Brokers.

As part of the requested supplemental information supplied later to the Commission, respondent indicated that he had 13 years in the import/export transportation field primarily as a manager. He also stated:

I understand that I am not allowed to do ocean freight forwarding whether or not compensated without holding an FMC license. In reference to work I have done in the past, I was not the freight forwarder. H. E. Schurig & Co. of La. FMC 583, did three export shipments for two of my import customers, Clarke Veneers and Monroe Lange Hardwoods. I only coordinated the shipments to the pier. Bills of Lading and Export Declarations, etc., were executed in the name of H. E. Schurig & Co. of La. However, I do handle export entries without going through H.E. Schurig.

During the course of an investigation into the application, respondent indicated that his office had on three occasions, in 1979, handled export shipments for his customers, using the name and license number of a licensed freight forwarder, H. E. Schurig & Co. As the evidence shows, in performing these services his office was responsible for the booking of the cargo, preparation of the bills of lading, delivery orders, dock receipts and export declarations. In addition his office invoiced the shippers and collected forwarding fees for the services performed. The only "service" not performed on the shipments was the signing of the export declaration which was done by H. E. Schurig & Co., which received no compensation on these shipments. According to the respondent's testimony he believed that he did not require a license since he did not receive any compensation from the ocean carriers involved in the shipments. He also testified that he considered the arrangements "legal" since the documents were signed by a licensed freight forwarder.

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<sup>10</sup> The letter from the Director, Gulf District Office, stated:

Your attention is specifically directed to Section 44, Shipping Act, 1916 which prohibits any person from engaging in the business of forwarding unless such person holds a license issued by the Federal Maritime Commission to engage in such business. "Carrying on the business of forwarding" is defined under Section 510.2 of the enclosed General Order 4.

If you should engage in the business of forwarding before receiving your license you will be subject to penalties provided by law and may prejudice the issuance of your license. If we can be of further assistance, you may contact this office by telephone \* \* \* or by mail. (Exhibit 4.)

## DISCUSSION

Section 44(a) of the Shipping Act prohibits a person from "carrying on the business of forwarding" without a license.<sup>11</sup> And section 1 of the Act defines the quoted language as:

[T]he dispatching of shipments by any person on behalf of others, by oceangoing common carriers in commerce from the United States, its Territories, or possessions to foreign countries, or between the United States and its Territories or possessions, or between such Territories and possessions, and handling the formalities incident to such shipment.

The record here establishes that respondent performed freight forwarding services on behalf of his shipper customers and in doing so violated the provisions of section 44(a). Although respondent adheres to the proposition that a licensed freight forwarder signed the export declarations, that alone does not operate to neutralize all the other freight forwarding activities undertaken by his office.<sup>12</sup> And he should have realized that his role in these shipments was of some consequence when he accepted payment for services and acknowledges that the shippers would turn to him if any transportation problems developed. Accordingly, it is found that the activities of the respondent constitute a violation of section 44(a) by engaging in unlicensed forwarding on three occasions.

The main focus in this proceeding has been upon whether a penalty should be assessed and, if so, the amount to be assessed. Section 32(a) of the Shipping Act, 1916, provides that:

\* \* \* whoever violates \* \* \* section 44 of the Act \* \* \* shall be subject to a civil penalty not to exceed \$5,000 for each such violation.

And, section 32(a) provides that:

\* \* \* The Commission shall have authority to assess or compromise all civil penalties provided in this Act.

The Bureau submits that a penalty of \$3,000 should be assessed here. Basically, it is argued that the penalty would act as a deterrent not only

<sup>11</sup> Section 44(a) provides:

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.

<sup>12</sup> The total discussion concerning this issue submitted by the respondent in his Reply to Memorandum of Law is as follows:

## DISCUSSION

## A. VIOLATIONS OF SECTION 44(A)

Under the definition "carrying on the business of forwarding" "and handling the formalities incident to such shipments" this part is clear that this includes all the formalities, I only handled some of the formalities, and due to the value of the three shipments involved a valid export declaration, properly executed, was needed in order for the steamship company to load the cargoes on board their vessel for export. This document was not executed by my office since I was not a licensed freight forwarder.

to this respondent but to others who might find themselves similarly situated. The Bureau finds little acceptable excuse in respondent's claim that he was not aware that he was violating the law. The Bureau maintains that such a penalty is in accord with prior Commission assessments for similar violations and "gives adequate consideration to the apparent unintentional and limited nature of the violations while serving to deter future violations. . . ." Respondent, on the other hand, claims that no civil penalty should be assessed because of the unintentional nature of the violations. It is also claimed that the Commission's warning not to engage in forwarding activities prior to receipt of a license was observed and that his actions were above-board since he did not sign the export declaration himself. He also claims that he "made valid efforts to comply with the regulations."<sup>13</sup>

The circumstances arising in this proceeding require the imposition of a civil penalty. Respondent is not new to the field of transportation and had clear and ample warning not to engage in any freight forwarding activity prior to the issuance of a license. In order to buttress his argument that his actions were considered "legal," respondent called as a witness a Vice-President of a freight forwarding company. Unfortunately, although this witness provided some support, he was not familiar with the facts, regulations, or Commission precedents and indicated that his testimony was based upon his opinion only. Furthermore, the evidence to the effect that respondent was involved in another business and unable to devote full attention to these transactions and that the involved documentation was handled by his employee--although mitigating--does not constitute an acceptable excuse. Here the respondent received a fee from his shipper customers for the performance of unlicensed forwarding services. And although he stresses that he did not receive brokerage from the carriers that nonetheless does not offset the benefit received from the services rendered. The circumstances presented here would indicate that respondent knew or should have known that the activities performed were in violation of the Shipping Act. The remaining consideration now concerns the amount of civil penalty to be imposed.

The three instances of violations represent a minimal dollar amount received for the services rendered. Respondent produced a witness favorably attesting to his business reputation in the customhouse brokerage field for over ten years. The problem is the present financial posture of the respondent to pay this amount. According to the record, as current assets, respondent has \$647.00 in savings and owns three undeveloped lots which could be sold for an estimated \$5,000. Respondent considers that the imposition of any fine would be detrimental

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<sup>13</sup> Reply Memorandum of Law, p. 1.

to his business and family. The maximum penalty permitted under 46 U.S.C. 831(a) is set at \$5,000 per violation which, in this proceeding, would amount to \$15,000. In approaching the special financial circumstances presented here it would seem to me that an assessment of \$1,000 is more appropriate especially where the Bureau concedes that the violations were "inadvertent." And while the Bureau considers that the imposition of \$3,000 would operate as a deterring factor for any future misconduct, it appears from the testimony of respondent and his present financial condition, the amount recommended is not warranted. While, the respondent will be able to improve his financial condition at a later time, his potential future earnings should not be the sole consideration for the imposition of an amount that would presently liquidate a savings account and force the sale of some undeveloped lots. In my view, the delay necessitated in processing this application--albeit necessitated by respondent's activities--is a factor to be considered as well. Certainly during the period of time from the submission of the application to date, the respondent was foreclosed from receiving compensation as a licensed freight forwarder. The loss of such compensation should not be entirely disregarded.

The Bureau points to two proceedings involving the imposition of \$5,000 for either six unintentional violations<sup>14</sup> or five shipments by an unlicensed forwarder.<sup>15</sup> On the other hand, the circumstances here surrounding the violations and the special financial condition of the respondent justify the lesser penalty. Indeed, it is recommended that the Bureau arrange payment of the assessed penalty herein from the future earnings of the respondent after his application is approved and when he has a reasonable time to improve his financial condition. The imposition of a penalty in the amount found here should be adequate enough to realistically meet the stated considerations of the Bureau.

The final issue to be determined is whether the applicant is fit to carry on the business of forwarding and to conform to the provisions of the Shipping Act and Commission regulations promulgated thereunder.

The Bureau treated this issue as follows:

\* \* \*[W]e agree with Mr. Sindik that Mr. Sindik's three violations are not of the type to demonstrate a pattern of flagrant violations or a deliberate attempt to circumvent the Shipping Act. In view of these circumstances, the fact that there were only three shipments, and the passage of over a year since the violations, we believe that Mr. Sindik has established that he has the requisite qualifications to be licensed\* \* \* and that he is fit, willing, and able to properly carry on the business of forwarding and to conform with the provisions of

<sup>14</sup> *All-Freight Packers & Forwarders, Inc.*, 23 F.M.C. 131 (1980) and 23 F.M.C. 417 (1980).

<sup>15</sup> *Air/Compak, Inc.--Freight Forwarder License Application*, 23 F.M.C. 223 (1980).

EMMETT I. SINDIK - FREIGHT FORWARDER LICENSE 739  
APPLICATION AND POSSIBLE VIOLATION

the Shipping Act and the requirements, rules and regulations of the Commission. Thus, he should be licensed to engage in the business of forwarding.

I agree with the view of the record as stated by the Bureau on this issue.

Accordingly, it is held that the respondent Emmet I. Sindik violated section 44(a), Shipping Act, 1916, by engaging in unlicensed freight forwarding activities, that civil penalties in the amount of \$1,000 are hereby assessed against Emmet I. Sindik, that payment of said penalty is a condition precedent to the issuance of a license herein, that within 30 days of the date of a final determination by the Commission, Emmet I. Sindik shall contact the Bureau of Investigation and Enforcement to arrange payment terms on the assessed penalty, that if such arrangement is not reached within this time period, the entire penalty amount shall become due and payable, and that respondent/applicant is found to possess the requisite fitness within the meaning of section 44(b), Shipping Act, 1916, to be licensed as an independent ocean freight forwarder.

(S) PAUL J. FITZPATRICK  
*Administrative Law Judge*

Washington, D. C.  
February 25, 1981

**FEDERAL MARITIME COMMISSION**

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**INFORMAL DOCKET NO. 800(1)  
STOODY INTERNATIONAL CO.**

v.

**SEA-LAND SERVICE, INC.**

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**ORDER DISCONTINUING PROCEEDING***March 31, 1981*

On February 26, 1981, the Commission reviewed the decision of the Settlement Officer in the above-captioned proceeding to consider the method used in computing the award of interest. Chairman Kanuk and Commissioner Moakley voted to adopt the decision of the Settlement Officer. Commissioners Teige and Day voted against adoption and Commissioner Daschbach declined to participate.

Reorganization Plan No. 7 of 1961 requires the affirmative votes of three Commissioners to transact business of the Commission. Because no action has been agreed upon by any three Commissioners, the decision of the Settlement Officer stands.

**THEREFORE, IT IS ORDERED,** That this proceeding is discontinued.

By the Commission.\*

(S) JOSEPH C. POLKING  
*Acting Secretary*

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\* Commissioner Richard J. Daschbach does not participate and issues a separate statement.

Separate Opinion of Commissioner Daschbach.

I am not participating because I do not believe the Commission should review the decisions of settlement officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The settlement officer's decisions in informal dockets have no precedential value and Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

## FEDERAL MARITIME COMMISSION

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INFORMAL DOCKET NO. 800(1)  
STOODY INTERNATIONAL CO.

v.

SEA-LAND SERVICE, INC.

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Decision of Juan E. Pine, Settlement Officer<sup>1</sup>

*Discontinued March 31, 1981*

### *Reparation Awarded*

Stoody International Co. (Claimant), by informal docket claim filed February 29, 1980, seeks recovery of alleged overcharges of \$568.80 plus interest from Sea-Land Service, Inc., (Respondent). Claimant is a domestic international sales corporation located in Industry, California. Respondent is a common carrier by water subject to the provisions of the Shipping Act, 1916.

Claimant alleges violation of section 22 of the Shipping Act, 1916 and that it has been subjected to the payment of charges for transportation which are inapplicable and unlawful in violation of section 18(b)(3) of the Shipping Act, 1916.

This claim involves two shipments, both of which moved from Long Beach, California to Busan, Korea.

The first shipment moved under respondent's bill of lading No. 995773838, dated February 12, 1979, on the SEA-LAND EXCHANGE. The shipment consisted of:

- 13 fibreboard drums
- 6 pallets STC 6 fibreboard drums
- 3 pallets STC 4 fibreboard boxes

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- 22 pcs. Steel Welding Wire & Rod  
17,692 #, 344.5 cft  
8.025 kg, 9.755 cm

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<sup>1</sup> Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 C.F.R. 592.301-304), this decision will be final unless the Commission elects to review it within 30 days from the date of service thereof.



Respondent assessed the following rates and charges on the movement:

Metal Products, N.O.S., Packed	9.76cm <sup>2</sup>	(\$167.00) <sup>3</sup>	\$1,629.92
Handling	9.76cm	(\$ 11.00) <sup>4</sup>	107.36
CAF	\$1,629.92	(.06) <sup>5</sup>	97.80
Total			\$1,835.08

Claimant alleges it should have been assessed:

Wire and Rods of Base Metal . . .

Used for Soldering or Welding

Special Rate	9.76cm	(\$119.00) <sup>6</sup>	\$1,161.44
Handling		(\$ 11.00)	107.36
CAF	\$1,629.92	(.06)	97.80
Total			\$1,366.60

Amount of claim on this shipment

\$ 468.48

The second shipment moved under respondent's bill of lading No. 995784420, dated June 12, 1979, on the SEA-LAND MCLEAN. The shipment consisted of:

7 pallets STC 7 fibreboard cartons

Steel Welding Rod 5,036#, 73.7cft, 2.284kg, 2.087cm

Respondent assessed the following rates and charges on the movement:

Metal Products, N.O.S., Packed	2.09cm	(\$177.00) <sup>7</sup>	\$369.93
Bunker surcharge		(\$5.00) <sup>8</sup>	10.45
Handling		(\$11.00)	22.99
CAF	\$369.93	(.05)	18.50
Total			\$421.87

Claimant alleges it should have been assessed:

Wire and Rods of Base Metal . . .

Used for Soldering or Welding

Special Rate	2.09cm	(\$129.00)	\$269.61
Bunker surcharge		(\$5.00)	10.45
Handling		(\$11.00)	22.99
CAF	\$369.93	(.05)	18.50
Total			\$321.55

<sup>2</sup> Rule 39.2.7 of the Pacific Westbound Conference Local and Overland Freight Tariff No. 11 - FMC-19 provides: "It shall be permissible in computing freight charges on total measurement of a shipment to round off the total cubic meters to three decimal places. . . ." Respondent and claimant have both rounded off two places, i.e., 9.76 cm. However, by rounding off three places, i.e., 9.755 cm, the total charges assessed would have been \$1,834.15. As this is less than one dollar lower than the total amount respondent charged, 9.76 cm will be used in the computations for consistency with the claim.

<sup>3</sup> Item No. 006030000, 2nd Revised Page 554, same tariff.

<sup>4</sup> Rule No. 55.2.3(b), same tariff.

<sup>5</sup> Currency Adjustment Factor - Rule 21.3.2, same tariff.

<sup>6</sup> Item No. 653 1700 40, same tariff.

<sup>7</sup> Item No. 006 0300 00, 3rd Revised Page 554, same tariff.

<sup>8</sup> Rule No. 21.4, same tariff.

Amount of claim on this shipment \$100.32

From the above computations, the total claim for both shipments is:

Shipment 1	\$468.48
Shipment 2	<u>100.32</u>
Total claim	\$568.80

Respondent has reviewed the claim and advises that it is correct as filed.

In processing this claim, an error has been found in claimant's computation of the charges it alleges it should have been assessed on both shipments. In computing the currency adjustment factor, claimant neglected to use the low ocean freight charges of \$1,161.44 and \$269.61, respectively, resulting from assessment of the lower "special rates" of \$119.00 and \$129.00, respectively, on the two shipments. The claim is understated accordingly. Below are the computations necessary to amend this oversight:

#### Currency Adjustment Factor

Assessed	Correct Assessment	Claim Understatement
Shipment 1		
\$1,629.92(.06)-\$97.80	\$1,161.44(.06)-\$69.69	\$28.11
Shipment 2		
\$369.93(.05)-\$18.50	\$269.61(.05)-\$13.48	<u>5.02</u>
 Total claim understatement		 \$33.13

In view of the above, the amount of the claim as amended herein is \$568.80 plus \$33.13 or \$601.93.

Reparation in the amount of \$601.93 plus 12 percent interest from the date charges were paid, is awarded to claimant. It is the Commission's general policy to award 12 percent interest on awards of reparation where the carrier had sufficient information at the time of shipment to determine the proper rate and its failure to do so was of its own doing.

Upon evidence of payment of the amount awarded, this record will be complete.

(S) JUAN E. PINE  
*Settlement Officer*

December 31, 1980

**FEDERAL MARITIME COMMISSION**

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**TITLE 46 - SHIPPING****CHAPTER IV - FEDERAL MARITIME COMMISSION****SUBCHAPTER B - REGULATIONS AFFECTING MARITIME  
CARRIERS AND RELATED ACTIVITIES****[GENERAL ORDER 17, AMDT. 2, DOCKET NO. 80-59]****PART 521 - TIME FOR FILING AND COMMENTING  
ON CERTAIN AGREEMENTS**

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*March 31, 1981***ACTION:** Final Rule

**SUMMARY:** These final rules amend existing regulations governing the time within which certain modifications of agreements approved pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. 814) should be filed with the Commission. In the case of (a) an application for extension of an approved agreement due to terminate or (b) a modification of an approved agreement, these rules enlarge the time for filing the application or modification from not less than 60 days to not less than 120 days prior to the date the approved agreement would otherwise terminate or when it is intended that action will begin, change or cease as a result of the modification. These rule changes are deemed necessary to accommodate agreement processing delays, including those imposed by the Government in the Sunshine Act (5 U.S.C. 552b) and the National Environmental Policy Act of 1969 (42 U.S.C. 5321 *et seq.*). The enlargement of time coupled with shortened internal deadlines for the processing of agreements should ensure that agreements are processed within the 120 days notice period.

**DATE:** Effective July 2, 1981.**SUPPLEMENTARY INFORMATION:**

The Commission previously gave notice (45 FR 58923-4) that it proposed to amend 46 C.F.R. 521 to enlarge the time period within which certain modifications of agreements approved pursuant to section 15 of the Shipping Act, 1916 should be filed with the Commission. The rule changes are necessary to allow the staff sufficient processing time

to accommodate delays imposed on the processing of certain agreements by legislation and to ensure that all affected agreements are processed within the 120 days notice period. Experience has also shown that under present time constraints, even where applications for agreement extension or modification are timely filed under the 60 days advance notice standard, there is often insufficient time to permit a detailed analysis of the need for the agreement's continuation.

Comments from the public were invited with respect to the proposed rules and four responses were filed on behalf of 22 representative commentators. Comments from the North European Conferences (NEC) represent the views of 12 conferences and rate agreements and 9 out of a total of ten<sup>1</sup> member lines, while the Far East Conference (FEC) expressed the views of its 11 member lines. Pacific America Container Express (PACE Line) and Delta Steamship Lines, Inc. (Delta) each commented on their own behalf.<sup>2</sup>

#### *Positions of the Commentators*

The NEC group expresses support for and urges adoption of the proposed rule change provided the Commission reaffirms its policy expressed in General Order 17 to afford filing parties flexibility to meet extraordinary, unforeseen or special circumstances as they pertain to specific filing deadlines. By substituting the word "should" for "must" in the rule as adopted in 1962, the Commission recognized that situations may arise where it is not possible to file a timely application. Therefore, the referenced flexibility was incorporated into the rule.

The Commission hereby reaffirms that the policy regarding flexibility in filing modifications that applied to the 60 day filing provisions of this rule shall also apply to the 120 day provisions.

NEC's support for the rule change is also contingent upon the inclusion of the following sentence at the end of section 521.2(a):

In the event such a duly filed application is not acted upon by the Commission prior to said termination date, the agreement shall remain in full force and effect at least until the subsequent date of receipt of service of a Commission order declaring the agreement to have terminated.

Implementation of this proposal for automatic interim approval of timely filed extension amendments would be unlawful and inappropriate. An agreement may not be extended, or otherwise modified, even for a temporary period, unless the Commission makes an affirmative finding that the additional period of implementation meets the requirements of section 15: *United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 543 (D.C. Cir. 1978); *Seatrains International, S.A. v.*

<sup>1</sup> United States Lines chose not to participate in NEC's comments.

<sup>2</sup> Pace, however, merely joined in those comments submitted by the FEC.

*Federal Maritime Commission*, 584 F.2d 546 (D.C. Cir. 1978). In situations where an agreement's anticompetitive aspects require its proponents to submit a justification statement or when substantial protests have been lodged against an agreement, that agreement may not be approved unless and until the initial arguments raised in opposition to approval are overcome. If the proponents fail to establish a sound basis for approval within section 521.2(a)'s 120-day time period, a further evidentiary hearing is ordinarily necessary.

It would turn the intended purpose of section 15 on its head if agreements originally approved with a specific expiration date could be extended indefinitely merely by filing an extension application and electing to participate in an administrative hearing. See *Canadian-American Working Arrangement*, 16 S.R.R. 733 (1976), review petition dismissed *sub nom.*, 15 S.R.R. 76 (D.D.C. 1976).

The Far East Conference (FEC) opposes the rule changes and believes that the Commission's policy of granting approvals for limited time periods is a major factor contributing to delay in section 15 procedures. It also believes that an extra 60 days could result in certain trade data submitted in support of a filing being at least six months old at the time of its review by the Commission.

It suggests that those who fail to supply adequate justification with sufficient promptness should suffer the consequences of their delinquency. In conclusion, FEC opines that environmental considerations should rarely, if ever, be involved in agreement approvals.

Delta Steamship Lines, Inc. joins FEC in its general opposition to the rules changes citing the difficulty and hardship in preparing justification four months prior to the effective date of the action to be taken. Delta is concerned primarily with the hardship placed on pooling agreement members and suggests a compromise expansion of time to 90 days with waivers for minor modifications and for major modifications for good cause shown. Relative to the filing of modifications to existing pooling agreements, Delta submits that:

Often the need arises for minor modifications to a pooling agreement. For instance, a party may join or withdraw from a trade, without affecting the overall structure of the agreement. In the event that a party wishes to join a pool, that party in the absence of protest should not have to wait four months to participate in the trade. On the other hand the need for a prompt and substantial modification can arise unexpectedly. For instance, the parties may be notified that an approved agreement does not comport with an inter-governmental understanding. In such circumstances the parties must act quickly to avoid disruption of international trade. A four month delay can exacerbate international tension.

There seems to be some confusion here. The rule changes do not mean that a modification *must* be filed with the Commission 120 days prior to the date it is intended that action will begin, else it cannot be processed timely. The Commission's affirmation *infra* and the previous substitution of the phrase "should be filed" as contained in sections 521.2(a) and (b) in lieu of "must be filed" should serve to alleviate Delta's concern.

While the Commission is aware of the potential difficulty faced by certain commentators in meeting the 120 day advance filing requirement, it must also consider the mandated and administrative constraints that the processing of agreement matters places on its staff. The Commission has, therefore, determined it appropriate to adopt the rule as proposed and enlarge the existing 60 days advance notice filing period set forth in General Order 17, to 120 days.

Therefore, it is ordered, that pursuant to 5 U.S.C. 533 and sections 15 and 43 of the Shipping Act, 1916 (46 U.S.C. 814 and 841a), 46 C.F.R. Part 521 is amended as follows:

Delete the words "sixty (60) days" from sections 521.2(a), (b) and 521.3 of 46 C.F.R. Part 521 and substitute the words "one hundred twenty (120) days" therefor.

By the Commission\*

(S) JOSEPH C. PÖL KING  
*Acting Secretary*

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\* Commissioner Teige not participating.

**FEDERAL MARITIME COMMISSION**

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**TITLE 46 - SHIPPING****CHAPTER IV - FEDERAL MARITIME COMMISSION****SUBCHAPTER B - REGULATIONS AFFECTING MARITIME****CARRIERS AND RELATED ACTIVITIES****PART 549 - REGULATIONS GOVERNING LEVEL OF****MILITARY RATES****[DOCKET 81-9; GENERAL ORDER 29; AMENDMENT 4]****TEMPORARY SUSPENSION OF REQUIREMENTS**

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*March 31, 1981***ACTION:** Final Rule**SUMMARY:** This Rule suspends regulations governing rates quoted for the transportation of U.S. Department of Defense cargoes pursuant to Military Sealift Command requests for proposals RFP-1600, First Cycle commencing on October 1, 1981, and RFP-1600, Second Cycle commencing on April 1, 1982. This action is taken in light of the determination that military rates are no longer so low as to be detrimental to the commerce of the United States, and with a view toward lessening the regulatory burden on U.S. flag operators.**DATE:** This Rule shall be in effect during the period October 1, 1981 through September 30, 1982**SUPPLEMENTARY INFORMATION:**

Notice is hereby given that the Federal Maritime Commission is suspending its regulations governing the level of military rates established in Part 549 of Title 46 of the Code of Federal Regulations, Federal Maritime Commission General Order 29.

The Commission's General Order 29 (46 C.F.R. 549) governing the level of military rates was published in the *Federal Register* on December 2, 1972 (37 FR 25720). The Commission's proposed temporary suspension of General Order 29, and the reasons therefor, were published in the *Federal Register* on February 4, 1981 (46 FR 10767). Comments on the proposed rule were due on March 6, 1981. The only comments received were submitted by the Commander, Military Sealift Command (MSC) on behalf of the Department of Defense. MSC stated

that it strongly supported the proposed temporary suspension and, furthermore, urged that the suspension be made permanent.

Therefore, pursuant to sections 18(b)(5) and 43 of the Shipping Act, 1916 (46 U.S.C. 817 and 841a), the Commission amends Part 549 of Title 46 C.F.R. by the addition of a new section as follows:

“Section 549.9 Temporary Suspension.”

“The provisions of this Part are suspended during the period October 1, 1981 through September 30, 1982.”

By the Commission.

(S) JOSEPH C. POLKING  
*Acting Secretary*



# FEDERAL MARITIME COMMISSION

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DOCKET NO. 81-2

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

v.

TRANS FREIGHT LINE, INC.

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## NOTICE

*April 7, 1981*

Notice is given that no appeal has been taken to the 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  
*Acting Secretary*

**FEDERAL MARITIME COMMISSION**

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DOCKET NO. 81-2

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

v.

TRANS FREIGHT LINE, INC.

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(1) MOTION OF COMPLAINANT TO DISMISS COMPLAINT  
GRANTED

(2) PROCEEDING DISCONTINUED

*Finalized April 7, 1981*

On Friday, February 27, 1981, at approximately 1:00 p.m., the Presiding Administrative Law Judge received a telephone call from Complainant's attorney, Mr. Paul M. Donovan (of LaRoe, Winn & Moerman), who advised there had been a meeting in Secaucus, New Jersey, with the respondents and petitioner for leave to intervene the Massachusetts Port Authority, and settlement had been reached. Request was made to cancel the prehearing conference scheduled for Monday, March 2, 1981, and a motion to dismiss the complaint. The Presiding Administrative Law Judge asked that the requests be reduced to writing. Because of the time limitation between Friday and Monday, the request to cancel the prehearing conference of Monday, March 2, 1981, was granted and steps taken immediately to clear the cancellation with the reporting company.

At 1:50 p.m., on Friday, February 27, 1981, the written requests were received asking for cancellation of the prehearing conference and dismissal of the complaint.

Upon consideration of the above, the prehearing conference of March 2, 1981, having been cancelled, no action having been taken on the petition for leave to intervene of the Massachusetts Port Authority, and the Complainant's request to dismiss the complaint, it is *ordered*:

(A) The motion of the Complainant to dismiss the complaint is granted.

(B) The proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS  
*Administrative Law Judge*

March 2, 1981

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 81-7****INGERSOLL-RAND COMPANY****v.****SOUTH AFRICAN MARINE STEAMSHIP CORP.**

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**NOTICE***April 7, 1981*

Notice is given that no appeal has been taken to the 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**  
*Acting Secretary*

FEDERAL MARITIME COMMISSION

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DOCKET NO. 81-7  
INGERSOLL-RAND COMPANY

v.

SOUTH AFRICAN MARINE CORPORATION

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WITHDRAWAL OF COMPLAINT

*Finalized April 7, 1981*

By request dated February 9, 1981, the Ingersoll-Rand Company asks that its complaint in this proceeding be withdrawn, on the ground that the respondent has agreed to the merits of the complaint and has agreed to refund the amount sought in the complaint.

Good cause appearing, the request to withdraw the complaint is granted, and the proceeding is discontinued.

(S) CHARLES E. MORGAN  
*Administrative Law Judge*

March 2, 1981

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 78-39**  
**STANDARD FRUIT AND STEAMSHIP CO., INC.**  
**AND UNITED BRANDS, INC.**

v.

**PACIFIC MARITIME ASSOCIATION**

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**DOCKET NO. 78-40**  
**SALEN SHIPPING AGENCIES, INC.**

v.

**PACIFIC MARITIME ASSOCIATION**

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**DOCKET NO. 79-103**  
**AGREEMENTS NOS. LM-28, ET AL.**

**DOCKET NO. 80-16**  
**DAIICHI CHUO KAISEN KAISHA,**  
**TOKO KAIUN KAISHA, LTD., AND**  
**ATLANTIC LINES AND NAVIGATION COMPANY, INC.**

v.

**PACIFIC MARITIME ASSOCIATION, ET AL.**

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**DOCKET NO. 80-29**  
**WEYERHAEUSER COMPANY**

v.

**PACIFIC MARITIME ASSOCIATION, ET AL.**

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**NOTICE***April 8, 1981*

Notice is given that no appeal has been taken to the March 6, 1981 dismissal of 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 dismissal has become administratively final.

(S) JOSEPH C. POLKING  
*Acting Secretary*

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 78-39**  
**STANDARD FRUIT AND STEAMSHIP CO., INC.**  
**AND UNITED BRANDS, INC.**

v.

**PACIFIC MARITIME ASSOCIATION**

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**DOCKET NO. 78-40**  
**SALEN SHIPPING AGENCIES, INC.**

v.

**PACIFIC MARITIME ASSOCIATION**

---

**DOCKET NO. 79-103**  
**AGREEMENTS NOS. LM-28, ET AL.**

**DOCKET NO. 80-16**  
**DAIICHI CHUO KAISEN KAISHA,**  
**TOKO KAIUN KAISHA, LTD., AND**  
**ATLANTIC LINES AND NAVIGATION COMPANY, INC.**

v.

**PACIFIC MARITIME ASSOCIATION, ET AL.**

---

**DOCKET NO. 80-29**  
**WEYERHAEUSER COMPANY**

v.

**PACIFIC MARITIME ASSOCIATION, ET AL.**

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APPROVAL OF SETTLEMENT AGREEMENT  
AND GRANTING OF VARIOUS MOTIONS  
FILED BY THE PARTIES

*Finalized April 8, 1981*

PRELIMINARY FACTS

Pacific Maritime Association ("PMA") is a multi-employer collective bargaining association consisting of the principal employers of West Coast dockworkers. The International Longshoremen's and Warehousemen's Union ("ILWU") is the certified collective bargaining agent for those dockworkers.

In 1978, the fringe benefit programs provided under the PMA-ILWU collective bargaining agreements were funded by assessments raised as follows: (1) the PMA-ILWU pension, welfare, holiday and vacation plans covering various categories of dockworkers were funded by uniform man-hour assessments; (2) the Pay Guarantee Plan ("PGP") was funded by a combination of uniform man-hour and weighted tonnage assessments; and (3) the Voluntary Travel Fund ("VTF") was funded on a weighted tonnage basis. The PGP, VTF and Holiday Pay Plan assessment methods were not set forth in collective bargaining agreements and were approved by the Commission as part of Agreement Nos. T-2635, LM-7 and T-2858, respectively. The pension, welfare and vacation plans were either temporarily exempted or temporarily approved by the Commission in 1978 when PMA filed with the Commission the various collective bargaining agreements it had entered into with ILWU. A history of the filing of the various agreements and of their handling by the Commission is set forth in the Commission's Order of Conditional Approval and Investigation and Hearing in Docket No. 79-103, served December 27, 1979, and published at 45 *Fed. Reg.* 837 (Jan. 3, 1980).

On October 6, 1978, Standard Fruit and Steamship Co., Inc. ("Standard") and United Brands, Inc. ("United") jointly filed a complaint against PMA alleging that uniform man-hour assessments under various plans were subject to the Shipping Act, and that these assessment methods were violative of sections 15, 16 and 17 of the Act. Standard and United are principal importers of bananas into the United States, and their complaint alleged that PMA's man-hour assessment method was unfair to them. The allegations were generally that unfairness resulted because their handling of banana cargoes has been labor intensive and that, because of a decline in man-hours worked under PMA-ILWU contracts as a result of mechanization achieved primarily by other industry sectors, their assessment costs had increased. On the same date, a similar complaint was filed by Salen Shipping Agencies, Inc., on behalf of certain citrus fruit exporters whose operations were



also alleged to be relatively labor intensive. The complaints were both served October 17, 1978, were assigned Federal Maritime Commission Docket Nos. 78-39 and 78-40, respectively,<sup>1</sup> and were consolidated for hearing. On November 17, 1978, the Master Contracting Stevedore Association of the Pacific Coast, Inc. ("MCSA") filed petitions to intervene in the consolidated proceedings, alleging that its members had a significant interest in the outcome of the proceeding because they are the direct employers of the ILWU labor for whose fringe benefit plans the PMA assessments are made. On December 12, 1978, the MCSA petition was granted.

In response to the concerns expressed by Standard, United, Salen and MCSA, and pursuant to an undertaking by PMA to the ILWU, PMA commissioned a study of its existing assessment methods which would recommend any changes believed by the consultant to be appropriate to make in the assessment formulae. Pending this review the parties agreed to a stay of the complaint proceedings, Docket Nos. 78-39 and 78-40, and an order to that effect was entered on February 7, 1979. A study was conducted by an independent consulting firm, Temple, Barker & Sloane, Inc. ("TBS"), and a modified funding method to replace all the current PMA-ILWU funding formulae was recommended in a report by TBS to PMA dated July, 1979. The alternative funding method recommended in the TBS Report was adopted by PMA, and was filed with the Commission for exemption or approval,<sup>2</sup> where it received conditional approval pending hearing, effective January 1, 1980. It was designated Agreement No. LM-28.

The filing of Agreement No. LM-28 did not, however, resolve the complaints of Standard, United, Salen and MCSA, and these parties therefore filed further protests to Agreement No. LM-28, although they did not oppose its implementation pending the disposition of their protests. An investigation concerning the lawfulness of Agreement No. LM-28 was instituted as Docket No. 79-103, and the Commission directed that that proceeding be heard together with the earlier complaint proceedings, Docket Nos. 78-39 and 78-40.<sup>3</sup> The filing of Agreement No. LM-28 also prompted a number of petitions for intervention by new parties, all of which were granted.<sup>4</sup> The intervenors participat-

<sup>1</sup> 43 *Fed. Reg.* 49564 (Oct. 24, 1978).

<sup>2</sup> 44 *Fed. Reg.* 69008 (Nov. 30, 1978).

<sup>3</sup> 45 *Fed. Reg.* 837 (Jan. 3, 1980).

<sup>4</sup> The Bureau of Hearing Counsel and Boise Cascade Corp. both intervened in the proceedings but subsequently withdrew from participation. Intervenors participating in the proceedings were: MacMillan Bloedel Limited, Crown Zellerbach Corporation ("Crown"), Norsk Pacific Steamship Company, Limited ("Norsk"), Weyerhaeuser Co., Georgia-Pacific Corp., Sause Bros. Ocean Towing Co./Crescent City Marine Ways & Drydock Co., ("Sause/Crescent"), Daiichi Chuo Kisen Kaisha ("Daiichi"), Toko Kaiun Kaisha, Ltd. ("Toko"), Atlantic Lines and Navigation Co. ("Atlantic") and Tokai Shipping Co., Ltd. ("Tokai").

ing in the proceedings are shippers and carriers of forest products (MacMillan Bloedel Limited, Crown Zellerbach Corporation, Norsk Pacific Steamship Company, Limited, Weyerhaeuser Co., Georgia-Pacific Corp., Sause Bros. Ocean Towing Co. and Crescent City Marine Ways & Drydock Co.), and carriers of imported iron and steel cargoes (Daiichi Chuo Kisen Kaisha, Toko Kaiun Kaisha, Ltd., Atlantic Lines and Navigation Co. and Tokai Shipping Co., Ltd.), all of whom alleged that their handling methods are labor-efficient and that Agreement No. LM-28 and the substantial tonnage assessments made thereunder were unfair and discriminatory to those labor efficient operations. Complaint proceedings were instituted by the steel carriers (Daiichi, Toko and Atlantic) and Weyerhaeuser Co. seeking reparations for alleged unfair assessments collected under Agreement No. LM-28. These proceedings were assigned Docket Nos. 80-16 and 80-29, respectively, and were consolidated for hearing with Docket Nos. 78-39, 78-40 and 79-103. Extensive discovery was conducted by all parties, and was completed in October, 1980.

Hearings in the consolidated proceedings were commenced in San Francisco, California, on November 18, 1980, and PMA presented the testimony of five witnesses who in turn were subjected to extensive cross-examination. The hearings in San Francisco were recessed on December 2, 1980, and were set to continue on January 6, 1981. In the meantime MCSA filed a motion dated January 2, 1981, to withdraw as protestants and parties. Immediately before the hearings were to resume on January 6, the parties advised the Administrative Law Judge that, notwithstanding their diverse interests, they had come to a common basis for settlement in principle, although they had not yet completed the details of their settlement.

No final settlement having been reached, the matter was called for hearing at 10:00 a.m. on January 6, 1981. The parties had not then completed the settlement stipulation and agreement although they were intensively negotiating a resolution of the complex and difficult issues in the case. The hearings were recessed to permit the parties to complete their negotiations and to report their conclusions, and the parties from time to time reported the progress of the negotiations.

On January 12, 1981, counsel for all the parties advised that they had achieved a settlement of all matters in dispute and had reduced that settlement to writing (subject to execution by principals and ratification by the membership of the Pacific Maritime Association in accordance with its by-laws).<sup>5</sup> At that time they furnished copies of documents which comprised the settlement agreement to the Administrative Law Judge (a "General Agreement of Compromise and Release," a revised

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<sup>5</sup> The membership of PMA has since ratified the settlement agreement and the principals have executed all necessary documents.

Assessment Agreement, proposed motions for dismissal and a "Compromise and Release of Claims" by the parties to Dockets 78-39 and 78-40). The parties also furnished a copy of a motion to dismiss Docket No. 79-103 as moot, which they intended to file in view of the cancellation of Agreement No. LM-28 and the withdrawal of all claims for reparations or other retroactive adjustments.<sup>6</sup>

### CONTENTIONS OF PARTIES

In essence, these proceedings concern two different assessment methods, in effect at different times. The first consists of man-hour assessment formulae (in Agreements Nos. LM-4, LM-23 and LM-24) and the second is embodied in Agreement No. LM-28 which uses both a man-hours and tonnage formula. As to the first, Standard, United and Salen contend that man-hour assessment formulae as constituted under those agreements tend to shift assessment costs unfairly to labor intensive or low productivity general cargo operators.

The MCSA urged that its members are direct employers of ILWU labor, responsible under the Employee Retirement Income Security Act ("ERISA") for the adequate funding of various PMA-ILWU pension plans, and that tonnage-based formulae would ensure adequate funding better than man-hour-based formulae.

The shippers and carriers of forest products (MacMillan Bloedel, Crown/Norsk, Weyerhaeuser, Georgia-Pacific and Sause Bros./Crescent), and the carriers of imported iron and steel cargoes (Daiichi, Toko, Atlantic and Tokai) all either support or have no objection to the man-hour assessment method of Agreement LM-4, et al., but do object to the substantial tonnage assessments provided in Agreement No. LM-28. These parties offered several alternative contentions as to how Agreement No. LM-28 should be modified to reduce these burdens, including the creation of new cargo assessment categories for their cargoes, and numerous variations of man-hour assessment methods to accommodate different cargo handling characteristics.

During the course of the proceedings the parties marshalled all available data which they believed supported their contentions as to the correct assessment method. A dozen or more different suggested assessment formula methods were urged upon the Commission and the record was inundated with complex expert testimony. None of the formula achieved any consensus. Instead, they all provoked extensive controversy. The principal obstacle to resolution of the disputes between the parties was that the labor-intensive operators (Standard, United and Salen), the high labor productivity parties (forest products

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<sup>6</sup> All documents have since been filed formally with the Secretary of the Commission and all parties to the settlement plus the MCSA have filed motions to dismiss their complaints and/or to withdraw their interventions as parties in the consolidated dockets, with prejudice.

and steel carriers) and PMA were unable to reach a consensus as to an assessment method that would meet the needs of all interests (containerized operators, bulk carriers, auto carriers and other general cargo operators). Such a consensus is understandably difficult to achieve where large sums of money must be raised annually (nearly \$104,000,000 in 1979) among a finite group of contributors, and where a reduction in one party's contribution under an assessment system necessarily means a corresponding increase in the assessments borne by the others.

#### SETTLEMENT AGREEMENT

The parties have, after extensive negotiations over a considerable period of time, reached a "General Agreement of Compromise and Release" which was executed by all parties participating in the proceeding except the Master Contracting Stevedore Association, which, as has been noted, sought to withdraw from the proceedings. Under the agreement PMA undertakes to cancel Agreement No. LM-28 and to file a new assessment agreement with the Commission, effective upon filing in accordance with the provisions of the Maritime Labor Agreements Act of 1980, Public Law 96-325 (94 Stat. 1021, Aug. 8, 1980). The new assessment agreement provides for a new assessment formula in two phases. Phase 1, effective upon the filing of the agreement, will continue in effect for two and one half years. Under Phase 1 of the agreement, 80.9% of the estimated monies required by the PMA Plans would be assessed on a uniform man-hour basis and 19.1% on a tonnage basis. The tonnage rates would be weighted according to six categories of cargo: dry bulk, autos and trucks, logs and lumber, low productivity general cargo, other general cargo, and containers. Containers are assessed a basic tonnage rate and the other five categories pay tonnage assessments as a percent of the container rate, as follows:

Dry Bulk	5.2154%
Autos and Trucks	23.4150%
Logs and Lumber	75.0000%
Low Productivity	
General Cargo	0.0
Other General Cargo	75.0000%

During Phase 2, commencing two and one half years later, the formula shifts from 80.9% uniform man-hour contributions to 100% man-hour contributions. In addition to a uniform man-hour contribution utilized to pay all benefit costs, however, there is a man-hour assessment which is utilized to finance credit adjustments given to low productivity general cargo (called "Credit Adjustment Cargo" under Phase 2 of the agreement). Low productivity general cargo operators thus will pay no tonnage assessments under Phase 1 and will receive comparable credits under Phase 2, and they, therefore, have withdrawn their complaints. At the same time, the complaints of the high produc-

tivity operators as to Agreement No. LM-28 have been alleviated sufficiently by the new formula to produce a settlement since the formula shifts the assessment system substantially back to a man-hour system, which high productivity operators tend to favor. The auto and dry bulk sectors will pay assessments which do not exceed what they paid under Agreements Nos. LM-4, et al., a system which they did not challenge. Containers do have a higher tonnage assessment rate than high productivity general cargo or logs and lumber, but only for a two and one half year period. Here it should be noted that some parties in the case contended that under Agreement No. LM-28, container interests for the year LM-28 was in effect were better off than high productivity general cargo or high productivity lumber.

Under the settlement agreement, the parties have agreed to forego retroactive adjustments or reparations in favor of a prospective, two-phase assessment agreement. Both PMA and the MCSA vigorously opposed retroactivity, in large part because they contend that the impact of retroactive adjustments falls upon stevedoring concerns who pay the assessments and who would likely be unable to pass shortfalls along to customers, and who, in other instances, might receive windfalls that could distort competitive relationships between them. PMA and the fruit shippers have, however, entered into a money settlement set forth in a separate settlement agreement between them. This settlement concerns allegations by the fruit shippers seeking adjustments for 1978 and before (during which period the collective bargaining contracts and uniform manhour formulae contained therein were not filed with the Commission) and claims that the fruit shippers experienced a consistent and abnormally high historical pattern of use of non-registered dockworkers in unloading their vessels. PMA contested the Commission's jurisdiction over these issues but elected to settle them rather than to continue litigation. PMA has agreed to pay Standard, United and Salen as follows:

On January 30, 1981<sup>7</sup>

To Standard	\$131,544
To United	\$124,626
To Salen	\$186,838

On January 30, 1982

To Standard	\$131,545
To United	\$125,627
To Salen	\$186,839

#### DISCUSSION

It is well established that settlement of administrative proceedings is favored by Congress, the courts and administrative agencies themselves. (See 5 U.S.C. §554(c)(1), and *Pennsylvania Gas & Water Co. v. Federal*

<sup>7</sup> These payments for January 30, 1981, have already been made.

*Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972)). The parties hereto have already consumed very large amounts of time and money in litigating the issues. Continuance of the litigation would cause further unnecessary expenditure of large amounts of time and money. The direct testimony and cross-examination in the litigation revealed no common ground as to an assessment basis with which the parties could all live. The multi-faceted settlement adopted during negotiations does produce this result.

Further, the parties in these proceedings represent major shipper and carrier elements of the maritime industry. Their interests are diverse and representative. The new assessment formula is a delicate compromise agreed to by the parties and represents a careful balancing of interests achieved during the course of hearings after months of expensive litigation having an uncertain outcome and after months of exhaustive negotiations. A critical element enabling this settlement to go forward at all is the mutual decision by the parties to adopt formulae operating prospectively, which obviated the need for the parties to press claims for retroactive application of whatever formula they contended should have been imposed by the Commission in lieu of Agreement No. LM-28.

It should be noted that during the pendency of these proceedings since 1978, all affected parties have had an opportunity to come forward and be heard by the Commission on the question of fringe benefit assessment methods. No party seeks continuation of these proceedings, and no interest, public or private, would be served by such a perpetuation. Accordingly, it is appropriate at this time to discontinue these proceedings.

Also, under the terms of the settlement agreement, Agreement LM-28 has been terminated, and all parties having claims concerning Agreement LM-28 have withdrawn them. Accordingly, Agreement LM-28 (and predecessor agreements) and the consolidated proceedings concerning these agreements are moot. No purpose would be served by reviving disputes over the lawfulness of superseded agreements. To do so would create wasteful and unnecessary litigation concerning what would have become theoretical issues arising out of agreements which are moot.

One should recognize that at the hearing of these proceedings counsel for all parties were diligent and resourceful and explored exhaustively all aspects of the issues presented. Their settlement, reached after detailed, good-faith negotiation, represents a statesmanlike, practical solution to highly complex problems in the industry by the persons most knowledgeable concerning them and most directly affected by them.

Finally, it is important to note two aspects of the proposed settlement that one might well overlook. First, since the settlement is so complex,

and since the issues overlap, the elements agreed to are interdependent on one another. What is given away or taken from one faction or group directly affects what is given away or taken from a competing faction or group. Therefore, any change in the settlement agreement may well cause the entire agreement to fall. For this reason great care needs to be exercised to insure that the agreement is considered as an entirety rather than a sum of many parts.

Secondly, since a new assessment agreement has been filed as a part of the settlement, consideration must be given to just how Public Law 96-325 should be applied. The law amends the Shipping Act of 1916 and provides in pertinent part that:

SEC. 15. Every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, \* \* \* The term "agreement" in this section includes understandings, conferences, and other arrangements, but does not include maritime labor agreements or any provisions of such agreements, unless such provisions provide for an assessment agreement described in the fifth paragraph of this section.

Section 5 of the law adds a new section 45 to the Shipping Act as follows:

SEC. 45. The provisions of this Act and of the Intercoastal Shipping Act, 1933, shall not apply to maritime labor agreements and all provisions of such agreements except to the extent that such provisions provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized. Notwithstanding the preceding sentence, nothing in this section shall be construed as providing an exemption from the provisions of this Act or of the Intercoastal Shipping Act, 1933, for any rates, charges, regulations, or practices of a common carrier by water or other person subject to this Act which are required to be set forth in a tariff, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to a maritime labor agreement.

Further, Public Law 96-325 further amends section 15 of the Shipping Act to read:

Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized, shall be deemed approved upon filing with the Commission.

\* \* \*

The approval of the settlement agreement in these consolidated proceedings was not predicated on any determination of whether or not the new assessment agreement is or is not exempt from the provisions of the Shipping Act, 1916, or the Intercoastal Shipping Act, 1933. The question was not raised in the pleadings in these consolidated proceedings, nor was it later argued by the parties. Therefore, it would be wrong to cite the settlement of these consolidated cases as precedent for the proposition that the provisions of the Shipping Act, 1916, or the Intercoastal Shipping Act, 1933, do or do not apply to the new assessment agreement, within the ambit of Public Law 96-325.

In light of the above discussion and the entire record in these consolidated proceedings it is held that the settlement agreement reached by the parties is in the public interest and is approved.<sup>8</sup> It is *Ordered* that:

(1) PMA shall pay to Standard, United and Salen at the times specified the amounts set forth in the Compromise and Release of Claims, and that all parties to the compromise will abide by the provisions contained in the Compromise and Release of Claims and will carry out its terms.

(2) All parties to the General Agreement of Compromise and Release will abide by the provisions contained in said document and will carry out its terms.

(3) As between the parties to these consolidated cases, the various formulae set forth in the Memorandum of Agreement Between Members of the Pacific Maritime Association Concerning Assessments to Pay ILWU-PMA Employee Costs, shall be used to pay such employee benefit costs; and as between the parties to these consolidated cases, the provisions of the Agreement shall be binding on the parties thereto.<sup>8 a</sup>

(4) The Motion to Dismiss Proceeding as Moot with respect to Docket No. 79-103 is hereby granted.<sup>9</sup>

(5) The various Motions for Dismissal of Intervention and Withdrawal of Protest are hereby granted with prejudice.<sup>10</sup>

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<sup>8</sup> The settlement agreement is comprised of the following documents: (1) General Agreement of Compromise and Release, (2) Memorandum of Agreement Between Members of the Pacific Maritime Association Concerning Assessments to Pay ILWU-PMA Employee Benefit Costs, (3) Motion to Dismiss Proceeding (79-103) as Moot, (4) series of Motions for Dismissal of Complaint and Intervention and Withdrawal of Protests. While necessary to an understanding of the entire settlement agreement, these documents are too lengthy to attach to this Order. They are part of the record of the case and are contained therein.

<sup>8 a</sup> Ordering Paragraph (3) is not inconsistent with ordering paragraph (2), or with any provisions of the General Agreement of Compromise and Release and must be considered and read together with them, so as not to preclude any changes in the Assessment Agreement permitted under the terms of the General Agreement of Compromise and Release.

<sup>9</sup> The motion was filed by PMA, Standard, United, Salen, Daiichi, Toko, Atlantic, Tokai, Weyerhaeuser, MacMillan, Sause/Crescent, Crown, Norsk and Georgia-Pacific.

<sup>10</sup> Such motions were filed by the same parties as are set forth in footnote 9.



STANDARD FRUIT AND SS. CO., INC. AND UNITED BRANDS, INC., ET AL V. PACIFIC MARITIME ASSOCIATION

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(6) The Motion for Permission to Withdraw as Intervenor by MCSA is hereby granted, with prejudice.<sup>11</sup>

(7) These consolidated proceedings are terminated with prejudice and are hereby discontinued. It is

*Further Ordered* that within thirty (30) days after this Order becomes final the parties file a joint affidavit of compliance with the terms of the settlement.

(S) JOSEPH N. INGOLIA  
*Administrative Law Judge*

March 6, 1981

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<sup>11</sup> The term "with prejudice" as to MCSA applies to issues determined in this consolidated proceeding. It does not apply to any issues raised in other later proceedings, nor does it apply to any issues raised by Public Law 96-325.

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 79-30**

**INDEPENDENT OCEAN FREIGHT FORWARDER**

**LICENSE NO. FMC 1728, I.M.S., INC.**

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**NOTICE**

*April 8, 1981*

Notice is given that no exceptions have been filed to the March 6, 1981 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**  
*Acting Secretary*

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 79-30****INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE****NO. F.M.C. 1728 I.M.S., INC.**

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Proposed settlement of civil penalties rejected; respondent found to have violated the Shipping Act; and a civil penalty of \$5,000 assessed.

*Philip L. Kellog and James L. Lyons* for respondent I.M.S., Inc.

*Paul J. Kaller, Joseph B. Slunt, and Alan J. Jacobson* as Hearing Counsel.

**REVIEW OF RECOMMENDED SETTLEMENT BY,  
AND INITIAL DECISION<sup>1</sup> OF CHARLES E. MORGAN,  
ADMINISTRATIVE LAW JUDGE**

*Finalized April 8, 1981*

By order of investigation and hearing served April 6, 1979, this proceeding was instituted to determine whether respondent I.M.S., Inc. (I.M.S.), a nonvessel operating common carrier by water (NVOCC), has violated section 18(b)(3) of the Shipping Act, 1916 (the Act), by failing to charge and collect fees for ocean transportation in accordance with the tariff filed by I.M.S. with the Commission; whether I.M.S. has violated section 18(b)(1) of the Act by providing a house-to-house ocean transportation service without an applicable tariff provision on file with the Commission; whether I.M.S. has violated section 18(b)(1) by operating as an NVOCC by water prior to the filing of a tariff with the Commission; and whether I.M.S.'s license as an independent ocean freight forwarder should be revoked or suspended.

On May 17, 1979, I.M.S. advised the Commission that it voluntarily has surrendered its Independent Ocean Freight Forwarder License No. 1728, for revocation without prejudice. Thus, this issue became moot.

By amended order of investigation and hearing served August 30, 1979, the Commission noted that I.M.S. has surrendered its forwarder license for revocation, and also that I.M.S. had requested permission to negotiate a settlement of civil penalty claims arising from the activities at issue in this proceeding. The Commission ordered the addition of a further issue to this proceeding, namely, the issue of "whether civil penalties should be assessed against I.M.S., Inc. and/or Peter Kirn,

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<sup>1</sup> 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).

President of I.M.S., Inc., pursuant to 46 U.S.C. 831(e) for violations of Shipping Act, 1916, and if so, the amount of such penalties."

It was further ordered by the Commission in its amended order of investigation and hearing, that the Administrative Law Judge shall preside over the taking of evidence; review of any recommended settlement, and render an Initial Decision thereon; and that settlement negotiations, if any, between the parties be concluded on or before November 26, 1979.

At the first prehearing conference Hearing Counsel and counsel for I.M.S. stated that they wanted time to engage in discovery, and for possible future settlement of the issues, and a status report was promised in 45 days.

On November 26, 1979, in lieu of completing settlement negotiations, Hearing Counsel filed a motion to "reactivate" the proceeding, stating that despite the best efforts of all concerned and substantial progress toward a settlement, that it had not been possible to reach a final settlement.

Accordingly, a second prehearing conference was held on December 13, 1979. At that time, Hearing Counsel stated that they had run into the problem of trying to come up with some guidelines or standards for the future conduct of the activities of I.M.S. Hearing Counsel stated that the problem was with the terms of settlement, but not with the monetary amount of a penalty.

Hearing Counsel stated that there was not any dispute as to what had happened in the past, but that there was a question as to whether the past activities of I.M.S. had violated provisions of the Shipping Act.

Hearing Counsel stated that I.M.S. was a freight forwarder licensed pursuant to section 44(b) of the Act, that I.M.S. also had a non-vessel operating common carrier (NVOCC) tariff on file with the Commission so that I.M.S. could act as an NVOCC, that I.M.S. also is known as an exempt Part IV freight forwarder under the Interstate Commerce Act, and that I.M.S. moved household goods only.

The problem in the view of Hearing Counsel related to the facts that I.M.S. performed functions under both the Interstate Commerce Act as well as the Shipping Act, and I.M.S.'s operations were intermodal.

A typical shipment of I.M.S. involved the transportation of household goods from a point in the Washington, D.C., area to the Port of Baltimore, thence by ocean carrier to the Port of Bremen, Germany, and thence to an inland point in Germany, serving German national diplomatic and military personnel.

The ocean transportation would be performed by a vessel operating common carrier pursuant to its tariff. I.M.S. had a port-to-port NVOCC tariff on file with the Federal Maritime Commission, with this tariff providing rates and charges from the Port of Baltimore to the Port of Bremen, among other ports listed.

Hearing Counsel requested two months to work out a stipulation, and February 15, 1980, was set as the time of submission of a proposed stipulation of facts and settlement of the proceeding. The proposed stipulation and settlement were not forthcoming timely, and extensions were granted at the request of Hearing Counsel, but finally to resolve the matter hearing was scheduled on June 11, 1980.

At the hearing on June 11, Hearing Counsel and counsel for I.M.S. offered two papers, both unsigned and both with handwritten insertions and deletions in rough "Draft" form. Counsel also promised to prepare a third document, a memorandum in support of the proposed settlement, which memorandum would be based on guidance from the Administrative Law Judge. Hearing Counsel stated that such guidance had not been requested three or six months earlier because "Until three days ago we did not have the amount." When asked to explain, Hearing Counsel elaborated, that basically the amount was not a problem, but that "What has been holding up the parties is the Commission has had under consideration for a very long time a proposal to exempt from filing with the Commission the tariff for an NVOCC household goods carrier." "In some instances I.M.S. does act as a household good carrier, as a non-vessel operating household carrier." "They have repeatedly sought to work out with the Commission's staff, with myself, and with the Commission's staff a means under which they could file a tariff that would meet the Commission's requirement." "They have been unable to do so." "Because it is an extremely difficult situation to cover a tariff which will cover the movement of household goods from anywhere in this country to anywhere in the world including from an inland destination."

Hearing Counsel went on to state that the Federal Maritime Commission was in the process of proposing that "you" (meaning NVOCC's handling household goods) not have to file such a tariff in the future. Hearing Counsel apparently refer to Docket No. 80-37, 46 C.F.R. 531, 536, *Used Household Goods--Tariff Filing Regulations Applicable to Carriers in the Foreign and Domestic Offshore Commerce of the United States--Proposed Rulemaking*, served June 10, 1980. In the proceeding in No. 80-37, it was proposed (1) to exempt transportation of used household goods by non-vessel operating common carriers from all tariff filing requirements; and (2) to require that rates for used household goods established by vessel operating common carriers be stated on a weight or container basis only and that the weights be substantiated by a public weigher's certificate.

Until June 4, 1980, counsel for the parties had not advised that one of their concerns in settling this proceeding related to the tariff filing rules which became the subject of Docket No. 80-37. But, in any event, this concern relates only to I.M.S.'s future conduct as to the filing of tariffs,

and does not relate to the alleged past violations by I.M.S. of the Shipping Act.

At the hearing on June 11, counsel were advised that the only two papers presented at the hearing, namely, the "Stipulation" and "Proposed Settlement of Civil Penalties," were lacking in factual detail, and that the stipulation was too vague.

In the stipulation (Exhibit No. 1), in paragraph 2, it was stipulated that in "some instances" I.M.S. only provided packing and crating services for export shipments; and in paragraph 3, it was stipulated that in "the majority of instances" I.M.S. offered to make all the shipping arrangements for the transportation of household goods to the foreign destination, and that when I.M.S. provided this service it arranged for the transportation to the export port as well as for the ocean transportation. However there was no stipulation as to how many shipments were handled one way or the other.

In paragraph 7 of the original stipulation presented at the June 11 hearing, it was stipulated that I.M.S. maintained an NVOCC tariff for the carriage of used household goods. This paragraph further stipulated:

However, *IMS did not uniformly follow its tariff* in arranging for the transportation of the household goods. [Emphasis supplied.]

At the request of counsel, the parties were given two more weeks to present their memorandum in support of proposed stipulation. Counsel were advised also that they could use the same two weeks to revise, if they wished, the stipulation and the proposed settlement, so as to improve upon and flesh out factual details in the stipulation.

In fact, the revised "stipulation" filed on June 25, 1980, was substantially the same as Exhibit 1 of record. But, the revised stipulation was more vague in that it changed the original stipulation in its paragraph 7 to state that I.M.S. "*may not have uniformly followed its tariff.*" (Emphasis supplied.)

Paragraph 7, as revised, added the word "through" in connection with transportation of household goods. The significance of the word "through" is that the I.M.S. NVOCC tariff on file with the Commission provides rates and charges on port-to-port shipments rather than the through house-to-house transportation offered at times by I.M.S. to its clients.

Upon examination of the three papers filed on June 25, 1980, it was clear that factual details of the past operation of I.M.S. were lacking, and the stipulation of facts was too vague. The said "Stipulation" is attached to this decision as Appendix "A," and the "Proposed Settlement of Civil Penalties" submitted June 25, 1980, is attached as Appendix "B."

Accordingly, the proposed settlement was rejected and the matter was set for hearing on August 12, 1980. Only one witness was called by the parties, namely, a district investigator for the Federal Maritime Commission. Following the conclusion of the August 12, 1980, hearing, opportunity was given the parties to petition to reopen the record if they saw fit so to request by August 22, 1980.

No request to reopen was made timely, but by letter dated August 25, 1980, Hearing Counsel and counsel for I.M.S. requested an opportunity to present additional evidence. Hearing Counsel stated that they and counsel for I.M.S. were meeting on September 3, 1980, and would give notification promptly regarding a proposed date for presenting further evidence. No such notification was received by September 25, 1980, and the parties were advised by notice of that date, served the next day, that the record would be deemed closed on October 1, 1980.

On October 1, 1980, the respondent served its "Supplemental Memorandum in Support of Proposed Settlement," with attachments. Therein, in conclusion, the respondent asks that the presiding Administrative Law Judge render an Initial Decision approving the proposed settlement. This supplemental memorandum hereby is accepted as part of the record in this proceeding.

This supplemental memorandum of I.M.S. contains some factual matter and together with the stipulations of the parties, and the transcript of hearing, there appears to be a minimum factual basis for reaching the conclusions necessary for an Initial Decision on the matters at issue in this proceeding. Nevertheless, the record at best is merely minimally adequate to reach necessary conclusions. For example, Hearing Counsel stated, "we have decided that this case is not worth pursuing through a hearing." "We decided instead to propose a settlement. The alternative to your not accepting the settlement, not considering it, is for the case to be dismissed and the U.S. Government getting nothing, Your Honor." "\* \* \* the primary factor that goes into the \$2,500 is that we can't prove a case."

At the June 11, 1980, hearing, Hearing Counsel agreed that in the first stipulation, paragraph 7 of Exhibit 1 of the record, there was an admission by I.M.S. that I.M.S. violated the law by not following its NVOCC tariff on file with the Commission.

However, Hearing Counsel went on to say at page 33:

Yes, your Honor. And what I'm saying to you is that the violations were—the possible violations were so complex and confusing, and their basic operation had nothing to do with the FMC jurisdiction, that we made the decision not to go ahead and establish exactly what shipments may have been in violation and which ones may not have been.

Apparently, Hearing Counsel failed to consider that it might have been advisable to prove that some violations occurred, without attempting to make findings as to all of I.M.S. shipments.

The revised stipulation submitted on June 25, 1980, states in part, "However, not more than twenty percent of its approximately 200 shipments per year may have been handled as an NVOCC." "In connection with these shipments I.M.S. may not have uniformly followed its tariff in arranging for the through transportation of the household goods."

At the hearing on August 12, 1980, a specific example of the operation of I.M.S. was given. This example was of a shipment which occurred during the period in issue herein, the five years between April 6, 1974, and April 6, 1979. In January of 1976, I.M.S. quoted a German national an estimated cost for moving his used household goods from a point in the Washington, D.C., commercial area to Wilhemshaven, West Germany.

In particular for this shipment, I.M.S. estimated a cost for packing, wrapping, and crating material, a cost for loading the container at the residence of the German national, a cost for supplying the steel container and the cartage to the warehouse of I.M.S. in Alexandria, Va., a cost for forwarding fees, a cost for cartage from the warehouse in Alexandria to the Port of Baltimore, a cost of ocean freight from the Port of Baltimore to the Port of Bremen, Germany, and a cost for destination services, that is, from dockside at Bremen to the residence or inland destination at Wilhelshaven.

In this particular instance, the total figure quoted was \$4,771.20 to the German national. I.M.S. included in its letter to the German national an estimate that the total charges would amount to \$56.80 per 100 pounds. Based upon an estimated weight of 8,400 pounds given to the German national, the total estimated charges (\$56.84 times 84) was \$4,771.20.

I.M.S. also estimated the volume at 34 cubic meters or 1,200 cubic feet, that is, to the German national.

When I.M.S. sent its bill to the German military representative at the German Embassy in Washington, D.C. (this military representative was paying for the move of the German national), a second set of figures was given by I.M.S. Namely, the weight was listed at 9,190 pounds, and the cubic feet as 1,312. Using the same rate of \$56.80 per 100 pounds, and the higher 9,190 pounds, the charges to the shipper apparently became \$5,219.92.

In connection with the same shipment, a third set of weight and measurement figures was used by I.M.S. for I.M.S.'s payment of ocean freight to the vessel operating common carrier, Baltic Shipping Company, and its agent Norton and Lilly. Namely, a weight of 6,700 pounds was recorded for the shipment. In other words, Baltic Shipping Compa-



INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE 775  
NO. FMC. 1728, I.M.S., INC.

ny received less than its tariff rate and charges from I.M.S. to the extent that this shipment falsely was listed as weighing 6,700 pounds, when in fact it weighed 9,190 pounds. This was an undercharge or rebate to I.M.S., whatever one may wish to call it, of (2,490 divided by 9,190) more than 27.09 percent.

The Commission's witness estimated that an average undercharge or rebate to I.M.S. in connection with the files he examined would be \$1,500 to \$2,000 per shipment on those shipments in which there were discrepancies in weight. This witness reviewed 60 files, not all of which showed discrepancies of weight, because I.M.S. also moved motor vehicles for which there were no weight discrepancies, so far as he knew, because motor vehicle weights may be checked later with ease. This witness believed that it was fair to say that I.M.S. was the beneficiary of undercharges or rebates on 20 of the 60 shipments which he examined, or about a total of \$1,500 times 20, or \$30,000.

The predominant carrier offering undercharges or rebates to I.M.S. was the Baltic Shipping Company. Another name which came to the mind of the witness in this connection was the Atlantic Container Line.

As stipulated, the primary service of I.M.S. was packing and crating for export shipment. In some instances the client made its own arrangements for the through transportation.

In the majority of instances, I.M.S. offered and provided for the transportation of the household goods from the client's residence in the Washington, D.C., area to the export port (Baltimore) and for the ocean transportation. Also, I.M.S. offered to make the arrangements and provided for destination services including the unpacking of the household goods at the ultimate destination, or inland point in West Germany.

Though I.M.S. was licensed as an ocean freight forwarder, it used the services of another licensed independent ocean freight forwarder in making arrangements for ocean transportation.

I.M.S. did not receive any brokerage compensation from the vessel operating ocean common carrier, but did receive the benefit of undercharges or rebates from the ocean carrier based on false underweights or undermeasurements of the household goods.

I.M.S. normally expressed the total charge for the through transportation to its clients in terms of costs per 100 pounds for all of the various services of packing and crating, loading into container at residence, supplying of the container and cartage to the I.M.S. warehouse in Alexandria, cartage from warehouse to Port of Baltimore, forwarding fees at the port, ocean freight charges, and destination charges including unpacking of the household goods.

I.M.S. maintained and still maintains an NVOCC tariff, but it is a port-to-port tariff and does not provide rates and charges from a residence in the Washington, D.C. area to an inland point in Germany.

In accordance with section 18(b)(1) of the Act, I.M.S. filed an NVOCC tariff with the Commission on February 14, 1975, showing its rates and charges for the ocean transportation of household goods. (I.M.S. tariff--FMC-1). Effective March 29, 1979, I.M.S.'s tariff FMC-2 cancelled and superseded its tariff FMC-1. In No. FMC-2, the rate from Baltimore to Bremen is listed as \$59 per 100 pounds, but again it is a port-to-port rate, rather than a house-to-house rate.

"On the shipments that I examined there was no shipment that reflected the commodity rate on file in I.M.S.'s tariff" was the unrefuted testimony of the Commission's witness.

It is concluded, not only that the underlying ocean carrier knowingly did not charge its proper tariff charges for its services to I.M.S., but also that I.M.S. knowingly did not charge its proper tariff charges to its clients.

It is concluded further that I.M.S. did not have a proper NVOCC tariff on file for the through house-to-house service which it offered to, and provided for, its clients at times.

It has been stipulated that I.M.S. provided its services, including in the majority of instances all transportation to the foreign destination, and that these services were provided between April 6, 1974, and April 6, 1979. It is concluded further that I.M.S. operated as an NVOCC prior to the time which I.M.S. filed a tariff as a NVOCC with the Commission.

It is common knowledge that the transportation of used household goods involves many characteristics which are different from the transportation of manufactured goods or of other commercial products. It is equally common knowledge that a one-time or two-or-three-times-in-his-life-shipper of household goods is not as aware of shipping customs and practices as is a shipper of commercial products who makes dozens of shipments every month or every year.

As the witness for the Commission testified it was "not an uncommon practice" for the household goods carriage industry to engage in certain abuses of shipper clientele. Such abuses include underestimating of weight and costs to a shipper to obtain his business, and the later assessment of higher charges based on higher weights after the business is obtained.

Mr. Kirn, the president of I.M.S., was approached "by representatives of the underlying ocean carrier" who offered to allow Mr. Kirn to declare to that ocean carrier a weight or measure below actual weight or measure to save on the cost of ocean freight. Mr. Kirn accepted the offer. Thus, the shipper client of I.M.S. was billed based at a relatively high weight, whereas the weight on the ocean carrier's bill of lading was lower, the latter fact being at the invitation of the ocean carrier, as reported by Mr. Kirn to the Commission's witness. Insofar as the record shows, the shipper clients were billed ultimately at the correct

weights although before the shipments were made, the weights were underestimated to the shipper clients of I.M.S.

I.M.S. in its normal operations offered and provided for the seven services listed in paragraph 4 of the stipulation, including origin packing and destination unpacking of the household goods, and billed its client shipper for these through house-to-house services as listed on a cost per 100 pounds basis.

The proposed settlement entered into between Hearing Counsel and I.M.S. states that I.M.S. has terminated all its practices related to inflating to its clients the weight of shipments, underdeclaring the weight or cube of shipments to carriers, and is willing and committed to maintaining measures designed to eliminate, to discourage and to prevent violations of the Shipping Act; I.M.S. is agreeable to paying to the Federal Maritime Commission the sum of \$2,500 in consideration of the compromise of all civil penalties under the Act that may have occurred between April 6, 1974, and April 6, 1979, and on condition that payment of this civil penalty shall forever bar any civil action or other claim for recovery of civil penalties from I.M.S. arising from the alleged violations between the dates above; and it being understood and agreed that there is no admission of guilt by I.M.S., its officers, directors or employees to the alleged violations above.

This settlement must be rejected, because for one reason the record shows that I.M.S. has violated provisions of the Shipping Act. I.M.S. violated section 18(b)(3) of the Act by charging its clients not in accordance with its rates on file. I.M.S. violated section 18(b)(1) of the Act by providing a house-to-house ocean transportation service without an applicable tariff provision on file with the Commission, and by operating as an NVOCC prior to the filing of a tariff with the Commission.

The settlement must be rejected for a second reason. The amount of \$2,500 is less than a minimum reasonable penalty for violations of the nature herein, even considering the character references and other mitigating data cited in I.M.S.'s supplemental memorandum. There is nothing in such data which would show that I.M.S. cannot pay a larger civil penalty.

The facts remain that Peter Kirn, I.M.S. president, pleaded guilty to one count of mail fraud in connection with I.M.S.'s activities prior to 1975. In the present proceeding, I.M.S.'s activities continued into 1975 and 1976, as seen by the typical shipment in January 1976, cited by the Commission's witness at the last hearing. The Federal Republic of Germany on the basis of its investigation of I.M.S. was satisfied that I.M.S. had terminated its improper weight practices in early 1975, and agreed to continue to do business with I.M.S. However, at least as late as January, 1976, I.M.S. was continuing its improper weight practices, record transcript--line 15, page 59, and pages 60 and 61. This evidence

directly negates the statement of counsel for I.M.S. at page 4, first complete paragraph of I.M.S.'s supplemental memorandum, "that I.M.S. terminated the improper practice of inflation of weights in early 1975."

Under all the above circumstances, a minimum penalty of \$5,000 is certainly justified in this proceeding.

It is ultimately concluded and found that the proposed settlement of civil penalties herein has not been justified; that respondent I.M.S. has violated sections 18(b)(1) and 18(b)(3) of the Shipping Act, 1916; and that a civil penalty of \$5,000 shall be assessed against I.M.S.

(S) CHARLES E. MORGAN  
*Administrative Law Judge*

Washington, D.C.  
March 6, 1981

Attachments:

Appendix A  
Appendix B

APPENDIX A  
BEFORE THE FEDERAL MARITIME COMMISSION

---

INDEPENDENT OCEAN FREIGHT  
FORWARDER LICENSE NO.  
F.M.C. 1728 I.M.S., INC.

DOCKET NO. 79-30

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STIPULATION

Pursuant to Rule 162 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.162) Respondent and Hearing Counsel hereby file this joint stipulation.

1. Between April 6, 1974 and April 6, 1979, I.M.S. provided a variety of services for clients who were primarily foreign military and embassy personnel shipping used household goods to and from the United States. The primary service performed by I.M.S. was the packing and crating, or the unpacking, of household goods at its client's residence in the United States.

2. In some instances, I.M.S. only provided packing and crating services for export shipments. The client made its own arrangements for the delivery of the household goods to the port and for the ocean transportation of the household goods to the foreign destination.

3. In the majority of instances, in addition to providing for packing and crating services, I.M.S. offered to make all the shipping arrangements for the transportation of the household goods to the foreign destination. When I.M.S. provided this service I.M.S. arranged for the transportation of the household goods to the export port as well as for the ocean transportation of the household goods.

4. When I.M.S. offered to make all the export arrangements for the household goods it provided an estimate for the cost of each of the following services:

- a) Packing, wrapping, crating and packing material;
- b) Loading into container at residence;
- c) Supplying of steel container and cartage to the I.M.S. warehouse;
- d) Cartage from warehouse to port;
- e) Forwarding fees at port;
- f) Ocean freight charges;
- g) Destination services including unpacking of household goods;

The charges were also expressed in terms of cost per hundred weight (100 lbs.) for all the services.

5. Though I.M.S. was licensed as an independent ocean freight forwarder it used the services of another licensed independent ocean freight forwarder in making arrangements for the ocean transportation. I.M.S. would select and contact the forwarder. The forwarder would book the shipment with the ocean carrier and inform I.M.S. of the ocean carrier booking number. I.M.S. or the forwarder arranged for the spotting of the ocean container at I.M.S.'s warehouse or the client's residence. I.M.S. then arranged for the transportation of the container carrying the household goods to the port.

6. I.M.S. did not receive any ocean freight compensation from the ocean carrier or share in any compensation with the ocean freight forwarder.

7. I.M.S. maintains a non vessel operating common carrier (NVOCC) tariff for the carriage of used household goods on file with the Commission. However, not more than twenty percent of its approximately 200 shipments per year may have been handled as on NVOCC. In connection with these shipments I.M.S. may not have uniformly followed its tariff in arranging for the through transportation of the household goods.

8. Peter Kirn, the former President of I.M.S., plead guilty to one count of mail fraud perpetrated in connection with I.M.S.'s activities prior to 1975. I.M.S. and Peter Kirn were alleged to have engaged in inflating the total net weight of property moved by I.M.S.

9. During 1975 and 1976 I.M.S. would, on occasion, understate the net weight of shipments to ocean carriers. This practice was engaged in following advice from the carriers' sales agents.

(S) PHILLIP L. KELLOGG  
*Counsel for I.M.S., Inc.*

(S) JAMES L. LYONS  
*Counsel for I.M.S., Inc.*

(S) PAUL J. KALLER  
*Acting Director  
Bureau of Hearing Counsel*

(S) JOSEPH B. SLUNT  
*Hearing Counsel*

(S) ALAN J. JACOBSON  
*Hearing Counsel*

APPENDIX B  
BEFORE THE FEDERAL MARITIME COMMISSION

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INDEPENDENT OCEAN FREIGHT  
FORWARDER LICENSE NO. F.M.C.  
1728 I.M.S., INC.

DOCKET NO. 79-30

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PROPOSED SETTLEMENT OF CIVIL PENALTIES

This proposed settlement is entered into between the Bureau of Hearing Counsel and I.M.S., Inc. hereinafter referred to as Respondent, the only parties ("The Parties") to this proceeding. This 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 April 6, 1979, the Commission has instituted an investigation of Respondent's activities as a non-vessel operating common carrier (NVOCC) and whereas the April 6, 1979 Order was amended by an Order of August 30, 1979 to include a determination of whether civil penalties should be assessed for possible violations of sections 18(b)(1) and 18(b)(3) of the Shipping Act, 1916.

Whereas, the Order of Investigation recites that the Respondent had apparently engaged in violations of sections 18(b)(1) and 18(b)(3) of the Shipping Act, 1916.

Whereas, the Respondent will not contest that it carried out certain practices which have been stipulated to with Hearing Counsel.

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 the activities set forth in the Commission's Order of April 6, 1979.

Whereas, section 32 of the Shipping Act, 1916 authorizes the Commission to assess, collect, compromise and settle certain designated civil penalties arising under the Shipping Act, 1916.

Whereas, the Respondent has terminated all its practices related to inflating to its clients the weight of shipments, underdeclaring the weight or cube of shipments to carriers, and has instituted and indicated its willingness and commitment to maintain measures designed to eliminate, discourage, and prevent violations of the Shipping Act 1916.

Now, therefore, in consideration of the premises herein, the undersigned Respondent hereby agrees to pay to the Federal Maritime Commission the sum of Two Thousand Five Hundred Dollars the payment of said amount to be made in accordance with the following terms of settlement:

1. 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 April 6, 1974 and April 6, 1979, the undersigned Respondent agrees to pay to the Federal Maritime Commission the sum of Two Thousand Five Hundred Dollars within 15 days from approval of the terms and conditions set forth herein by the presiding Administrative Law Judge and Commission.

2. Upon payment of the civil penalty amount following approval of this agreement of settlement by the presiding Administrative Law Judge and Commission, this instrument shall forever bar the commencement or institution of any civil action or other claim for recovery of civil penalties from Respondent arising from the alleged violations set forth and described herewith, and that occurred between April 6, 1974 and April 6, 1979.

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.

(S) PHILIP L. KELLOGG  
*Counsel for I.M.S., Inc.*

(S) JAMES L. LYONS  
*Counsel for I.M.S., Inc.*

(S) PAUL J. KALLER  
*Acting Director  
Bureau of Hearing Counsel*

(S) JOSEPH B. SLUNT  
*Hearing Counsel*

(S) JOSEPH B. SLUNT  
*for ALAN J. JACOBSON  
Hearing Counsel*



**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 79-88****PACIFIC COAST OCEAN FREIGHT FORWARDERS  
CONFERENCE - AGREEMENT NO. 8330, AS AMENDED, AND  
AGREEMENT NO. 8330-2**

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**NOTICE***April 10, 1981*

Notice is given that no exceptions were filed to the February 26, 1981 initial decision in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the decision has become administratively final.

(S) JOSEPH C. POLKING  
*Secretary*

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 79-88****PACIFIC COAST OCEAN FREIGHT FORWARDERS  
CONFERENCE - AGREEMENT NO. 8330, AS AMENDED, AND  
AGREEMENT NO. 8330-2**

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1. Where a group of freight forwarders seeks approval of an agreement under section 15, Shipping Act, 1916, which agreement allows them to form a conference to discuss "any and all matters of mutual interest" with other conferences and with direct and indirect carriers by rail, water, truck or air, such agreement is per se violative of United States antitrust laws and requires justification under the ruling in *Federal Maritime Commission v. Aktiebalager Svenska Amerika Linian* (Swedish American Line), 390 U.S. 238 (1968).
2. In considering the question of approval under section 15, the Commission must have sufficient information and data to determine the impact of the agreement on the commerce of the United States and, where justified, to exempt the proposed anticompetitive combination from the operation of the antitrust laws; and it is incumbent on the proponent to furnish such information. Here, where the record is devoid of substantive, probative facts, approval of Agreement 8330-2 is not justified.
3. Where, as here, an agreement is so broad, indefinite and vague that it fails to apprise the Commission, as well as any interested parties, as to the procedures and arrangements under which the concerted activity permitted by the agreement is to take place, it cannot be approved.
4. Since Agreement 8330-2 is a complete revision and update of Agreements 8330 and 8330-1, these latter agreements likewise do not meet the requirements of section 15 of the Shipping Act, 1916, and must be disapproved.

*J. Donald Kenny* for proponents the Pacific Coast Ocean Freight Forwarders Conference and members thereof.

*Paul J. Kaller, Joseph B. Slunt, and William D. Weiswasser* for Bureau of Investigation and Enforcement (formerly Bureau of Hearing Counsel).

**INITIAL DECISION<sup>1</sup> OF JOSEPH N. INGOLIA,  
ADMINISTRATIVE LAW JUDGE**

*Finalized April 10, 1981*

This proceeding arose as a result of an Order of Investigation and Hearing served by the Federal Maritime Commission (Commission) on September 13, 1979.<sup>2</sup> The parties took part in discovery and various documents were made a part of the record. In order to facilitate reference to those documents, as well as the Order of Investigation and

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<sup>1</sup> 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)

<sup>2</sup> Exhibit 5, *Ibid.*

AGREEMENT NO. 8330, AS AMENDED, AND AGREEMENT 785  
NO. 8330-2

Hearing itself, they have been identified and assigned exhibit numbers as follows:

Deposition of William F. Bosque	Exhibit 1
Deposition of Donald I. Theiss	Exhibit 2
21 Supporting Affidavits	Exhibit 3
Supporting Affidavit of J. Murray Fox	Exhibit 4
Order of Investigation and Hearing	Exhibit 5

As to the agreements involved here, neither of the parties actually offered them into evidence even though they are referred to and discussed in the original and reply briefs. Portions of the agreements as set forth in the briefs will be noted and discussed herein where necessary. Finally, during the pendency of the proceeding, the parties did not offer any oral testimony for the record and the case was submitted on the basis of the written materials previously identified.

**FINDINGS OF FACT**

1. On December 10, 1958, the Commission approved Agreement 8330, which authorized the formation of a conference of freight forwarders named the Pacific Coast Ocean Freight Forwarders Conference (PCOFFC). (Exhibit 5.)

2. On June 19, 1958, the Commission approved Agreement 8330-1, which was a modification of Agreement 8330. (Exhibit 5.)

3. The PCOFFC never actually functioned in the manner contemplated by the agreements, and recently its members decided to activate the conference realizing that some of the provisions of Agreements 8330 and 8330-1 may be archaic in view of intervening legal and commercial developments. (Exhibit 5.)

4. Agreement 8330-2 was filed by the "Temporary Committee for Revitalization of the Pacific Coast Ocean Freight Forwarders Conference" on September 17, 1978, and was signed by thirteen licensed ocean freight forwarders. It is primarily designed to update Agreements 8330 and 8330-1. (Exhibit 5.)

5. The Commission, in its Order of Investigation and Hearing, ordered:

That pursuant to sections 15 and 22 of the Shipping Act, 1916 (46 U.S.C. 814 and 821) that a proceeding be instituted to determine:

1. Whether Agreements Nos. 8330, 8330-1, and 8330-2 are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or may operate to the detriment of the commerce of the United States, or are contrary to the public interest or otherwise in violation of the Shipping Act, 1916;

2. Whether Agreements Nos. 8330 and 8330-1 should be ordered modified or disapproved pursuant to the standards of section 15 of the Shipping Act, 1916;

3. Whether Agreement No. 8330-2 should be approved, modified, or disapproved pursuant to the standards of section 15 of the Shipping Act, 1916. (Exhibit 5.)

6. The Commission Order designated PCOFFC as the proponent in this case, and Hearing Counsel as a party. While it invited petitions to intervene, none were forthcoming from other parties. However, the Pacific Coast European Conference (PCEC) did file comments on Agreement 8330-2. (Exhibit 5.)

7. Article 13 of Agreement 8330-2 authorizes PCOFFC to "meet with any other Conference, for the purpose of discussing and agreeing upon any and all matters of mutual interest . . ." It also authorizes meetings with direct and indirect carriers of all modes "as required to fulfill the purposes of this Conference as set forth under Article 2."<sup>3</sup> (Opening Brief of Hearing Counsel, page 6; Reply Brief of PCOFFC, pages 3 and 4.)

8. Agreement 8330-2 is a complete revision of Agreements 8330 and 8330-1. (Opening Brief of PCOFFC, page 4.)

#### ULTIMATE FINDINGS OF FACT

9. Article 13 of Agreement 8330-2, which would allow discussion of "any and all matters of mutual interest" with other conferences and with direct and indirect carriers by rail, water, truck or air, is per se violative of United States antitrust laws and requires justification under the *Svenska* test. (Entire record.)

10. Article 13 of Agreement 8330-2 is so broad, indefinite and vague that it fails to apprise the Commission, as well as any interested parties, as to the procedures and arrangements under which the concerted activity permitted by the agreement is to take place. (Entire record.)

11. The record is devoid of any substantive, probative facts which would justify approval of Agreement 8330-2 under section 15 of the Shipping Act, 1916. (Entire record.)

12. Since Agreement 8330-2 is a complete revision and update of Agreements 8330 and 8330-1, those latter agreements likewise do not meet the requirements of section 15 of the Shipping Act, 1916, and must be disapproved. (Entire record.)

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<sup>3</sup> Article 2 reads:

The Conference is formed to promote the commerce of the United States; to promote sound, ethical and honorable business dealings and practices among those engaged in the ocean forwarding business and between those engaged in such business on the one hand, and, on the other hand, shippers and receivers of freight and common carriers by water; to promote harmonious relationships between exporters, common carriers by water, intermodal carriers, steamship conferences, and the members of this Conference, and to promote financial responsibility of Conference members for the protection of the exporting public, and other matters of general interest and importance to the members of this Conference.

DISCUSSION

Section 15 of the Shipping Act, 1916, requires "that every common carrier by water or other person subject to this Act shall file immediately with the Commission a true copy . . . of every agreement with another such carrier or other person . . . or modification . . . thereof . . . pooling or apportioning earnings, losses or traffic." Section 15 further provides that once an agreement is filed:

The Commission shall by order after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other(s)

....

Since its enactment, section 15 has been the subject of a large body of case law. While not always definitive, there are certain tenets that have been established. It has been held that in enacting this provision, Congress intended to tolerate only minimum anticompetitive behavior necessary to preserve an essentially competitive structure in the Maritime industry (*Seatrains Lines, Inc. v. Federal Maritime Commission*, 460 F.2d 932 (1972). *aff'd* 411 U.S. 726 (1973)); that once agreements come under the Commission's jurisdiction, the Commission may approve them even though they violate the antitrust laws if they take antitrust principles into account in reaching their decision, (*Seatrains Lines, Inc. v. Federal Maritime Commission, supra*); that accommodation between antitrust and regulatory objectives by the Commission does not authorize it to ignore the antitrust laws (*Federal Maritime Commission v. Aktiebalager Svenska Amerika Linian (Swedish Am. Line)*, 390 U.S. 238 (1968), Dist. Col. 1968); that antitrust questions in general, and in particular contracts involving all-encompassing restraints, present issues of a kind that should be explored *sua sponte* in order to discharge an agency's duty to guard the public interest (*Marine Space Enclosures, Inc. v. Federal Maritime Commission*, 420 F.2d 577 (1969)); that presumptively all anticompetitive combinations run counter to the public interest in free and open competition and it is incumbent upon those who seek exemption of anticompetitive combinations under section 15 to demonstrate that the combination seeks to eliminate or remedy conditions which preclude or hinder the achievement of the regulatory purposes of the Shipping Act (*Svenska, supra; Mediterranean Pools Investigation*, 9 F.M.C. 264, 290 (1966)); that under section 15 it is not enough that the Commission is apprised merely as to the terms of an agreement but it is essential that it know at all times the *nature* of the activities undertaken in the agree-

ment (*In re: Pacific Coast European Conference*, 7 F.M.C. 27 (1961)); that section 15 expressly confers on the Commission the power of disapproval, "whether or not previously approved," and necessarily imposes a continuing duty upon the Commission to ensure that the parties to section 15 agreements are complying with the Act and with their approved agreement (*In re: Pacific Coast European Conference. supra*).

In this proceeding the proponent avers that freight forwarders are employed to represent the shipping public and that the only shippers' representatives who could "negotiate collectively on their behalf" with antitrust immunity are freight forwarders. It argues that PCEC is dominated by foreign flag carriers who "dictate to the forwarders as to the amount of brokerage which the Conference members would pay" to freight forwarders, but who nevertheless do not believe that freight forwarders should be in a position to negotiate with the Conference (PCEC) over brokerage. The proponent concludes that:

It is inconceivable that the Commission could find that it is in the public interest to deny the representatives of American shippers the right to negotiate collectively as to items which directly affect the public's costs while permitting a foreign flag dominated Conference to sit with antitrust immunity and dictate as a collective body the amount of brokerage to be paid and what rules will govern the payment of such sums.

In support of approval of its agreements, the proponent submits the affidavit of J. Murray Fox,<sup>4</sup> the Executive Secretary of the Pacific Agricultural Cooperative for Export, Inc. (PACE), which is an association of exporters qualified under the Webb-Pomerene Act (15 U.S.C. 61-65) as exempt from certain United States antitrust laws. According to Mr. Fox, it was established "to facilitate the movement of American products to foreign markets." Mr. Fox supports the agreement involved here because:

(a) Under present law groups such as PACE are exempt from antitrust laws as to certain concerted activities by member exporters. Steamship conferences also have antitrust immunity as to certain concerted activities of member lines. Under Agreement 8330-2 the Forwarder Conference could negotiate with steamship conferences such problems dealing with documentation, delivery procedures and certain rate issues in a manner not presently available to forwarders.

(b) Agreement 8330-2 is not a substitute for shipper's councils or exporter associations. It does, however, provide a means for negotiation and agreement between forwarders and confer-

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<sup>4</sup> Exhibit 4.

ences under direct Commission supervision which does not presently exist in any other form.

(c) As shippers PACE members recognize that the portion of forwarder overhead not borne by the (conference) carriers must be paid by the shippers. At present, conferences establish levels of forwarder compensation under their approved agreements. There is no requirement that conferences investigate to determine a fair and proper compensation level. While Agreement 8330-2 does not force conferences to negotiate compensation with forwarders, it does permit such negotiations on behalf of the forwarders.

In addition to the affidavit, the proponent offered the testimony of William F. Bosque into evidence.<sup>5</sup> Mr. Bosque is the Acting Committee Secretary, Temporary Committee for Revitalization of PCOFFC. He stated he was the person "most familiar with the need for the agreement and the reasons for the revitalization of the Conference." In discussing the scope of Article 13 of Agreement 8330-2, Mr. Bosque stated:

Q. Why don't we answer the first questions. What would you talk about, what types of matters is it anticipated would be discussed within the membership itself?

A. The Freight Forwarding industry is so involved with international transportation matters that one could picture an entire gamut of interests that Freight Forwarders will have. They would touch upon the involvement of the other Conferences, upon our Conferences, what affect they have on it, what we, as a group, could do to facilitate the public interest, what influence we could have with other portions of the shipping industry to promote exports to the United States. I am sure that there are many specific things that we could involve ourselves with but in general, it was felt that this Conference would serve the industry, our industry, as well as the general industry of exports and public interest because of the Shipping Act allowing us to meet and the current feeling within the international industry. I can't get too much more specific with it.

Q. Fine. Now, to get back to meetings with other Conferences, can you give us a general idea what types of discussions would be held with other conferences under Article 13?

A. Yes. It had been a feeling of our industry, the freight forwarding industry, particularly out on the Pacific Coast here, that the shippers have not been represented sufficiently enough in their contact with Steamship Conferences, for instance, or perhaps Conferences of terminal operators and other people that are under control of the Shipping Act. Therefore,

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<sup>5</sup> Exhibit 1.

we envision situations that we could meet with these other Conferences in order to promote the good of the country, all of our exports, the shipping public in general. Now, the freight forwarding industry is probably the one industry that does represent the public to the greatest degree because it is independent, it represents shippers, paid by shippers to represent them so that it opens an opportunity for us to represent them in a better way. Without a Conference structure, the industry, the freight forwarders, have been very frustrated as well as the shipping public because of the limitations that are placed upon us in reacting to Conference cartel type rules and regulations.

We, of course, envision many activities that we could work with at Conferences such as simplification of tariffs, the ability to interface EDP equipment with Conference systems or members of the Conferences, the ability to have Conferences react to rate requests of exporter and industry matters, the problems that are involved with rate matters, such as the inability of the public at the moment to receive instant information as to what rate structures are, matters of interest to the general public, again, such as the ability to depend on the rates that are quoted; questions regarding the financial status of the member carriers of the Conference are of great interest to the public now because of the recent bankruptcies in the industry.

The subject could be almost limitless as to what could be brought up in these matters that our people feel is necessary to have the protection of a Conference status.

\* \* \* \* \*

Q. Assuming that a particular freight forwarder had the ability to route a particular piece of cargo and the routing was open at the discretion of the freight forwarder and the freight forwarder had this ability to route cargo to a certain carrier and there was a certain carrier in a trade that was taking a position contrary to the uniform position of the forwarder that had been agreed upon within the Conference. Would the possibility under those conditions exist that the forwarder, due to the fact he had agreed to take a uniform position in regard to a certain trade practice would not route the cargo to that particular carrier but route it to another carrier instead?

A. I am afraid I can't answer that question because I just don't have the experience in working within a Conference structure, nor am I certain as to the authority that the Conference has.

\* \* \* \* \*

Q. Could you elaborate on that, is there still a problem with foreign competition and could you explain that a little bit for us?



A. Three years ago, I believe, there was a concern upon the industry for their welfare because of the entry into the industry of foreign owned and controlled business and there is also the concern of the shipping public and the freight forwarders alike that foreign interests are able to have certain advantages over the United States owned companies, so, I believe that that was the reason why we mentioned it. Again, there is nothing specific there but since it is obviously an international business those concerns are always with our industry, as well as the general shipping public.

\* \* \* \* \*

Q. Now, the competition within the forwarding industry itself, between the members of the forwarding industry, would that be affected by this group of freight forwarders banding together and having this conference?

A. We would assume there would be some affect, yes. However, the international freight forwarding industry also usually uses the word independent freight forwarder and I think in that respect, independent is meant independent from carriers independent from exporters but, in fact, the industry, historically, is a very independent one, that is, amongst themselves wanting to take independent action and the spirit of the industry has always been one of independence. So, we don't foresee that a group such as ours will be such an influence to eliminate the need from other outside freight forwarders, forwarders that operate from other coasts but I am sure it will have a certain affect, hopefully, a beneficial effect to the general public.

\* \* \* \* \*

Q. Is there any intention among the members of the Conference if the Conference is reactivated, to discuss the subject of ocean freight forwarding compensation with either ocean carrier conferences or independent ocean carriers?

A. I can't predict what the Conference would do or the members of the conference. I am sure that there is some tendency on the part of some to want to change the different levels of compensation or brokerage but I believe that the impact of it will be more in the conditions that are applied, rather than the rate, the cost of living today, the inflation, the steamship tendency to apply surcharges as methods of receiving compensations, such as bunker surcharges and currency surcharges which are now outside of the areas of compensation to the freight forwarder, indicate to me that there could be questions of this nature brought up but I don't believe at this time that there is any program or that this is the major consideration to any extent.

Q. But certainly the level of compensation would be, wouldn't it, a subject matter which could possibly be discussed?

A. Certainly, I think so, yes.

\* \* \* \* \*

MR. KENNY: What I am driving at, is it the intent of this Conference to act as a group in discussing and possibly coming to agreement with conferences of ocean carriers with respect to their limitations on brokerage?

THE WITNESS: Yes. I would envision that possibility that this conference would try to eliminate unfair restrictions placed on commissions, yes, by conferences.

\* \* \* \* \*

MR. KENNY: Now, you mentioned that the group would deal with intermodal carriers to some extent where that is connected with ocean freight. For example, let's say that you have cargo coming into the Pacific Coast by rail, by truck and by air, for forwarding to ocean vessels to carry to the Far East or beyond. Would it be your intention to deal with these rail, air or truck carriers as to matters that involve your customers, your shippers?

THE WITNESS: Yes, indeed. If the Conference could provide the vehicle to deal with these different other regulated groups, it would be a big plus factor for the shipping public since, again, it is my understanding that even in domestic areas the exporting public or the shipping public is somewhat limited in what influence they have on these other groups of carriers.

Finally, the proponent submitted into evidence twenty-one supporting affidavits<sup>6</sup> from members of PCOFFC. Generally, the affidavits are similar in context. All support the approval of Agreement 8330-2 for various reasons, including:

1. The shipping public needs effective representation in resolving problems that arise with ocean carriers.<sup>7</sup>
2. The need for exporters and freight forwarders to be represented by a group empowered to make joint decisions on its behalf.
3. It would further the national goal of increasing exports and creating a more favorable balance of payments.

<sup>6</sup> Exhibit 3.

<sup>7</sup> The "problems" are characterized in general terms. For example, one affidavit refers to protection against "the arbitrary acts by members of the Pacific Westbound Conference and other member organizations," and identifies those acts as capricious increases in bunker and currency surcharges "without valid justification." It also refers to "brokerage fees which are ridiculously low in view of the fees paid in eastern and gulf ports."

Hearing Counsel opposes the approval of the agreements involved for several reasons. First, it avers that "there is no demonstrated reason to forego the benefits of competitive rate setting by forwarders." It cites *Svenska, supra*, for the proposition that if a price-fixing agreement interferes with the policies of the antitrust laws, it will be approved only if the proponents can "bring forth such facts as would demonstrate that the . . . rule was required by a serious transportation need necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." In addition, Hearing Counsel notes that section 15 requires that, once approved, an agreement is subject to continued scrutiny by the Commission and argues that the filing of Agreement 8330-2 itself emphasizes that Agreement 8330 is outmoded and irrelevant "to the facts and conditions of the 1980's." It cites the change in the regulatory context of Agreement 8330's original approval wherein, in 1961, section 44 of the Shipping Act was promulgated empowering the Commission to regulate the independent ocean freight forwarder industry.<sup>8</sup> Hearing Counsel also notes that "in 1968 the Supreme Court decided *Svenska*, now seen as one of the fundamental interpretations of the Shipping Act."

Hearing Counsel's second major objection to approval of the agreements is that "the unfettered discussion authority sought by Article Thirteen is unnecessarily vague and may seriously infringe anti-trust principles." As has been noted, Article 13 authorizes the Conference to "meet with any other Conference, for the purpose of discussing and agreeing upon any and all matters of mutual interest . . ." It also authorizes meetings with direct and indirect carriers of all modes "as required to fulfill the purposes of this Conference as set forth under Article 2." Hearing Counsel points out that the language of Article 13 might allow the Conference to "overstep the permissible." It argues "the question is the legality of the Commission giving section 15 approval (and anti-trust immunity) to anything respondents might decide to do under the broad wording of the agreement," citing *Agreement 9448 - N. Atlantic Outbound/European Trade*, 10 F.M.C. 299 (1967) at 306. Hearing Counsel then proceeds to illustrate the vagueness of the agreements by citing instances in the testimony of Mr. Bosque, where the witness ostensibly exhibited an inability to be specific about the intentions of the Conference and its members and the direction the Conference might take.

Hearing Counsel argues further that General Order 18, *Conference Agreement Provisions Relating to Concerted Activities*, 46 C.F.R. 537, clearly articulates Commission policy that it "ensure that parties to agreements approved under section 15 . . . are at all times complying

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<sup>8</sup> General Order 4, 46 C.F.R. 510, has been issued to implement this authority.

with the requirements of the Act . . . . In order to discharge properly this responsibility, the Commission must be fully apprised of the manner in which operations are being and will be carried out." It again cites the testimony of Mr. Bosque in support of the argument that the agreements are vague.

Finally, Hearing Counsel asserts that "the benefits claimed are largely available independently of the agreements." It argues that General Order 4 protects the public with the "payover" provision of section 501.23(f), and by section 510.5(g) also affords as much protection as would the agreements in the area of fiscal responsibility.

In addition to testimony previously discussed, the record contains the affidavit of Donald I. Theiss, the Chairman of PCEC. (Exhibit 2.) In his testimony, Mr. Theiss opposed approval of the instant agreements. Some of the reasons given were that the carriers prefer to handle rate requests through the shipper and not the freight forwarder; that the carriers did not wish to discuss brokerage fees with a freight forwarders' conference; that the agreements do not "spell out" what is intended; that a conference of freight forwarders might exert undue pressure on conference member lines by "playing" an independent line against the conference and might influence more and more the routing of cargo.

In rebuttal to Hearing Counsel and to the testimony of Mr. Theiss, the proponent argues that since Agreement 8330-2 deleted Article 5 of Agreement 8330, PCOFFC "no longer seeks rate setting authority and the issue is moot." The proponent also states that the discussion authority sought by Article 13 is "not unnecessarily vague and satisfies a serious transportation need." It points out that the agreement does not permit agreements "between the forwarders' conference and other parties . . . unless approved pursuant to Section 15 of the Shipping Act, 1916." Once again, the proponent cites the "serious transportation need" satisfied by the agreement; namely, that "shippers presently have no means to negotiate as a collective body with anti-trust immunity except through forwarders." It states that the only area of Article 13 which could be considered vague is the statement "for the purpose of discussing and agreeing upon any and all matters of mutual interest," and proposed a modification which, in pertinent part, is as follows:

This Conference may meet with any other Conference, the agreement of which has been approved under Section 15 of the Shipping Act of 1916, as amended, for the purpose of discussing and agreeing upon matters related to documentation, terminal practices and procedures, tariff rates and regulations, dual rate and credit agreements, brokerage, container allocations, shipper's requests and complaints, and matters of a similar nature.

Finally, the proponent disputes Hearing Counsel's contention that the benefits available under the agreements are available independent of section 15 approval. It notes that common carriers cannot even meet with shippers or freight forwarders and that section 15 authority is necessary to antitrust immunity.

### CONCLUSIONS<sup>9</sup>

In arriving at any determination of the issues in any proceeding, it is first necessary to extract from the record those facts that have been proven. Unfortunately, in this proceeding the record is almost completely barren of any substantive, probative facts. As has been noted, the agreements themselves have not been placed into evidence. However, from the briefs of both parties, which discuss Article 13 of Agreement 8330-2, it is clear that the proponents do intend to meet not only amongst themselves, but with members of conference carriers and with carriers by rail, water, truck or air. It is equally clear, and is admitted by the proponents, that those meetings will involve discussion of "any and all matters of mutual interest," including tariff rates and regulations, dual rate and credit agreements, *brokerage*, container allocations, shippers' requests and complaints, and *matters of a similar nature*. Given these facts, it is clear that Agreement 8330-2 is anticompetitive in nature, as Hearing Counsel suggests. The unfettered discussion authority that is sought is obviously meant to engender concerted behavior as to the setting of freight forwarder commissions, as well as a whole range of subjects affecting the shipping public and the shipping environment.

In considering the antitrust aspects of section 15 agreements, the Commission, in *Mediterranean Pools Investigation*, *supra*, stated:

Thus, the question of approval under section 15 requires (1) consideration of the public interest in the preservation of the competitive philosophy embodied in the antitrust laws insofar as consistent with the regulatory purpose of the Shipping Act, and (2) a consideration of the circumstances and conditions existing in the particular trade involved which the anticompetitive agreement seeks to remedy or prevent. The weighing of these two factors determines whether the agreement is to be approved. The essential ingredient in this process is, of course, information or data for without it no intelligent judgment as to the probable future impact of the particular agreement upon our commerce would be possible. Almost uniformly, the kind of information necessary to this judgment is in the hands of those seeking approval of the agreement and the resultant

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<sup>9</sup> As the proponent suggests, Agreement 8330-2 is a complete revision of Agreements 8330 and 8330-1, and whatever determination is made regarding Agreement 8330-2 will be equally applicable to the other two agreements.

exemption of the proposed anticompetitive combination from the operation of the antitrust laws; and it is incumbent upon those in possession of such information to come forward with it.

Here, when one searches the record for the information needed to make a valued judgment in the antitrust area, he finds allegations that "freight forwarders are employed to represent the shipping public" and that "the only shippers representatives who could negotiate collectively on their behalf with anti-trust immunity are the freight forwarders." However, the record contains no evidence *that under the terms of Agreement 8330-2*, freight forwarders will be acting as "agents" for shippers and in their behalf. Indeed, as to the setting of freight forwarder commissions, for example, Mr. Bosque testified that the freight forwarders' conference would seek to raise those commissions -- an act hardly calculated to aid shippers. Likewise, if freight forwarders can act in concert with carrier conferences generally, what assurance, or even likelihood, is there that the resultant action will benefit shippers? Unfortunately, the record is devoid of any real evidence in this regard.

The proponent also avers that a freight forwarders' conference would have the right to discuss brokerage fees with PCEC because PCEC is "able to act as a conference in unilaterally setting brokerage rates without negotiation and without the impact of the forwarders as a group." It criticizes the fact that PCEC is a "foreign flag dominated" conference. Yet, nowhere in the record is there any evidence relating specifically to anything PCEC has done. Is PCEC operating under an agreement approved by the Commission?; is its act of setting freight forwarders' commissions outside the ambit of the agreement?; is PCEC violating any section of the Shipping Act and, if so, how?; what adverse effect do the foreign flag members have on PCEC activities which causes the conference to act in a manner detrimental to the United States commerce, or contrary to the public interest, or in violation of the Shipping Act; even assuming PCEC is acting illegally in setting freight forwarders' commissions, how would a freight forwarders' conference go about remedying the wrong and would it be consonant with the provisions of the Shipping Act? None of these specific questions or others like them calculated to supply the Commission with the factual information it needs is even asked, much less answered by the proponent. Instead, the proponent leaps to the conclusion that "to permit ocean carriers to meet and arbitrarily establish rates and procedures without negotiation with the representatives of shippers and exporters is discriminatory and unfair." The bare allegation standing alone as it does, without any material factual support of record, is worthless. The same is true of proponent's assertions that "we have shown that the agreement fulfills a serious transportation need and is not discriminatory nor is it unfair. Further, the agreement will support the com-

AGREEMENT NO. 8330, AS AMENDED, AND AGREEMENT 797  
NO. 8330-2

merce of the United States and will not be a detriment in any way." There simply is no evidence in the record to support these statements. The self-serving statements in the affidavits (Exhibit 3) recite a host of alleged reasons why the freight forwarders' conference should be approved, but nowhere is there any evidence of a single specific incident which would support the reasons given or would demonstrate how the freight forwarders' conference would resolve any alleged wrongdoing. For example, as has been noted, at least one of the affiants characterizes bunker surcharge increases by PCEC as "arbitrary" and "capricious," without valid justification. Yet, the record is silent as to any facts which might support the allegations made.

As to the arguments of Hearing Counsel and the proponents on brief, it must be noted that there are counterbalances on each side. The proponent has deleted Article 5 of original Agreement 8330 so that, as the proponent avers, Hearing Counsel's arguments based on Article 5 rate-setting authority are moot. However, the new Article 13, even as modified as the proponent suggests, would allow concerted activity clearly violative of antitrust laws so that while the specific applicability of Article 5 might be moot in Agreement 8330-2, the issue of antitrust immunity granted under section 15 is not.

In essence then, the record in this proceeding supports the finding that Article 13 of Agreement 8330-2, which allows discussion of "any and all matters of mutual interest" with other conferences and with direct and indirect carriers by rail, water, truck or air, is per se violative of United States antitrust laws and requires justification under the *Svenska* test. The record does not justify a holding that Agreement 8330-2 is required by a serious transportation need, necessary to secure important public benefits, or in furtherance of a valid regulatory purpose of the Shipping Act. Indeed, Article 13 of Agreement 8330-2 is so broad, indefinite and vague, as is the testimony of the proponent's principal witness, that it falls to apprise the Commission, as well as any interested parties, as to the procedures and arrangements under which the concerted activity permitted by the agreement is to take place. Further, the record is devoid of any substantive, probative facts which would justify approval of Agreement 8330-2, under section 15, Shipping Act, 1916. Since Agreement 8330-2 is a complete revision and update of Agreements 8330 and 8331, those latter agreements likewise do not meet the requirements of section 15, Shipping Act, 1916, and must be disapproved.

Finally, it should be noted that the above holding is based on the proponent's failure of proof. There is nothing inherently wrong in freight forwarders forming a conference and it may well be that there are problems in the industry which justify its formation. Certainly, one need not reject such a conference because the carrier conferences simply prefer to talk to shippers directly rather than to freight forward-

ers. Also, there may be a serious transportation need for such a conference and it may be necessary to secure important benefits -- all of which would justify its approval by the Commission. Here, however, there is a complete failure of proof. The record is little more than a conglomeration of unsupported conclusory statements espousing the approval of discussion of almost any activity related to freight forwarders with any group having anything to do with the freight forwarding business. The activity intended is too broad; the record made is too weak.

It is held, therefore that:

1. Agreements 8330, 8330-1 and 8330-2 may operate to the detriment of the commerce of the United States and are contrary to the public interest; and

2. Agreements 8330, 8330-1 and 8330-2 are disapproved pursuant to the standards of section 15 of the Shipping Act, 1916.<sup>10</sup>

(S) JOSEPH N. INGOLIA  
*Administrative Law Judge*

Washington, D.C.  
February 26, 1981

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<sup>10</sup> In re: Pacific Coast European Conference, *supra*.



**FEDERAL MARITIME COMMISSION**

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**SPECIAL DOCKET NO. 752****APPLICATION OF COORDINATED CARIBBEAN TRANSPORT,  
INC. FOR THE BENEFIT OF UNIVERSAL  
TRANSCONTINENTAL CORP.**

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**NOTICE***April 10, 1981*

Notice is given that no exceptions were filed to the March 9, 1981 Order Affirming Initial Decision in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the March 9, 1981 order has become administratively final.

(S) JOSEPH C. POLKING  
*Acting Secretary*

## FEDERAL MARITIME COMMISSION

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SPECIAL DOCKET NO. 752

COORDINATED CARIBBEAN TRANSPORT, INC. FOR THE  
BENEFIT OF UNIVERSAL TRANSCONTINENTAL CORP. AS  
AGENT FOR MORISAENZ, S.A.C.

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ORDER AFFIRMING INITIAL DECISION SERVED OCTOBER  
16, 1980, DENYING APPLICATION FOR PERMISSION TO  
REFUND A \$682.22 PORTION OF AGGREGATE FREIGHT  
CHARGES OF \$6,182.22

*Finalized April 10, 1981*

In response to the Commission's Order of Remand served February 6, 1981, the Presiding Administrative Law Judge issued on that same date (served February 9, 1981) an Order for Applicant-Carrier to develop a full and complete picture of the arrangements between the carrier and shipper which led to the filing of the July 14, 1980, project rate relied upon in the application, including the nature of the "project" which qualified the subject shipment of motor vehicles for carriage at a rate other than that stated for other Passenger Automobiles at Third Revised Page 46 of the Coordinated Caribbean Transport, Inc.'s Tariff FMC No. 14. It was *ordered*: (A) Within ten (10) days of its receipt (date of receipt to be certified in response) of this Order, the said Applicant-Carrier shall conform to the provisions of the Order of Remand in developing a full and complete picture in which the said Applicant-Carrier fully explains the clerical or administrative error or error due to inadvertence showing why the application should be granted; (B) Failure of the Applicant-Carrier to respond within the time provided will leave denial of the application unchanged.

### DISCUSSION

Twenty-eight (28) days have elapsed since the serving of the Order on February 9, 1981, and no response has been received from the Applicant-Carrier. It is deemed that the Applicant-Carrier has been given a reasonable period of time within which to respond to the request for further information. The failure of the Applicant-Carrier to respond to the request for further information, and the Commission's conclusion in its February 9, 1981, Order of Remand that the Presiding Officer's findings regarding the applicant's insufficiency under 46 C.F.R. 502.92 were correct, are reasons why the Presiding Administrative Law Judge *finds* and *concludes* his Initial Decision herein served October 16, 1980, should be affirmed.

COORDINATED CARIBBEAN TRANSPORT, INC. FOR THE 801  
BENEFIT OF UNIVERSAL TRANSCONTINENTAL CORP.

Wherefore, it is *ordered*,

The Initial Decision denying the special docket application served herein October 16, 1980, be and hereby is affirmed.

(S) WILLIAM BEASLEY HARRIS  
*Administrative Law Judge*

March 9, 1981

## FEDERAL MARITIME COMMISSION

### SPECIAL DOCKET NO. 752

#### APPLICATION OF COORDINATED CARIBBEAN TRANSPORT, INC. FOR THE BENEFIT OF UNIVERSAL TRANSCONTINENTAL CORP. AS AGENT FOR MORISAENZ, S.A.C.

Permission to refund a \$682.22 portion of aggregate freight charges of \$6,182.22 denied.

#### INITIAL DECISION<sup>1</sup> OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

*Finalized April 10, 1981*

This is a special docket proceeding under 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 commodity shown on the Bills of Lading is set up motor vehicles ORM-C, Model Scout.

The tariff applicable is that of Coordinated Caribbean Transport, Inc., FMC-14, between Ports of Florida and Ports in Ecuador, S.A.

The commodity set up motor vehicles, a one shipment of project of 11 vehicles were transported on the vessel *Lionheart*, Voy. 84, which sailed July 13, 1980, from Miami, Florida, for Manta, Ecuador. Third Revised Page 46 of the applicable tariff, effective March 18, 1980, for the Commodity, Automobile, viz: Passenger (Includes Jeeps and Scouts) S/U unboxed to Manta, Rate Basis \$43.00 W/M, rate was applied on the following Bills of Lading:

Universal Transcontinental Corp. Forwarding Agent FMC No. 394

Prepaid Freight Charge	Date of B/L	B/L No.	Commodity	Weight	Forwarder Date		Vessel/Voyage
\$ 589.56	7/07/80	MA 106120	1 set up Motor Vehicle ORM-C Model Scout weight 3,990 lbs./1,810 K	M- 477 cu.ft.	6/30/80	Miami, Fla. to Manta, Ecuador	Lionheart/ 84
\$3,305.38	7/07/80	MA 106173	6 set up Motor Vehicles OCR-C Model Scout weight 23,519 lbs./10,668 K	M-2,687 cu.ft.	6/26/80	Miami, Fla. to Manta, Ecuador	Lionheart/ 84

<sup>1</sup> 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).

**COORDINATED CARIBBEAN TRANSPORT, INC. FOR THE 803  
BENEFIT OF UNIVERSAL TRANSCONTINENTAL CORP.**

Universal Transcontinental Corp. Forwarding Agent FMC No. 394—Continued

Prepaid Freight Charge	Date of B/L	B/L No.	Commodity	Weight	Forwarder Date		Vessel/Voyage
\$ 554.08	7/08/80	MA 106132	1 set up Motor Vehicle ORM-C Model Scout weight 3,920 lbs./1,778K	M- 447 cu.ft.	6/30/80	Miami, Fla. to Manta, Ecuador	Lionheart/ 84
\$ 589.56	7/08/80	MA 106136	1 set up Motor Vehicle ORM-C Model Scout weight 3,990 lbs./ 1,810 K	M- 447 cu.ft.	6/30/80	Miami, Fla. to Manta, Ecuador	Lionheart/ 84
\$ 589.56	7/09/80	MA 106166	1 set up Motor Vehicle ORM-C Model Scout weight 3,990 lbs./ 1,810 K	M- 447 cu.ft.	6/30/80	Miami, Fla. to Manta, Ecuador	Lionheart/ 84
\$ 554.08	7/10/80	MA 106195	1 set up Motor Vehicle ORM-C Model Scout weight 3,926 lbs./1,781 K	M- 447 cu.ft.	7/9/80	Miami, Fla. to Manta, Ecuador	Lionheart/ 84
<hr/>							
<div style="display: flex; justify-content: space-between;"> <span>\$6,182.22</span> <span></span> </div> <hr/>							

The aggregate freight charges of \$6,182.22 are certified to have been paid and borne by Morisaenz, S.A.C., for whom Freight Forwarder, Universal Transcontinental Corp., FMC 394, is Agent.

The rate sought to be applied is \$500.00 all inclusive per vehicle. Shipment consists of 11 vehicles at \$500.00, equals \$5,500. Amount collected, \$6,182.22 minus \$5,500 equals \$682.22 sought to be refunded.

On July 10, 1980, the applicant-carrier had ordered tariff change to be effective July 11, 1980, that movement from Miami, Fla., to Manta, Ecuador, of eleven vehicles, each measuring approximately 504 cu.ft. will be accorded a rate of flat \$500 including all charges accrued under the tariff, Bill of Lading to be claused E JOB-2009. Noted that cargo will be moving on July 11, 1980 (approximate date).

The carrier submits as fully explaining the clerical or administrative error or error due to inadvertence for which the application should be granted only the following: "Attached Bills of Lading were rated without knowledge of the existing project rate filed with FMC prior to the sailing."

The carrier filed in its tariff, 14th Revised Page 106, effective date July 14, 1980:

Movement from Miami, Fla. to Manta, Ecuador of eleven (11) vehicles, each measuring approximately 504 cu.ft., will be accorded a rate, each of Flat \$500.00 including all charges accrued under this Tariff. Bill of Lading to be claused Item JOB-E-2009. Rate to expire 8/14/80.

Certification is contained in the application that it was mailed at Miami, Florida, September 10, 1980, to the Secretary of this Commission. Under Rule 92(a)(3) and such circumstances, the filing date of this application is the so certified date of mailing, being within 180 days of July 13, 1980, the sailing date of the shipment, the application is filed timely.

The shipments involved sailed on the vessel *Lionheart*, Voy. 84, July 13, 1980 (date shown on Republica del Ecuador, Declaration General copy attached to application).

#### DISCUSSION

The application does not explain whether a clerical or administrative error or error due to inadvertence is involved; it merely states, "Attached Bills of Lading were rated without knowledge of the existing project rate filed with FMC prior to sailing." Such a statement tends to raise more questions than it answers. For example, who was without knowledge of the project rate? Who rated the Bills of Lading? When, by whom and with whom was the project rate negotiated? In any event, the applicant should have identified the kind of error and elucidated that it was not a rate agreed upon after shipment.

The application asserts the dates shown on the Bills of Lading are 6/26/80, 6/30/80, and 7/9/80. These dates on the Bills of Lading above are dates next to the name of the Forwarding Agent, Universal Transcontinental Corp., the date of 6/26/80 on B/L MA 106173; 6/30/80 on B/L's MA 106120, MA 106132, MA 106136, and MA 106166; 7/9/80 on B/L MA 106195. There is no explanation as to what the dates mean, so it is surmised the dates show when the cargo came into the possession of the forwarding agent.

The applicant's change order dated July 10, 1980, directed the change to be effective July 11, 1980. To set forth the rate on which to base refund, the Revised Page 106 of the applicant's tariff filed was to be effective July 14, 1980. Third Revised Page 46 of the applicable tariff, effective March 18, 1980, under which the cargo was rated previously, remained unchanged. The 14th Revised Page 106 of the tariff was received by the Commission prior to the September 10, 1980, filing of this application and so conforms to Rule 92(a)(2).

The application is silent as to whether there are other special docket applications or decided or pending formal proceedings involving the same rate situation; or whether there are shipments of other shippers of the same or similar commodity which (a) moved via applicant during the period of time beginning on the day the bills of lading were issued and ending on the effective date of the conforming tariff and (b) moved on the same voyage of the vessel carrying the shipment described herein.

The Commission wrote in *Munoz y Cabrero v. Sea-Land Service, Inc.*, Special Docket No. 491, 20 F.M.C. 152, 153 (1977):

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 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.

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 information submitted is inadequate to prove the requested permission to refund should be granted.

(2) The application for permission to refund should be denied.

Wherefore, it is *ordered*, subject to review by the Commission, as provided in the Commission's Rules of Practice and Procedure, that

(A) The application is denied.

(B) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS  
*Administrative Law Judge*

Washington, D.C.  
October 16, 1980

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 81-13**

**CHARLESTON WAREHOUSE ASSOCIATES ET AL.**

**v.**

**BARBER STEAMSHIP LINES, INC. ET AL.**

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**NOTICE**

*April 17, 1981*

Notice is given that no appeal has been taken to the March 16, 1981 discontinuance 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 discontinuance has become administratively final.

**(S) JOSEPH C. POLKING**  
*Acting Secretary*



**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 81-13****CHARLESTON WAREHOUSE ASSOCIATES ET AL.**

v.

**BARBER STEAMSHIP LINES, INC. ET AL.**

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**NOTICE OF WITHDRAWAL OF COMPLAINT AND  
DISCONTINUANCE OF PROCEEDING***Finalized April 17, 1981*

Complainants, seven warehouse operators within a 50-mile radius of Charleston, South Carolina, have filed a motion seeking permission to withdraw their complaint. Complainants had alleged that 17 named respondent vessel-operating common carriers by water or associations of them, had violated sections 14, 16, 17, and 18(a) of the Shipping Act, 1916, and sections 2 and 4 of the Intercoastal Shipping Act, 1933, by implementing the so-called 50-mile container rules at Charleston. However, even before the date on which an answer to the complaint would have been due, complainants, on February 17, moved for permission to withdraw the complaint without prejudice. No replies to the motion were filed.

Complainants give no reason for their decision to withdraw the complaint. Respondents, on the other hand, have said nothing about the request that the complaint be withdrawn without prejudice. I have no reason to disturb the apparent desires of the parties and no authority to compel a private litigant to continue litigating its own complaint against its will under the present circumstances. Accordingly, the motion is granted. The complaint is withdrawn without prejudice and the proceeding is discontinued.

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

March 16, 1981

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 81-29****MURAN INTERNATIONAL CORPORATION - POSSIBLE  
VIOLATIONS OF SECTION 16, INITIAL PARAGRAPH SHIPPING  
ACT, 1916**

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**ORDER***April 12, 1981*

By an Order of Investigation and Hearing dated April 17, 1981, this proceeding was instituted to determine whether Muran International Corporation (Muran) obtained transportation by water for cargo bound for Tunisia at rates in violation of section 16, Initial Paragraph, of the Shipping Act, 1916. The Commission had information that indicated that Muran had misdeclared the weight of certain shipments for the purpose of obtaining transportation by water for property at less than rates and charges which would otherwise be applicable and had refused to pay applicable tariff rates for other shipments. Pursuant to the special settlement procedures set forth at 46 C.F.R. 505, respondent Muran and the Commission's General Counsel's office and the Bureau of Investigation and Enforcement entered into settlement discussions.

Muran and the Commission's Bureau of Investigation and Enforcement entered into stipulations which set forth the factual background surrounding the violations alleged in the Order of Investigation and Hearing. The stipulations provided the factual basis upon which a settlement agreement has been concluded between Muran and the Director, Bureau of Investigation and Enforcement. As an express condition of such settlement and compromise, Muran has consented to the entry of this Order below directing them to cease and desist from practices enumerated below.

**THEREFORE, IT IS ORDERED,** That Muran International Corporation shall cease and desist from misdeclaring the weight of its shipments and obtaining or attempting to obtain transportation by water for property at less than rates and charges which would otherwise be applicable;

**IT IS FURTHER ORDERED,** That Muran International Corporation shall cease and desist from refusing to pay applicable ocean carrier tariff rates.

**IT IS FURTHER ORDERED,** That Muran International Corporation shall cease and desist for a period of five years from the date of this Order from discarding, mutilating, disposing of or otherwise destroying any underlying documents such as warehouse receipts, ship-

pers' instructions or packing lists, delivery receipts, weight bills or other documentation which show or reflect the actual weight or measure of cargo tendered by Respondent and upon which the ocean freight rate is computed and assessed.

IT IS FURTHER ORDERED, That this Order shall continue in force unless and until suspended, modified or set aside by the Commission, provided however that should Muran International Corporation petition the Commission after April 20, 1986 to set aside this Order, such petition shall be favorably considered unless the Commission at that time has reason to believe that Muran International Corporation has in any way violated the Shipping Act, 1916 or this Order while this Order has been in effect.

IT IS FURTHER ORDERED, That Muran International Corporation shall, upon reasonable notice, allow investigators or attorneys of the Federal Maritime Commission unimpeded access to the underlying documents required to be maintained by this Order, and shall allow the removal of such documents specifically requested by Commission investigators or attorneys for the purpose of duplication.

IT IS FURTHER ORDERED, That this proceeding be, and hereby is, discontinued.

By the Commission

(S) JOSEPH C. POLKING  
*Acting Secretary*

**FEDERAL MARITIME COMMISSION**

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**TITLE 46 - SHIPPING****CHAPTER IV - FEDERAL MARITIME COMMISSION****SUBCHAPTER B - REGULATIONS AFFECTING MARITIME  
CARRIERS AND RELATED ACTIVITIES****[GENERAL ORDER 44: DOCKET NO. 80-82]****PART 525 - EXEMPTION OF COLLECTIVE BARGAINING  
AGREEMENTS**

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*April 24, 1981*

- ACTION:** Removal of Exemption - Final Rule
- SUMMARY:** The existing section 35 exemption for collective bargaining agreements from the filing and approval requirements of section 15, Shipping Act, 1916, has been superseded by the Maritime Labor Agreements Act of 1980 (P.L. 96-325).
- DATE:** Effective May 1, 1981
- AUTHORITY:** Sections 15, 35 and 43; 46 U.S.C. 814, 833 and 841a.
- SUPPLEMENTARY INFORMATION:**

On December 23, 1980, the Commission gave Notice in the *Federal Register* (45 F.R. 84832) of its intention to revoke 46 C.F.R. 525 (Commission General Order 44), providing for the exemption of collective bargaining agreements from the filing and approval requirements of section 15, Shipping Act, 1916, 46 U.S.C. 814. That Notice was prompted by the enactment of the Maritime Labor Agreements Act of 1980, P.L. 96-325, 94 Stat. 1021, which removes collective bargaining agreements from the requirements of section 15. The American Trucking Associations, Inc. (ATA) filed comments, which do not oppose the proposed revocation of 46 C.F.R. 525, but rather focus on the scope of the Maritime Labor Agreements Act of 1980.

Generally, ATA points out that the Maritime Labor Agreements Act of 1980 does not affect the Commission's responsibility to ensure that carriers provide services and facilities, including access to and the use of containers, to all persons on a nondiscriminatory basis. The Commission does not disagree with this assessment but is of the view that it is not relevant to the matter at issue. The fact is that the types of agreements, *i.e.*, those arising from collective bargaining, which 46 C.F.R. 525 exempts from regulation under section 15, have since been statutorily removed altogether from Commission jurisdiction under that

REMOVAL OF EXEMPTION OF COLLECTIVE BARGAINING 811  
AGREEMENTS

section. It follows therefore that the administrative exemption provided by 46 C.F.R. 525 is no longer necessary or appropriate.

THEREFORE, IT IS ORDERED, That effective upon publication of this Notice in the *Federal Register*, Part 525 of Title 46 of the Code of Federal Regulations is removed.

By the Commission.

(S) JOSEPH C. POLKING  
*Acting Secretary*

**FEDERAL MARITIME COMMISSION**

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**46 C.F.R. PART 510****(GENERAL ORDER 4, REVISED; DOCKET 80-13)****LICENSING OF INDEPENDENT OCEAN FREIGHT  
FORWARDERS**

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*April 27, 1981***ACTION:** Final rule.

**SUMMARY:** The Federal Maritime Commission is revising its General Order 4 (46 C.F.R. 510) which governs the licensing and operations of independent ocean freight forwarders. Ocean freight forwarders, oceangoing common carriers and the Commission have agreed that General Order 4 needs to be substantially revised, updated and clarified. The Commission also wishes to minimize its regulation of this business activity, to the extent its statutory duties permit. This revision of the Order is intended to accomplish those purposes and, at the same time, balance the differing interests of freight forwarders, export shippers, and oceangoing common carriers and where possible, eliminate unnecessary, ineffective or unduly burdensome regulation. The major changes include: a requirement for the licensing of separately incorporated branch offices, increased bond amounts to cover branch office operations, establishment of a minimum period of experience for qualifying individuals, elimination of the so-called payover rule, an increase in fees for licenses, and new anti-rebate certification requirements.

**DATES:** October 1, 1981, is the general effective date of these revised rules. However, persons who on October 1, 1981, hold valid independent ocean freight forwarder licenses need not comply with the surety bond requirements contained in section 510.15(a) of these revised rules until March 1, 1982. With respect to such persons, the surety bond requirements of the present rules will continue to apply until March 1, 1982. Licensees who fail to comply with the revised surety bond requirements by March 1, 1982, will be issued a notice that their licenses will be suspended effective

May 1, 1982, in the absence of compliance by that date. Failure to achieve compliance with the bond requirements by July 1, 1982, will result in automatic revocation of the license. This rule is being submitted to the Office of Management and Budget pursuant to the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511).

**SUPPLEMENTARY INFORMATION:**

Sections 18, 21, 43 and 44 of the Shipping Act, 1916 (46 U.S.C. 817, 820, 841a, 841b), and section 4 of the Administrative Procedure Act (5 U.S.C. 553) authorize the Federal Maritime Commission to make rules and regulations affecting oceangoing common carriers and the licensing, activities, obligations and responsibilities of independent ocean freight forwarders engaged in carrying on the business of forwarding in commerce from the United States.

The current rules, General Order 4, were originally issued in December, 1961. Commission and industry experience has indicated a need for updating, clarifying and changing many provisions of the Order. Accordingly, on March 17, 1980, the Commission issued a notice of proposed rulemaking (45 F.R. 17029) requesting comments from interested parties with respect to proposed revisions of General Order 4.

Written comments were received from 30 commentators,<sup>1</sup> some of whom also provided oral comments to the Commission on September 16, 1980. On the basis of the written and oral comments, a number of changes to the rules as proposed on March 17, 1980, are now being

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<sup>1</sup> 1.) B.F. Goodrich Company; 2.) North Carolina State Ports Authority; 3.) Fritz Companies; 4.) South Carolina State Ports Authority; 5.) American Council of Voluntary Agencies for Foreign Service, Inc.; 6.) Casey Overseas Corp.; 7.) Joint Association--South Atlantic Marine Terminal Conference Terminal Operators Conference of Hampton Roads; 8.) Emerson Electric Co.; 9.) The Far East Conference; 10.) Associated Latin American Freight Conferences; 11.) McGregor, Swire Air Services (America) Inc.; 12.) Foreign Shipowners Association of the Pacific Coast; 13.) Pacific Coast European Conference, Latin America-Pacific Coast Steamship Conference, and Pacific Coast River Plate Brazil Conference; 14.) National Customs Brokers and Forwarders Association of America, Inc.; 15.) Inter-American Freight Conference; 16.) West Gulf Maritime Association; 17.) Pacific Westbound Conference, Pacific-Straits Conference, and Pacific Indonesian Conference; 18.) Behring International, Inc.; 19.) International Freight Forwarders and Customs Brokers Association of New Orleans, Inc.; 20.) The "8900" Lines, North Atlantic Mediterranean Freight Conference, U.S. Atlantic & Gulf/Australia-New Zealand Conference, U.S. North Atlantic Spain Rate Agreement, and U.S. South Atlantic/Spanish, Portuguese, Moroccan and Mediterranean Rate Agreement (except Lykes Bros. Steamship Co., Inc.); 21.) Transoceanic Shipping Co., Inc.; 22.) Fillette, Green & Co. of Tampa, Smith and Kelly Co., Southern Overseas Corporation, Southern Shipping Company, and Waters Shipping Company; 23.) Independent Customs Brokers and Freight Forwarders Association of Savannah, Inc.; 24.) The North European Conferences; 25.) Interconex, Inc.; 26.) Dorf International, Ltd.; 27.) The Roanoke Companies; 28.) Association of Forwarding Agents and Foreign Freight Brokers of Mobile, Inc.; 29.) Georgia Ports Authority; and 30.) Customs Brokers and Forwarders Association of Miami, Inc. These 30 commentators are comprised of shippers, freight forwarders, common carriers by water, port/terminal interests, surety companies, and charitable institutions.

adopted by the Commission. A brief section-by-section discussion of the newly adopted revisions to General Order 4 follows:<sup>2</sup>

§510.1 *Scope*. This section describes the scope of the entire part and reflects present sections 510.1 and 510.20. No comments on this section were received but changes have been made to reflect the changes adopted in other sections.

§510.2 *Definitions*. This section collects the definitions contained in present sections 510.2 and 510.21.

Proposed section 510.2(b) changed the definition of "beneficial interest" from present section 510.21(l) for purposes of clarification only. One commentator (17), however, recommended that the definition be substantively revised to include the rental, leasing or other furnishing of containers. The Commission does not believe such a change should be made, and only minor editorial changes have been adopted.

A number of commentators raised points in regard to proposed section 510.2(h), the definition of "freight forwarding services." One commentator (16) asked that a provision be added to proposed section 510.2(h)(3) dealing with export declarations, which would make it clear that forwarders are required to file shippers' export declarations in accordance with U.S. Customs Service regulations. The Commission, however, believes that such revision would be superfluous. Commentators 9 and 15 suggested clarification in regard to proposed section 510.2(h)(14) dealing with the advancement of funds by forwarders. The Commission is in general agreement with those suggestions and has revised the definition accordingly. See combined definition in 510.2(h)(11).

One commentator (23) suggested that proposed section 510.2(j), the definition of an "independent ocean freight forwarder," be revised to exclude from the definition any person connected to "any" shipper (e.g., by rail, air or motor). The Commission, however, believes it was the Intent of Congress to proscribe only those shipper connections involving oceangoing common carriers as defined in section 510.2(n) of these final rules.

§510.3 *License; when required*. This section, as proposed, incorporated the requirements of present section 510.3(a), but also included a requirement that every branch office be separately licensed and bonded. In the "Supplementary Information" section of its notice of proposed rulemaking, the Commission stated that one alternative would be graded levels of surety bonds depending on the number of a forwarder's branch

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<sup>2</sup> Written and oral comments not mentioned in the section-by-section discussion have nevertheless been considered by the Commission. Further, it should be clearly understood that failure to address or refute a particular comment in no way implies Commission agreement with the comment. This is especially true with respect to commentators' assertions as to the proper interpretation of law, court decisions, and Commission rules, findings or actions.



offices. Proposed section 510.3 also deleted the obsolete grandfather provisions of present section 510.3(b).

The commentators were divided in their opinions as to whether separate licenses and bonds should be required for each branch office.

In order to minimize the impact of its regulations on the forwarding industry while increasing the protection to the shipping industry, the Commission has decided to require a separate license and bond only for branch offices which are separately incorporated. At the same time, \$10,000 in additional bond coverage will be required for each unincorporated branch office operated by a licensee. For example, a forwarder operating out of its home office and two unincorporated branch offices would be required to maintain on file with the Commission one surety bond in the amount of \$50,000 (i.e., the basic \$30,000 bond plus an additional \$10,000 for each branch office). The full amount of such coverage (i.e., \$50,000) would be available with respect to any obligation of the forwarder originating at any location from which it operates. Thus, branch office coverage under a bond will not be limited to just \$10,000.

§510.4 *License; when not required.* This proposed section combined various provisions of the present rules.

One commentator (17) suggested that nonvessel operating common carriers by water be prohibited from engaging in forwarder activity. Another commentator (23) suggested that vessel operating common carriers by water and their agents be denied licenses as there are sufficient forwarders to perform the services on behalf of shippers.

The Commission does not believe sufficient grounds exist for adopting those suggestions. The final rule has been modified, but only to clarify the rule with respect to ocean freight brokers.

§510.11 *Basic requirements for licensing eligibility.* This proposed section retained substantially the same requirements as the present rules, except that a specific minimum experience requirement was prescribed to assure that each applicant has a basic level of expertise to operate an independent ocean freight forwarding business.

Commentators generally supported the minimum experience requirement, but one commentator (11) was opposed to requiring a minimum level of experience for managers of branch offices. One commentator (30) suggested that prospective forwarders should be required to pass a test as the three year experience requirement may not adequately ensure that newly licensed forwarders will have an adequate level of expertise.

The Commission has decided not to impose a specific experience requirement for managers of unincorporated branch offices. The proper operation of an unincorporated branch office is the responsibility of the licensee who will be held strictly responsible for the activities of all its employees. Since, under these revised rules, a separately incorporated

branch office must be separately licensed, an applicant for such a license must meet the same minimum experience requirements as any other applicant. In addition, the Commission has decided that an examination for applicants will not be required. Minor clarifications to this section also have been made.

§510.12 *Persons not eligible.* No change was made to this proposed section.

§510.13 *Application for license.* The license application form is deleted from the body of the rules to enable revisions to be made to the form when necessary without republication of the rule. While not contained in the proposed rule, the requirement to publish notice of applications in the *Federal Register* as provided in present section 510.6 is restored pending its consideration in Docket 80-44.

§510.14 *Investigation of applicants.* No major change was made to this proposed section.

§510.15 *Surety bond requirement.* This proposed section incorporated provisions of present sections 510.5(f), (g), (h) and the provisos in present section 510.9, with some changes for clarification and flexibility.

Many of the commentators expressed the view that the bond should be increased either by a sliding scale based on the volume of cargo handled by the forwarder or by the number of branch offices operated. As mentioned earlier, the Commission has decided to require \$10,000 additional bond coverage for each unincorporated branch office.

§510.16 *Denial of license.* Proposed paragraph (b) of this section, "Reapplication within one year prohibited," is deleted. That subject matter is covered under new section 510.18 of the final rules.

§510.17 *Revocation or suspension of license.* This proposed section (originally proposed as section 510.50) retained the criteria of present section 510.9, but added a proposed paragraph (b) which provided for assessment of civil penalties for violations in any proceeding involving the suspension or revocation of a license. In addition, under proposed paragraph (c), the Commission addressed the matter of rejecting an application submitted within one year from the date of revocation of the applicant's previous license.

One commentator (18) urged the deletion of proposed section 510.50(a)(1) which provided for the suspension or revocation of a license for failure to conduct forwarding business consistent with the national maritime policies stated in the Merchant Marine Act of 1936. That provision, as well as proposed paragraph (c), is deleted in the final rules. The subject matter of proposed paragraph (c) is covered under new section 510.18.

§510.18 *Application after revocation or denial.* This section covers the subject matter of originally proposed sections 510.16(b) and 510.50(c).

§510.19 *Issuance and use of license.* This section was originally proposed as section 510.17. It contains provisions of present sections

510.5(a)(3), 8(b) and 8(d) and reflects changes made to other sections of the final rules.

§510.20 *Changes in organization.* This section, originally proposed as section 510.18, includes various provisions in the present rules plus codification of existing policy concerning the conduct of operations in the event of the death of a sole proprietor licensee.

Three commentators (14, 23 and 30) opposed the requirement in proposed subparagraph (a)(5) that prior approval be required for the transfer of 5% or more of the stock of a corporate licensee. The Commission has decided to retain this requirement in order to better ensure that licensees remain independent of shipper connections, a primary reason for the enactment of section 44 of the Act. A new paragraph (d) specifies the conditions under which newly incorporated branch offices may operate until they are independently licensed.

§510.21 *Branch offices; interim operation.* This section, originally proposed as section 510.19, provides for an orderly system of transition from an existing separately incorporated branch office status to a separately licensed status.

This grandfather provision is necessary to cover a separately incorporated branch office during the interim period from the effective date of these rules until it is granted its individual license.

§510.31 *General duties.* This section incorporates the provisions of prior sections 510.5(e) and 510.23(a), (b), (d) and (1), and adds a new provision (paragraph (h)) requiring anti-rebate certifications on invoices and other documents as provided in section 21(b) of the Shipping Act, 1916.

Three commentators (11, 18 and 23) objected to the requirement in proposed paragraph (b) that the name and license number of all related forwarders be included on a licensee's stationery and billing forms as such information would take too much room. The Commission agrees and has deleted the requirement.

Two commentators (14 and 18) objected to the new requirement in proposed paragraph (h) for an anti-rebating statement on forwarders' certifications and invoices, while one commentator (20) supported the proposed requirement. The Commission believes that, consistent with the intent of section 21(b) of the Act, forwarders should certify continuously that they have a policy against rebates, and has retained the certification requirement.

In agreement with a commentator (18) who objected to proposed section 510.31(d)(5) as being unfair and unnecessarily restrictive, the Commission deleted that provision from the final rule. It would have required forwarders to obtain Commission approval before employing persons whose licenses have been revoked or suspended.

§510.32 *Forwarder and principal; fees.* With slight changes, this proposed section incorporated several provisions of the existing rules and,

in order to avoid discrimination between shippers, deleted the exemption contained in current section 510.24(b), which allowed a forwarder to perform forwarding services for relief or charitable agencies free of charge or at a reduced rate.

Several commentators (14, 18 and 30) objected to the language of proposed section 510.32(e) as it affects a forwarder's obligation for its principal's actions. A new subpart (k) has been added requiring forwarders to account to their principals for certain overpayments and adjustments, and other language in this section has been revised to clarify the fact that a forwarder will not automatically be held responsible for the actions of its principal.

§510.33 *Forwarder and carrier; compensation.* This proposed section included a number of provisions from the current rules and proposed, in paragraph (b), to change the maximum allowable time period for a forwarder to pay over freight monies to a carrier from seven days to twenty days and, in paragraph (c), proposed a new provision to prohibit a carrier from requiring a licensee to assume the obligation of paying freight charges before such sums are advanced by the shipper to the forwarder. A provision in paragraph (d) proposed to require ocean carriers to pay compensation to forwarders within 30 days after the payment of ocean freight charges.

Numerous comments were received both for and against the three new proposals. After fully considering all of the concerns, the Commission has decided to delete all three of the new proposals as well as the existing payover rule. The matters addressed in the new proposals in proposed section 510.33(c) and (d) are best left to the parties' own determination. With respect to the payover rule, ocean freight payments are governed by tariff and bill of lading provisions, and the Commission is of the opinion that any type of payover rule tends to confuse the legal rights and obligations of the parties under such governing provisions. In short, the Commission is of the view that all of these financial arrangements should not be governed by Commission regulations, but instead should be left to the competitive controls of the market place.

§510.34 *Records required to be kept.* This proposed section contained provisions of present sections 510.23(k) and (l), 510.25(a), and 510.26(b). No comments were received in regard to these provisions and no significant changes were made in the final rule.

§510.35 *Reports required to be filed.* This section includes the reporting requirements of present sections 510.5(c) and 510.26(a). A new provision (paragraph (a)) would require the filing of samples of office stationery and invoice forms within sixty days of changes in organization. Proposed new paragraph (c) requires an annual filing of an anti-rebate certification pursuant to section 21(b) of the Act.

One commentator (18) opposed the filing of the annual anti-rebate certification. The Commission believes that it is important and consistent with the intent of section 21(b) that the requirement be retained and does not believe that an annual certification will cause any undue burden on licensees.

§510.36 *Section 15 agreements.* This proposed section tracks the present section 510.26.

One commentator (14) objected to the requirement that a copy of non-exclusive working agreements be kept in a licensee's file, while another commentator (17) suggested that the Commission should require the filing of such agreements with the Commission. The Commission has decided to adopt the rule as proposed with a slight modification to cover agreements which have been exempted from the requirements of section 15.

*Therefore, 46 C.F.R. Part 510 is amended to read as follows:*

**PART 510 - LICENSING OF INDEPENDENT  
OCEAN FREIGHT FORWARDERS  
SUBPART A - GENERAL**

- Sec.*  
510.1 Scope  
510.2 Definitions  
510.3 License, when required  
510.4 License, when not required

**SUBPART B - ELIGIBILITY AND PROCEDURE  
FOR LICENSING; BOND REQUIREMENTS**

- Sec.*  
510.11 Basic requirements for licensing; eligibility  
510.12 Persons not eligible  
510.13 Application for license  
510.14 Investigation of applicants  
510.15 Surety bond requirements  
510.16 Denial of license  
510.17 Revocation or suspension of license  
510.18 Application after revocation or denial  
510.19 Issuance and use of license  
510.20 Changes in organization  
510.21 Branch offices; interim operation

**SUBPART C - DUTIES AND RESPONSIBILITIES OF FREIGHT  
FORWARDERS; FORWARDING CHARGES; REPORTS TO  
COMMISSION**

- Sec.*  
510.31 General duties  
510.32 Forwarder and principal; fees  
510.33 Forwarder and carrier; compensation  
510.34 Records required to be kept  
510.35 Reports required to be filed  
510.36 Section 15 agreements

**AUTHORITY:** Secs. 18, 21, 43 and 44, as amended; 46 U.S.C. 817, 820, 841a and 841b.

**SUBPART A - GENERAL**

**§510.1 Scope.**

This part sets forth regulations providing for the licensing as independent ocean freight forwarders of persons, including individuals, corporations and partnerships, who wish to carry on the business of freight

forwarding. This part also prescribes the bonding requirements and the duties and responsibilities of independent ocean freight forwarders, regulations concerning practices of freight forwarders and common carriers by water, and the grounds and procedures for revocation and suspension of licenses.

§510.2 *Definitions.*

The terms used in this part are defined as follows:

(a) "Act" means the Shipping Act, 1916 (46 U.S.C. 801 *et seq.*), as amended.

(b) "Beneficial interest" includes any lien or interest in or right to use, enjoy, profit, benefit, or receive any advantage, either proprietary or financial, from the whole or any part of a shipment of cargo where such interest arises from the financing of the shipment or by operation of law, or by agreement, express or implied. The term "beneficial interest" shall not include any obligation in favor of a freight forwarder arising solely by reason of the advance of out-of-pocket expenses incurred in dispatching a shipment.

(c) "Branch office" means any office established and maintained by or under the control of a licensee for the purpose of rendering freight forwarding services, which office is located at an address different from that of the licensee's designated home office. This term does not include a separately incorporated entity.

(d) "Brokerage" refers to payment by an oceangoing common carrier to an ocean freight broker for the performance of services as specified in section 510.2(m) of this part.

(e) "Compensation" means payment by an oceangoing common carrier to a freight forwarder for the performance of services as specified in section 510.33(c) of this part.

(f) "Freight forwarder" is anyone who performs, or holds itself out to perform, the dispatching of a shipment of cargo for another by rendering any one or more of the services enumerated in section 510.2(h) of this part.

(g) "Freight forwarding fee" means charges billed by a freight forwarder to a shipper, consignee, seller, purchaser, or any agent thereof, for the performance of freight forwarding services as specified in section 510.2(h) of this part.

(h) "Freight forwarding services" refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by an oceangoing common carrier, which may include, but is not limited to, the following:

- (1) ordering cargo to port;
- (2) preparing and/or processing export declarations;
- (3) booking, arranging for or confirming cargo space;
- (4) preparing or processing delivery orders or dock receipts;

- (5) preparing and/or processing ocean bills of lading;
- (6) preparing or processing consular documents or arranging for their certification;
- (7) arranging for warehouse storage;
- (8) arranging for cargo insurance;
- (9) clearing shipments in accordance with United States Government export regulations;
- (10) preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required;
- (11) handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;
- (12) coordinating the movement of shipments from origin to vessel; and
- (13) giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargo's dispatch.

(i) "In commerce from the United States" means oceanborne export commerce from the United States, its Territories, or possessions to foreign countries, or oceanborne commerce between the United States and its Territories and possessions, or between such Territories and possessions.

(j) "Independent ocean freight forwarder" refers to a person performing freight forwarding services for a consideration, either monetary or otherwise, who is not a shipper or consignee or seller or purchaser of property in commerce from the United States and who has no beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest.

(k) "Licensee" is any person licensed by the Federal Maritime Commission as an independent ocean freight forwarder.

(l) "Nonvessel operating common carrier by water" is a common carrier by water as defined in section 1 of the Act, which does not operate the vessel by which its ocean transportation is provided but which holds itself out, by the establishment and maintenance of tariffs, by advertisement, solicitation, or otherwise, to provide transportation of property for hire by water in commerce from the United States; which assumes responsibility or has liability imposed by law for the safe transportation of such property; and which arranges in its own name for the performance of such transportation by underlying water carriers.

(m) "Ocean freight broker" is an entity which is engaged by a carrier to secure cargo for such carrier and/or to sell or offer for sale ocean



transportation services and which holds itself out to the public as one who negotiates between shipper or consignee and carrier for the purchase, sale, conditions and terms of transportation.

(n) "Oceangoing common carrier" is a common carrier by water as defined in section 1 of the Act, including a nonvessel operating common carrier by water, engaged in transportation for hire by water of property in commerce from the United States, as defined in section 510.2(i) of this part.

(o) "Principal", except as used in Surety Bond Form FMC 59 Rev., refers to the shipper, consignee, seller, or purchaser of property, and to anyone acting on behalf of such shipper, consignee, seller, or purchaser of property, who employs the services of a licensee to facilitate the ocean transportation of such property.

(p) "Reduced forwarding fees" means charges to a principal for forwarding services that are below the licensee's usual charges for such services.

(q) "Small shipment" refers to a single shipment sent by one consignor to one consignee on one bill of lading which does not exceed the underlying oceangoing common carrier's minimum charge rule.

(r) "Special contract" is a contract for freight forwarding services which provides for a periodic lump sum fee.

(s) "Territory or possession" includes the Commonwealth of the Northern Marianas, the Commonwealth of Puerto Rico, American Samoa, Guam, the U.S. Virgin Islands, and any other Territory or possession of the United States.

#### §510.3 *License, when required.*

Except as otherwise provided in this part, a person must hold a valid independent ocean freight forwarder license in order to perform freight forwarding services, and, except as provided in section 510.4 of this part, no person shall perform, or hold out to perform, such services unless such person holds a valid license issued by the Commission to engage in such business. A separate license is required for each branch office that is separately incorporated.

#### §510.4 *License, when not required.*

A license is not required in the following circumstances:

(a) *Shipper.* Any person whose primary business is the sale of merchandise may, without a license, dispatch and perform freight forwarding services on behalf of its own shipments or on behalf of shipments or consolidated shipments of a parent, subsidiary, affiliate, or associated company. Such person shall not receive compensation from the oceangoing common carrier for any services rendered in connection with such shipments.

(b) *Employee or branch office of licensed forwarder.* An individual employee or unincorporated branch office of a licensed independent ocean freight forwarder is not required to be licensed in order to act

solely for such licensee, but each licensed independent ocean freight forwarder will be held strictly responsible hereunder for the acts or omissions of any of its employees rendered in connection with the conduct of the business.

(c) *Oceangoing common carrier.* An oceangoing common carrier, or agent thereof, may perform ocean freight forwarding services without a license only with respect to cargo carried under such carrier's own ocean bill of lading. Charges for such forwarding services shall be assessed in conformance with the carrier's published tariffs on file with the Commission.

(d) *Ocean freight broker.* An ocean freight broker is not required to be licensed to perform those services specified in section 510.2(m) of this part.

### SUBPART B - ELIGIBILITY AND PROCEDURE FOR LICENSING; BOND REQUIREMENTS

#### §510.11 *Basic requirements for licensing; eligibility.*

(a) *Necessary qualifications.* To be eligible for an independent ocean freight forwarder's license, the applicant must demonstrate to the Commission that:

- (1) its proposed forwarding business will be consistent with the national maritime policies declared in the Merchant Marine Act, 1936;
- (2) it will meet the definition of an independent ocean freight forwarder;
- (3) it is fit, willing and able properly to carry on the business of freight forwarding and to conform to the provisions of the Shipping Act, 1916, as amended, and the requirements, rules and regulations of the Commission issued thereunder;
- (4) its qualifying individual has a minimum of three (3) years of experience in ocean freight forwarding duties in the United States;
- (5) it has obtained and filed with the Commission a valid surety bond in conformance with section 510.15 of this part; and
- (6) it and its qualifying individual are otherwise qualified within the provisions of the Shipping Act, 1916 and the requirements, rules and regulations of the Commission.

(b) *Qualifying individual.* The following individuals must qualify the applicant for a license:

- (1) *Sole proprietorship* - The applicant sole proprietor.
- (2) *Partnership* - At least one of the active managing partners, but all partners must execute the application.
- (3) *Corporation* - At least one of the active corporate officers.

(c) *Affiliates of forwarders.* An independently qualified applicant may be granted a separate license to carry on the business of forwarding even though it is associated with, under common control with, or otherwise related to another independent ocean freight forwarder through stock ownership or common directors or officers, if such applicant submits (1) a separate application and fee, and (2) a valid surety bond in the form and amount prescribed under section 510.15 of this part. The proprietor, partner or officer who is the qualifying individual of one active licensee shall not also be designated the qualifying proprietor, partner or officer of an applicant for another independent ocean freight forwarder license.

(d) *Oceangoing common carriers.* An oceangoing common carrier or agent thereof which meets the requirements of this part may be licensed to dispatch shipments moving on other than such carrier's own bill of lading, subject to the provisions of section 510.33(g) of this part.

§510.12 *Persons not eligible.*

No person is eligible for a license who is a shipper, consignee, seller, or purchaser of shipments in commerce from the United States, or who has any beneficial interest therein, or who directly or indirectly controls or is controlled by such shipper, consignee, seller, or purchaser of shipments or by any person having a beneficial interest in such shipment.

§510.13 *Application for license.*

(a) *Application and forms.* Any person who wishes to obtain a license to carry on the business of forwarding shall submit, in duplicate, to the Director of the Commission's Bureau of Certification and Licensing, a completed application Form FMC-18 Rev. "Application for a License as an Independent Ocean Freight Forwarder") and a completed anti-rebate certification in the format prescribed under section 510.35(c) of this part. Copies of Form FMC-18 Rev. may be obtained from the Director, Bureau of Certification and Licensing, Federal Maritime Commission, Washington, D.C. 20573, or from any of the Commission's offices at other locations. Notice of filing of such application shall be published in the *Federal Register* and shall state the name and address of the applicant. If the applicant is a corporation or partnership, the names of the officers or partners thereof shall be published.

(b) *Fee.* The application shall be accompanied by a money order, certified check or cashier's check in the amount of \$350 made payable to the "Federal Maritime Commission."

(c) *Rejection.* Any application which appears upon its face to be incomplete or to indicate that the applicant fails to meet the licensing requirements of the Shipping Act, 1916, or the Commission's regulations, shall be returned by certified U.S. mail to the applicant without further processing, together with an explanation of the reason(s) for rejection, and the application fee shall be refunded in full. All other

applications will be assigned an application number, and each applicant will be notified of the number assigned to its application. Persons who have had their applications returned may reapply for a license at any time thereafter by submitting a new application, together with the full application fee.

(d) *Investigation.* Each applicant shall be investigated in accordance with section 510.14 of this part.

(e) *Changes prior to licensing.* Each applicant shall submit to the Commission, in duplicate, an amended Form FMC-18 Rev., advising of any changes in the facts submitted in the original application, within thirty (30) days after such change(s) occur. Any unreported change will delay the processing and investigation of the application and may result in rejection or denial of the application. No fee is required when reporting changes to an application for initial license under this section.

#### §510.14 *Investigation of applicants.*

The Commission shall conduct an investigation of the applicant's qualifications for a license. Such investigations may address:

- (a) the accuracy of the information submitted in the application;
- (b) the integrity and financial responsibility of the applicant;
- (c) the character and independence of the applicant and its qualifying individual;
- (d) the length and nature of the qualifying individual's experience in handling, freight forwarder duties; and
- (e) such further evidence of the fitness, willingness, and ability of the applicant to carry on the business of forwarding as the Commission may require.

#### §510.15 *Surety bond requirements.*

(a) *Form and amount.* No license shall be issued to an applicant who does not have a valid surety bond (FMC-59 Rev.) on file with the Commission in the amount of \$30,000. The amount of such bond shall be increased by \$10,000 for each of the applicant's unincorporated branch offices. Surety companies must be certified by the U.S. Department of the Treasury in order to execute Federal bonds. Surety Bond Form FMC-59 Rev. can be obtained in the same manner as Form FMC-18 Rev. under section 510.13(a) of this part, and shall read as follows:

LICENSING OF INDEPENDENT OCEAN FREIGHT  
FORWARDERS

827

(FORM FMC-59 REV.)

BOND NO. \_\_\_\_\_  
FMC LICENSE NO. \_\_\_\_\_

FEDERAL MARITIME COMMISSION  
INDEPENDENT OCEAN FREIGHT FORWARDER'S BOND  
(SECTION 44, SHIPPING ACT, 1916)

KNOW ALL MEN BY THESE PRESENTS, That \_\_\_\_\_

Principal (hereinafter called Principal), and \_\_\_\_\_ as

Surety (hereinafter called Surety) are held and firmly bound unto the  
UNITED STATES OF AMERICA in the sum of  
\$ \_\_\_\_\_ for the payment of  
which sum we bind ourselves, our heirs, executors, administrators,  
successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Principal has applied for, is about to apply for, or holds  
a license as an independent ocean freight forwarder pursuant to section  
44 of the Shipping Act, 1916, and has elected to file this bond with the  
Federal Maritime Commission;

NOW, THEREFORE, the condition of this obligation is such that if  
the Principal shall, while this bond is in effect, supply the services of an  
independent ocean freight forwarder in accordance with the contracts,  
agreements, or arrangements made therefor, then this obligation shall be  
void, otherwise to remain in full force and effect.

The liability of the Surety shall not be discharged by any payment or  
succession of payments hereunder, unless and until such payment or  
payments shall aggregate the penalty of this bond, and in no event shall  
the Surety's total obligation hereunder exceed said penalty.

This bond shall inure to the benefit of any and all persons for whom  
the Principal shall have undertaken to act as an independent ocean  
freight forwarder.

This bond is effective the \_\_\_\_\_ day of  
19 \_\_\_\_, and shall continue in effect until  
discharged or terminated as herein provided. The Principal or the  
Surety may at any time terminate the bond by written notice to the  
Federal Maritime Commission at its office in Washington, D.C. Such  
termination shall become effective thirty (30) days after receipt of said  
notice by the Commission. The Surety shall not be liable for any  
contracts, agreements, or arrangements made by the Principal after the  
expiration of said thirty (30) day period but such termination shall not  
affect the liability of the Principal and Surety for any breach of the

condition hereof occurring prior to the date when said termination becomes effective.

The underwriting Surety will promptly notify the Director, Bureau of Certification and Licensing, Federal Maritime Commission, Washington, D.C. 20573, of any claims against this bond.

Signed and sealed this \_\_\_\_\_, day of  
19 \_\_\_\_\_.

(PLEASE TYPE NAME OF SIGNER UNDER EACH SIGNATURE.)

(Individual Principal or Partner) (Business Address)

(Individual Principal or Partner) (Business Address)

(Individual Principal or Partner) (Business Address)

Corporate Principal

Business Address

*(Affix Corporate Seal)*

By

Title

Corporate Surety

Business Address

*(Affix Corporate Seal)*

By

Title

(b) *Filing of bond.* Upon notification by the Commission by certified U.S. mail that the applicant has been approved for licensing, the applicant shall file with the Director of the Commission's Bureau of Certification and Licensing, a surety bond in the form and amount prescribed in section 510.15(a) of this part. No license will be issued until the Commission is in receipt of a valid surety bond from the applicant. If more than six (6) months elapse between issuance of the notification of qualification and receipt of the surety bond, the Commission shall, at its discretion, undertake a supplementary investigation to determine the applicant's continued qualification. The fee for such a supplementary investigation shall be \$100, payable by money order, certified check or cashier's check to the "Federal Maritime Commission." Should the applicant not file the requisite surety bond within two years of notification, the Commission will consider the application to be invalid.

(c) *Branch offices.* A new surety bond, or rider to the existing bond, increasing the amount of the bond in accordance with section 510.15(a) of this part, shall be filed with the Commission prior to the date the licensee commences operation of any branch office. Failure to adhere to this requirement may result in revocation of the license.

(d) *Termination of bond.* No license shall remain in effect unless a valid surety bond is maintained on file with the Commission. Upon receipt of notice of termination of a surety bond, the Commission shall notify the concerned licensee by certified U.S. mail, to its last known address, that the Commission shall, without hearing or other proceeding, revoke the license as of the termination date of the bond unless the licensee shall have submitted a valid replacement surety bond before such termination date. Replacement surety bonds must bear an effective date no later than the termination date of the expiring bond.

§510.16 *Denial of license.*

If the Commission determines, as a result of its investigation, that the applicant:

- (a) will not conduct its forwarding business in a manner consistent with the national maritime policies declared in the Merchant Marine Act, 1936;
- (b) fails to meet the definition of an independent ocean freight forwarder as set forth in section 1 of the Act and section 510.2(j) of this part;
- (c) is not fit, willing, and able properly to carry on the business of forwarding, or to conform to the provisions of the Act or the requirements, rules and regulations of the Commission issued thereunder;
- (d) has failed to respond to any lawful inquiry of the Commission;  
or

- (e) has made any willfully false or misleading statement to the Commission in connection with its application;

a letter of intent to deny the application shall be sent to the applicant by certified U.S. mail, stating the reason(s) why the Commission intends to deny the application. If the applicant submits a written request for hearing on the proposed denial within twenty (20) days after receipt of notification, such hearing shall be granted by the Commission pursuant to its Rules of Practice and Procedure contained in part 502 of this Chapter. Otherwise, denial of the application will become effective and the applicant shall be so notified by certified U.S. mail. Civil penalties for violations of the Act or any Commission order, rule, or regulation may be assessed in any proceeding on the proposed denial of a license or may be compromised for any such violation when a proceeding has not been instituted in accordance with part 505 of this Chapter.

**§510.17 Revocation or suspension of license.**

(a) *Grounds for revocation.* Except for the automatic revocation for termination of a surety bond under section 510.15(d) of this part, or as provided in section 510.15(c) of this part, a license may be revoked or suspended after notice and hearing for any of the following reasons:

- (1) Violation of any provision of the Act, as amended, or any other statute or Commission regulation related to carrying on the business of forwarding;
- (2) Failure to respond to any lawful inquiry by the Commission;
- (3) Making a willfully false or misleading statement to the Commission in connection with an application for a license or its continuance in effect;
- (4) Change of circumstances whereby the Commission determines that the licensee no longer qualifies to be an independent ocean freight forwarder; or
- (5) Conduct which the Commission determines renders the licensee unfit or unable to carry on the business of forwarding.

(b) *Civil penalties.* As provided for in part 505 of this Chapter, civil penalties for violations of the Act or any Commission order, rule, or regulation may be assessed in any proceeding to revoke or suspend a license and may be compromised when such a proceeding has not been instituted.

(c) *Notice of Revocation.* The Commission shall publish in the *Federal Register* its order of revocation.

**§510.18 Application after revocation or denial.**

Whenever a license has been revoked or an application has been denied because the Commission has found the licensee or applicant to be unfit, any further application within 3 years of the date of the most recent conduct on which the Commission's notice of revocation or denial was based, made by such former licensee or applicant or by another applicant employing the same qualifying individual or con-



trolled by persons on whose conduct the Commission based its determination of lack of fitness, shall be reviewed directly by the Commission. §510.19 *Issuance and use of license.*

(a) *Qualification necessary for issuance.* The Commission will issue a license if it determines, as a result of its investigation, that the applicant is fit, willing, and able properly to carry on the business of ocean freight forwarding, and is otherwise qualified within the provisions of applicable statutes and the requirements, rules, and regulations of the Commission.

(b) *To whom issued.* The Commission will issue a license only in the name of the applicant, whether the applicant be a sole proprietorship, a partnership, or a corporation, and the license will be issued to only one legal entity. A license issued to a sole proprietor doing business under a trade name shall be in the name of the sole proprietor, indicating the trade name under which the licensee will be conducting business. Only one license shall be issued to any applicant regardless of the number of names under which such applicant may be doing business.

(c) *Use limited to named licensee.* Except as otherwise provided in this part, such license is limited exclusively to use by the named licensee and shall not be transferred to another person.

§510.20 *Changes in organization.*

(a) The following changes in an existing licensee's organization require prior approval of the Commission:

- (1) Transfer of a corporate license to another person;
- (2) Change in ownership of an individual proprietorship;
- (3) Addition of one or more partners to a licensed partnership;
- (4) Change in the business structure of a licensee from or to a sole proprietorship, partnership, or corporation, whether or not such change involves a change in ownership;
- (5) Sale or transfer of five (5) percent or more of stock of a licensed corporation to new stockholder interests;
- (6) Acquisition of one or more additional licensees, whether for purposes of merger, consolidation, or control (see section 15 of the Act);
- (7) Any change in a licensee's name; or
- (8) Change in the identity or status of the designated qualifying individual, except as discussed in paragraphs (b) and (c) of this section.

(b) *Operation after death of sole proprietor.* In the event the owner of a licensed sole proprietorship dies, the licensee's executor, administrator, heir(s), or assign(s) may continue operation of such proprietorship solely with respect to shipments for which the deceased sole proprietor had undertaken to act as an independent ocean freight forwarder pursuant to the existing license, if the death is reported within thirty (30)

days to the Commission and to all principals for whom services on such shipments are to be rendered. The acceptance or solicitation of any other shipment is expressly prohibited until a new license has been issued. Applications for a new license by the said executor, administrator, heir(s), or assign(s) shall be made on Form FMC-18 Rev., and shall be accompanied by the transfer fee set forth in section 510.20(e) of this part.

(c) *Operation after retirement, resignation, or death of qualifying individual.* When a partnership or corporation has been licensed on the basis of the qualifications of one or more of the partners or officers thereof, and such qualifying individual(s) shall no longer serve in a full-time, active capacity with the firm, the licensee shall report such change to the Commission within thirty (30) days. Within the same 30-day period, the licensee shall furnish to the Commission the name(s) and detailed ocean freight forwarding experience of other active managing partner(s) or officer(s) who may qualify the licensee. Such qualifying individual(s) must meet the applicable requirements set forth in section 510.11(a) of this part. The licensee may continue to operate as an independent ocean freight forwarder while the Commission investigates the qualifications of the newly designated partner or officer.

(d) *Incorporation of branch office.* In the event a licensee's validly operated branch office undergoes incorporation as a separate entity, the licensee may continue to operate such office pending receipt of a separate license, provided that:

- (1) the separately incorporated entity applies to the Commission for its own license within ten (10) days after incorporation, and
- (2) the continued operation of the office is carried on as a bona fide branch office of the licensee, under its full control and responsibility, and not as an operation of the separately incorporated entity.

(e) *Application form and fee.* Applications for Commission approval of status changes or for license transfers under section 510.20(a) of this part shall be filed in duplicate with the Director, Bureau of Certification and Licensing, Federal Maritime Commission, on Form FMC-18 Rev., together with a processing fee of \$100, made payable by money order, certified check, or cashier's check to the "Federal Maritime Commission."

§510.21 *Branch offices; interim operation.*

A licensee operating a separately incorporated, but not separately licensed, branch office approved by the Commission prior to the effective date of this rule, may continue to operate such office while the application by the branch office for an individual license is pending. No such branch office may continue in operation unless it files an applica-

tion for an individual license with the Commission within one year after the effective date of this rule.

**SUBPART C - DUTIES AND RESPONSIBILITIES OF FREIGHT  
FORWARDERS; FORWARDING CHARGES; REPORTS TO  
COMMISSION**

**§510.31 *General duties.***

(a) *License; name and number.* Each licensee shall carry on the business of forwarding only under the name in which its license is issued and only under its license number as assigned by the Commission. Wherever the licensee's name appears on shipping documents, its FMC license number shall also be included.

(b) *Stationery and billing forms.* The name and license number of each licensee shall be permanently imprinted on the licensee's office stationery and billing forms. The Commission may temporarily waive this requirement for good cause shown if the licensee rubber stamps or types its name and FMC license number on all papers and invoices concerned with any forwarding transaction.

(c) *Use of license by others; prohibition.* No licensee shall permit its license or name to be used by any person who is not a *bona fide* individual employee of the licensee. Unincorporated branch offices of the licensee may use the license number and name of the licensee if such branch offices (1) have been reported to the Commission in writing and (2) are covered by an increased bond in accordance with section 510.15(c) of this part.

(d) *Arrangements with forwarders whose licenses have been revoked.* Unless prior written approval from the Commission has been obtained, no licensee shall, directly or indirectly, (1) agree to perform forwarding services on export shipments as an associate, correspondent, officer, employee, agent, or sub-agent of any person whose license has been revoked or suspended pursuant to section 510.17 of this part; (2) assist in the furtherance of any forwarding business of such person; (3) share forwarding fees or freight compensation with any such person; or (4) permit any such person directly or indirectly to participate, through ownership or otherwise, in the control or direction of the freight forwarding business of the licensee.

(e) *Arrangements with unauthorized persons.* No licensee shall enter into an agreement or other arrangement with a person not authorized by this part to transact forwarding business for others so that any resulting fee, compensation, or other benefit inures to the benefit of the unlicensed person. When a licensee is employed for the transaction of forwarding business by an unlicensed person who is not the actual shipper, the licensee must transmit to the actual shipper of the cargo a copy of the invoice for services rendered.

(f) *False or fraudulent claims, false information.* No licensee shall prepare or file or assist in the preparation or filing of any claim, affidavit, letter of indemnity, or other paper or document concerning a forwarding transaction which it has reason to believe is false or fraudulent, nor shall any such licensee knowingly impart to a principal, oceangoing common carrier or other person, false information relative to any forwarding transaction.

(g) *Response to requests of Commission.* Upon the request of any authorized representative of the Commission, a licensee shall make available promptly for inspection or reproduction all records and books of account in connection with its forwarding business, and shall respond promptly to any lawful inquiries by such representative.

(h) *Policy against rebates.* The following declaration shall appear on all invoices and certifications under section 510.32(h) and 510.33(c) of this part:

(Name of Firm) has a policy against payment, solicitation, or receipt of any rebate, directly or indirectly, which would be unlawful under the United States Shipping Act, 1916, as amended.

**§510.32 Forwarder and principal; fees.**

(a) *Beneficial interest.* No licensee shall act in the capacity of a shipper, consignee, seller or purchaser of any shipment in commerce from the United States, nor have any beneficial interest in such a shipment.

(b) *Compensation or fee sharing.* No licensee shall share, directly or indirectly, any compensation or freight forwarding fee with a shipper, consignee, seller, or purchaser, or an agent, affiliate, or employee thereof; nor with any person advancing the purchase price of the property or guaranteeing payment therefor; nor with any person having a beneficial interest in the shipment.

(c) *Withholding information.* No licensee shall withhold any information concerning a forwarding transaction from its principal.

(d) *Due diligence.* Each licensee shall exercise due diligence to ascertain the accuracy of any information it imparts to a principal concerning any forwarding transaction.

(e) *Errors and omissions.* Each licensee shall comply with the laws of the United States and any involved State, Territory, or possession thereof, and shall assure that to the best of its knowledge there exists no error, misrepresentation in, or omission from any export declaration, bill of lading, affidavit, or other document which the licensee executes in connection with a shipment. A licensee who has reason to believe that its principal has not, with respect to a shipment to be handled by such licensee, complied with the laws of the United States or any State, Commonwealth or Territory thereof, or has made any error or misrepresentation in, or omission from, any export declaration, bill of lading,

affidavit, or other paper which the principal executes in connection with such shipment, shall advise its principal promptly of the suspected noncompliance, error, misrepresentation or omission, and shall decline to participate in any transaction involving such document until the matter is properly and lawfully resolved.

(f) *Express written authority.* No licensee shall endorse or negotiate any draft, check, or warrant drawn to the order of its principal without the express written authority of such principal.

(g) *Receipt for cargo.* Each receipt issued for cargo by a licensee shall be clearly identified as "Receipt for Cargo" and be readily distinguishable from a bill of lading.

(h) *Invoices; list of charges; exceptions.*

(1) Each licensee shall use an invoice which lists separately for each shipment:

- (i) the actual amount of ocean freight assessed by the ocean-going common carrier;
- (ii) the actual amount of consular fees paid;
- (iii) the insured value, the actual insurance rate, and the actual premium paid the insurance company for insurance arranged;
- (iv) the actual cost to the licensee for each accessorial service arranged by the licensee to be performed by others in connection with the shipment; and,
- (v) the total service fee charged by the licensee unless the licensee has a special contract arrangement with the principal.

(2) Exceptions:

- (i) The licensee need not list separately its costs for services set forth under sections 510.32(h)(1)(ii), 510.32(h)(1)(iii) and 510.32(h)(1)(iv) of this part if the licensee has provided its principal with a prior written quotation of total charges for shipment(s), a copy of which it retains in the shipment file, and has received written authorization from the principal to forward the shipment(s) for that total charge.
- (ii) Licensees who offer to forward small shipments for uniform charges available to the public at large and duly filed with the Commission shall not be required to itemize the components of such uniform charges on shipments so long as the charges have been quoted in writing to the shipper prior to the time of shipment.
- (iii) Licensees who maintain a uniform schedule of fees for placing insurance and for performing accessorial services (stated by dollar amount and/or percentage of markup) need not itemize the components of such charges in their

invoices. Licensees who elect to maintain such uniform pricing schedules must make the current schedule and every superseded schedule available upon request, and shall not assess fees different from those specified in the effective schedule. Such a schedule shall be filed with the Commission, posted in a conspicuous place in the forwarder's office, and shall be mailed upon request to shippers.

(i) *Special contracts.* To the extent that special arrangements or contracts are entered into by a licensee, the licensee shall not deny equal terms to other shippers similarly situated.

(j) *Reduced forwarding fees.* Except as otherwise provided in this part, no licensee shall render, or offer to render, any forwarding service free of charge or at a reduced fee in consideration of receiving compensation from oceangoing common carriers on the relevant shipment or for any other reason.

(k) *Accounting to principal.* Each licensee shall account to its principal(s) for overpayments, adjustments of charges, reductions in rates, insurance refunds, insurance monies received for claims, proceeds of c.o.d. shipments, drafts, letters of credit, and any other sums due such principal(s). These sums shall be forwarded promptly to the principal or, with the principal's written consent, may be used to offset the licensee's outstanding receivables due from such principal.

#### §510.33 Forwarder and carrier; compensation.

(a) *Disclosure of principal.* No licensee, acting in the capacity of an independent ocean freight forwarder, shall identify itself as the shipper on the shipper identification line which appears above the cargo description data on the bill of lading. The actual shipper must always be disclosed thereon. The forwarder's name may appear *after* the name of the actual shipper but the forwarder must be identified as agent.

(b) *Certification required for compensation.* An oceangoing common carrier may pay compensation to a licensee pursuant to such carrier's tariff provisions. If the carrier's tariff so provides, such compensation shall be paid for any shipment forwarded on behalf of others when, and only when, such carrier is in possession of a certification in the form prescribed in section 510.33(c) of this part, and the actual shipper has been disclosed on the bill of lading as provided for in section 510.33(a) of this part. The oceangoing common carrier shall be entitled to rely on such certification unless it knows that the certification is incorrect, and shall retain such certification for a period of five (5) years.

(c) *Form of certification.* Prior to receipt of compensation, the licensee shall file with the carrier, in addition to the anti-rebate certification required by section 510.31(h) of this part, a signed certification as set forth below on one copy of the relevant ocean bill of lading which

indicates performance of at least two of the listed services in addition to arranging for space:

The undersigned hereby certifies that it is the holder of valid FMC License No. \_\_\_\_\_, issued by the Federal Maritime Commission and has, in addition to soliciting and securing the cargo specified herein or booking or otherwise arranging for space for such cargo, performed at least two (2) of the following services, as indicated:

- (1) Coordinated the movement of the cargo to shipside.
- (2) Prepared and processed the ocean bill of lading.
- (3) Prepared and processed dock receipts or delivery orders.
- (4) Prepared and processed consular documents or export declarations.
- (5) Paid the ocean freight charges.

A copy of such certificate shall be retained by the licensee pursuant to section 510.34 of this part.

(d) *Compensation pursuant to tariff provisions.* No licensee, or employee thereof, shall accept compensation from an oceangoing common carrier which is different than that specifically provided for in the carrier's effective tariff(s) lawfully on file with the Commission.

(e) *Compensation; services performed by underlying carrier; exemptions.* No licensee shall charge or collect compensation in the event the underlying oceangoing common carrier, or its agent, has, at the request of such licensee, performed any of the forwarding services set forth in section 510.2(h) of this part, unless no other licensee is willing and able to perform such services, or unless the Commission has granted a port-wide exemption from this rule to oceangoing common carriers or their agents in the port of loading. Such exemptions may be granted by the Commission upon (1) application of any licensed forwarder, (2) publication of notice of application for such exemption in the *Federal Register* with a twenty (20) day public comment period, and (3) a finding by the Commission that an insufficient supply of forwarding services is being offered by licensees domiciled at the port of loading. Exemptions shall remain in effect until rescinded by the Commission.

(f) *Duplicative compensation or brokerage.* Where an oceangoing common carrier has paid or has incurred an obligation to pay either brokerage to an ocean freight broker or compensation to a licensee, such carrier shall not be obligated to pay additional compensation to any other person for forwarding services rendered on behalf of the same cargo.

(g) *Licensed oceangoing common carriers; compensation.* An oceangoing common carrier, agent, or person related thereto, acting as an independent ocean freight forwarder, may collect compensation when, and only when, the following certification is made on the "line copy"

of the underlying carrier's bill of lading, in addition to all other certifications required by this part:

The undersigned certified that neither it, nor any related person, has issued a bill of lading covering the ocean transportation of the shipment covered by this bill of lading or otherwise undertaken common carrier responsibility therefor.

Whenever a person acts in the capacity of an oceangoing common carrier or agent thereof as to any shipment, such person shall not be entitled to collect compensation nor shall any underlying carrier pay such compensation to such oceangoing common carrier or agent thereof for such shipment.

**§510.34 *Records required to be kept.***

Each licensee shall maintain in an orderly and systematic manner, and keep current and correct, all records and books of account in connection with its business of forwarding. These records must be kept in the United States in such manner as to enable authorized Commission personnel to readily determine the licensee's cash position, accounts receivable and accounts payable, and to verify information submitted under section 510.35 of this part. The licensee must maintain the following records for a period of five years:

(a) *General financial data.* A current running account of all receipts and disbursements, accounts receivable and payable, and daily cash balances, supported by appropriate books of account, bank deposit slips, cancelled checks, and a monthly reconciliation of bank statements.

(b) *Types of services by shipment.* A separate file for each shipment which includes a copy of each document prepared, processed, or obtained by the licensee with respect to such shipment.

(c) *Receipts and disbursement by shipment.* A record of all sums received and/or disbursed by the licensee for services rendered and out-of-pocket expenses advanced in connection with each shipment, including specific dates and amounts.

(d) *Special contracts.* A true copy, or if oral, a true and complete memorandum, of every special arrangement or contract with a principal, or modification or cancellation thereof, to which it may be a party. Authorized Commission personnel and *bona fide* shippers shall have access to such records upon reasonable request.

(e) *Exempt non-exclusive cooperative working arrangements.* As provided in section 510.36(b) of this part.

**§510.35 *Reports required to be filed.***

Each licensee shall file with the Commission information and reports as follows:

(a) *Samples of office stationery and invoice forms.* Within sixty (60) days after licensing or approval of a change in business name or organization.



(b) *Non-exempt section 15 agreements.* As provided in section 510.36 of this part.

(c) *Anti-rebate certification.* By March 1st of each year, the Chief Executive Officer of every licensee shall certify that it has a policy against rebates, that it has promulgated such policy to all appropriate individuals in the firm, that it has taken steps to prevent such illegal practices which measures must be fully described in detail, and, that it will cooperate with the Commission in any investigation of suspected rebates. This certification shall be in accordance with the following format:

(NAME OF FILING FIRM)  
**CERTIFICATION OF POLICIES AND EFFORTS TO COMBAT  
 REBATING IN THE FOREIGN COMMERCE  
 OF THE UNITED STATES**

Pursuant to the provisions of section 21(b) of the Shipping Act, 1916, as amended, and Federal Maritime Commission regulations promulgated pursuant thereto, 46 C.F.R. parts 510 and 552,

I, \_\_\_\_\_, Chief Executive Officer of (name of firm), holder of valid, independent ocean freight forwarder license # \_\_\_\_\_, state under oath that:

1. It is the policy of (name of firm) to prohibit the participation of said freight forwarder in the payment, solicitation, or receipt of any rebate, directly or indirectly, to or by any carrier or shipper, which is unlawful under the provisions of the Shipping Act of 1916, as amended.
2. Each owner, officer, employee and agent of (name of firm) was notified or reminded of this policy on or before \_\_\_\_\_ of the present year.
3. (Set forth the details of measures instituted within the filing firm or otherwise to prohibit participation in the payment of illegal rebates in the foreign commerce of the United States.)
4. (Name of firm) affirms that it will fully cooperate with the Commission in its investigation of suspected rebating in United States foreign trades.

*Signature*

Subscribed to and sworn before me this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_.

(S)

**NOTARY PUBLIC**

§510.36 *Section 15 Agreements.*

(a) *Filing for approval.* A copy of each written agreement and a true and complete memorandum of each oral agreement between a licensee and any other licensee, common carrier, or other person subject to the Act, and modifications or cancellations thereof, must be filed with the Commission for approval in accordance with part 522 of this Chapter, if they are subject to section 15 of the Act and have not been exempted from the requirements of that section. Such submissions shall clearly show the nature of the agreement, the parties thereto, the port(s) involved, and subject matter in detail, and shall refer to any previously filed agreements to which they may relate. Except as provided for in paragraph (b) of this section, no agreements, or modifications or cancellations thereof, shall be implemented without prior approval of the Commission.

(b) *Exemptions.* Nonexclusive cooperative working agreements between licensed independent ocean freight forwarders, which provide for the completion of documentation and performance of other forwarder services on behalf of the parties to the agreements, are exempt from the provisions of section 15 of the Act, and need not be filed with the Commission for approval, but shall be retained in the files of the licensees. Such agreements shall be in the following format:

**NONEXCLUSIVE COOPERATIVE WORKING AGREEMENT**

Parties to the agreement are:

- |     |                                 |                  |                    |
|-----|---------------------------------|------------------|--------------------|
| (a) | (Company name)<br>FMC No. _____ | (Street address) | (City, State, Zip) |
| (b) | (Company name)<br>FMC No. _____ | (Street address) | (City, State, Zip) |

Terms of the agreement:

1. This is a cooperative, nonexclusive working arrangement (exempted under 46 C.F.R. 510.36(b)) in which either party may complete documentation and perform other freight forwarder functions on behalf of the other party. Either of the parties may engage or be engaged by other forwarder(s) under a similar nonexclusive working agreement or pursuant to an agreement approved by the Federal Maritime Commission under the provisions of section 15 of the Shipping Act, 1916, as amended.
2. Forwarding fees are to be divided between the parties as follows:
3. Ocean freight compensation is to be divided between the parties as follows:

- 4. This agreement shall not be terminated on less than 15 days' notice to the other party.

*(Signature) (Official Title)*

*(Type in company name)*

**(Date)**

*(Signature) (Official Title)*

*(Type in company name)*

**(Date)**

**By the Commission.**

**(S) JOSEPH POLKING**  
*Acting Secretary*

**FEDERAL MARITIME COMMISSION**

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**INFORMAL DOCKET NO. 420(1)****THE STOP & SHOP COMPANIES, INC., BRADLEES DIVISION****v.****BARBER BLUE SEA LINE AND  
BARBER STEAMSHIP LINES, INC.**

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**NOTICE***April 28, 1981*

Notice is given that the time within which the Commission could determine to review the March 25, 1981 order of dismissal of the Settlement Officer in this proceeding has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

**(S) JOSEPH C. POLKING**  
*Acting Secretary*

## FEDERAL MARITIME COMMISSION

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INFORMAL DOCKET NO. 420(1)  
STOP & SHOP COMPANIES, INC., BRADLEES DIVISION

v.

BARBER BLUE SEA LINE AND  
BARBER STEAMSHIP LINES, INC.

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Complaint dismissed.

DECISION OF JAMES S. ONETO, SETTLEMENT OFFICER<sup>1</sup>

*Finalized April 28, 1981*

By complaint, timely filed through an auditing service, the complainant, a corporation whose primary enterprise is that of a department store, seeks the return of monies paid for charges alleged to have been in excess of those lawfully applicable for transportation in violation of section 18(b)(3) of the Shipping Act, 1916, on a shipment of hardware from Taiwan to Boston, via New York. Two hundred and fifty-two dollars and sixty-four cents are sought as reparation.

The complaint was dismissed as jurisdictionally defective because the complainant did not appear to be the real party in interest. That decision was reversed and the proceeding remanded for amendment of the complaint. Thereafter the complaint was satisfactorily amended to show the real party complainant.

The second decision denied reparation because the evidence adduced did not demonstrate the validity of the claim with reasonable certainty and definiteness. In reviewing the second decision the Commission agreed that the complainant's presentation did not support an award of reparation, nevertheless it ruled the complainant should have been afforded an opportunity to explain or correct the inconsistencies in its submissions. Accordingly the second decision was also reversed and the proceeding again remanded for the issuance of a supplemental decision within forty-five days from the date of its order, February 11, 1981. The complainant was requested on February 17, to provide any additional information by March 16. No further information having been forthcoming from the complainant, explaining or correcting the incon-

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<sup>1</sup> Both parties having consented to the informal procedure under Subpart S 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.

**STOP & SHOP CO., BRADLEES DIVISION V. BARBER BLUE 845**  
**SEA LINE**

sistencies in its submissions as of the date of this decision, the complaint is herewith dismissed.

**(S) JAMES S. ONETO**  
*Settlement Officer*

**March 25, 1981**

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 76-34****TARIFF FMC 6, RULE 22 OF THE CONTINENTAL  
NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE**

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**DOCKET NO. 76-36****TARIFF RULES CONCERTEDLY PUBLISHED DEFINING  
PRACTICES OF CONFERENCES AND RATE AGREEMENT  
MEMBERS REGARDING THE ACCEPTANCE AND  
RESPONSIBILITY FOR SHIPPER-OWNED OR SHIPPER-LEASED  
TRAILERS OR CONTAINERS**

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**ORDER***April 30, 1981*

On January 27, 1981; the Commission issued an Order on Remand following the decision of the United States Court of Appeals in *Interpool, Ltd. v. FMC*, D.C. Cir. No. 79-1194 which vacated the Commission's Report and Order in these consolidated dockets and remanded the case to the Commission for further proceedings. The Commission's Order on Remand invited interested parties—especially container leasing companies—to file statements indicating whether they believed further proceedings were necessary, and, if so, to describe the evidentiary issues which required determination and the appropriate procedures for resolving such issues. Interested parties were also invited to comment as to whether other procedures, e.g. rule making, might be more desirable for considering the general question of container use practices and allowances from a broader perspective.

In response to its January 27th Order, the Commission received five separate submissions. Responses were received from (1) Trans Ocean Leasing Corporation, a petitioner in D.C. Cir. No. 79-1194; (2) the other two petitioners, Interpool Ltd. and ITEL Corporation, as well as a number of shippers; (3) the Pacific Coast European Conference; (4) the North European U.S. Pacific Freight Conference; and (5) four other North Atlantic Conferences. No statements were received from the Pacific Westbound Conference or the Far East Conference, who were intervenors in the appeal of the Commission's previous Report and Order. The Department of Justice, which opposed the Commission on appeal, also filed no response to the Order on Remand. All respond-



ing parties, however, expressed the view that further proceedings were unnecessary and the current proceedings should be discontinued.

In its Order on remand to the Commission, the Court did not indicate whether it believed the neutral container rules should be approved or disapproved.

All of the participating conferences in Dockets Nos. 76-34 and 76-36 have discontinued the "neutral container rules" prescribed by the tariff regulations in issue. While the Pacific Coast European Conference (PCEC) has had a similarly worded tariff rule in operation for nearly 10 years, this conference has represented to the Commission that its rule prohibiting carriers from paying rental or lease charges for shipper furnished containers is different in effect and implementation from the North Atlantic "neutral container rules" that are the primary subject of this proceeding. Despite the existence of PCEC's rule the container leasing companies nevertheless contend that there is no reason to continue these proceedings at this time.

Because there is no known "neutral container rule" presently in effect, and no interested party has expressed an interest in having these, or alternative proceedings involving the neutral container rule continued, the Commission has concluded that there is no immediate regulatory purpose to be served by going forward with this investigation. The Commission has, therefore, decided to discontinue all further proceedings herein. If any conference should seek to implement a "neutral container" rule of the type covered by this proceeding, the Commission can *sua sponte*, or upon application or complaint of an aggrieved party, institute a new proceeding to determine whether such rules are permitted under provisions of the Shipping Act and can be promulgated under the authorization given to conferences by their section 15 agreements.

**THEREFORE, IT IS ORDERED,** That proceedings in Dockets Nos. 76-34 and 76-36 will not be reopened and are hereby discontinued.

By the Commission.

(S) JOSEPH C. POLKING  
*Acting Secretary*

*Acting Chairman Leslie Kanuk, dissenting.* I cannot agree with the majority's decision to discontinue these proceedings, because I believe that this action is inconsistent with the court's decision remanding this case to the Commission. (See my dissenting opinion to the Order on Remand, served January 27, 1981.) The court specifically directed the Commission to reconsider the rules in terms of their effect on competition. *Interpool Ltd. v. Federal Maritime Commission*, No. 79-1194, Slip Op. at 18 (D.C. Cir. Nov. 18, 1980). By not following this clear instruction, the Commission has failed to satisfy the terms of the remand.

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-73****KELCO, DIVISION OF MERCK & COMPANY**

v.

**JOHNSON SCANSTAR**

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**NOTICE***May 4, 1981*

Notice is given that no exceptions have been filed to the March 31, 1981 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**  
*Acting Secretary*

**FEDERAL MARITIME COMMISSION**

NO. 80-73

**KELCO, DIVISION OF MERCK & COMPANY**

v.

**JOHNSON SCANSTAR**

Complainant found to have been overcharged \$4,597.33 on two shipments, found to have consisted of propylene glycol alginate and xanthan gum, rather than of synthetic resins; and Johnson Scanstar, a joint service, found properly named as respondent.

*Albert W. Risch* for the complainant, Kelco, a division of Merck & Company.  
*David C. Nolan* and *F. Conger Fawcett* for respondent, Johnson Scanstar.

**INITIAL DECISION<sup>1</sup> OF CHARLES E. MORGAN,  
ADMINISTRATIVE LAW JUDGE***Finalized May 4, 1981*

The shortened procedure was followed. By complaint dated at Chicago, Illinois, September 30, 1980, filed October 1, 1980, and served on October 15, 1980, the complainant Kelco, a division of Merck & Company, a New Jersey corporation engaged in the manufacture and distribution of chemicals and chemical products, alleges that respondent, Johnson Scanstar, billed and collected inapplicable freight charges on two shipments made by the complainant from Los Angeles, California, to Liverpool, England, respectively, on September 22, 1978, and on October 26, 1978. The complainant alleges that it was overcharged a total of \$4,597.33 in violation of section 18(b)(3) of the Shipping Act, 1916 (the Act).

The shipments both were described on the bills of lading as synthetic resin, dry non-hazardous. The first shipments consisted of one 20-foot container S.T.C. (said to contain) 200 drums synthetic resins, dry non-hazardous, shipper's load & count. The second shipment consisted of two 40-foot containers S.T.C. 1090 drums synthetic resin, dry non-hazardous, shipper's load & count.

Both bill of lading #730302 dated September 22, 1978, and bill of lading #63041 dated October 26, 1978, are marked, "Freight Prepaid."

The first shipment weighed 23,800 pounds, or 10,796 kilograms, and measured 920 cubic feet or 26.052 cubic meters.

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<sup>1</sup> 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 second shipment weighed 94,704 pounds, or 42,974 kilograms, and measured 2,988 cubic feet or 84.612 cubic meters.

Both shipments were charged on the basis of metric tons of 1,000 kilograms per ton.

The basic freight rate charged was \$294.25 per metric ton, applicable on Resins, Synthetic, Viz., NOS (Non-Hazardous), Value per 1000 kilos: over \$2,755.75, as per 1st revised page 187-A of Pacific Coast European Conference Tariff No. FMC-16. Thus, basic freight charges on the first shipment for 10.796 metric tons were \$3,176.72, and for the second shipment for 294.25 metric tons were \$12,645.10.

Other charges of \$8.45 per metric ton billed and collected are not in issue. They were \$90.15 and \$358.83, respectively, on the first and second shipments.

The sought basic freight rate is \$208.75 per metric ton, applicable on Algin, in Fiber Drums, Viz., Propylene Glycol Alginate, item 581.9910 as per 8th revised page 89 of the conference's tariff. For the first shipment at this rate basic charges would be \$2,253.67, resulting in an alleged overcharge of \$923.05.

For the second shipment, the sought basic freight rate also is \$208.75 per metric ton, applicable on Algin, in Fiber Drums, Viz., Propylene Glycol Alginate, again as per 8th revised page 89 of the tariff, for part of the second shipment; and for the other part of the second shipment, the same rate applicable on Xanthan Gum, in Fibre Drums, item 292.2090 as per 5th revised page 218 of the conference's tariff, the rate on the latter commodity subject to an expiration date of November 26, 1978. For the second shipment basic charges at the sought rate would be \$8,970.82, resulting in an alleged overcharge of \$3,674.28.

Total alleged overcharges for the two shipments are \$4,597.33.

All of the above three tariff items are in the same "General Section" of the conference's tariff, providing commodity code numbers, and commodity descriptions and packagings. In other words, their location in the tariff is no reason to favor one of these tariff listings over another, as might be the case if these items were listed in different sections of a tariff.

The shipments were described in the bill of lading as synthetic resins. Also, the shipper's export declarations described the shipments as synthetic resins, dry non-hazardous. Packing lists also described the shipments as synthetic resin, and show that the containers were sealed. The second shipment on the *FALSTRIA* made on October 26, 1978, was the subject of a routine cargo policing inspection by the conference's neutral body, and no discrepancies were found. When the complainant's freight forwarder requested space for the two shipments, the commodities were said to be synthetic resin.

On August 2, 1979, Ocean Freight Consultants, Inc., apparently, presented two overcharge claims on behalf of the complainant to Gen-

eral Steamship Corporation, Ltd., acting as general agents for Johnson Scanstar. In reply to a follow-up letter dated December 5, 1979, the general agents advised on February 6, 1980, that they were unable to favorably consider the claims at that time, because of Rule 19.1 of the conference, which states that overcharge claims, based on errors in description unless presented to the carrier in writing before the shipment involved leaves the custody of the carrier, will not be considered.

Of course, a shipper may yet prove his claim of misdescription and misrating of cargo by the filing of a complaint with the Commission, but the shipper bears a heavy burden of proof as to what actually was shipped. The complainant contends that the first shipment should have been described as kelcoloid 0 (propylene glycol alginate), and rated as algin viz: propylene glycol alginate. The complainant contends that the second shipment should have been described and rated partly as xanthan gum, and partly as kelcoloid 0 & HVF (propylene glycol alginate).

#### GENERAL DISCUSSION AND CONCLUSIONS

Besides the issue as the merits or proper description of the commodities shipped, there are other issues raised in response to the complaint. These other jurisdictional issues will be discussed first.

The complaint was filed more than two years after the first shipment moved. The complainant states that these "claims were received by the respondent within the legal two (2) year Statute of Limitation, \* \* \*." Perhaps, Mr. A. W. Risch, the manager of distribution and sales service, who filed the complaint of Kelco, is aware of the statute of the Interstate Commerce Commission, which provides in part in its section 16(c) that for recovery of overcharges the statute may be tolled if claim for the overcharges has been *presented in writing to the carrier* within the statutory period of limitation, and said period shall be extended to include six months from the time notice in writing is given *by the carrier* to the claimant of disallowance of the claim.

However, the statute of limitations of the Federal Maritime Commission contains no similar provision, and a complaint under the Shipping Act for overcharges *must be filed with the Commission*, rather than with the carrier to toll the statute.

Nevertheless, the response of Johnson Scanstar admits (Exhibit No. 5) that a check for the freight funds for the first shipment herein was received in the custody of the carrier's agent on October 13, 1978. If one treats this date as the date on which the cause of action accrued, then the complaint was filed timely as to the first shipment. Johnson Scanstar states that the complainant was allowed this brief credit period for cash payment, only because it had a surety bond on file with the Pacific Coast European Conference, and the argument is made that this surety bond irrevocably bound the complainant and its surety to pay-

ment of the freight charges on September 22, 1978, the bill of lading date.

It is concluded and found since Johnson Scanstar, or the conference, did not go against the surety bond as of September 22, 1978, that the cause of action did not occur then, but in fact occurred when the check for the freight for the first shipment was received on October 13, 1978. Thus, the first shipment was not time barred.

In respondents' answering memorandum under the shortened procedure, they consent to the shortened procedure, make certain admissions and denials, and assert as an affirmative defense that the respondents are not the proper parties, and that the Commission lacks jurisdiction over them.

The pertinent two bills of lading at their tops list one of the contracting parties as Johnson Scan Star (in large print) and in small print, "Joint Service of REDERIAKTIEBOLAGET NORDSTJERNAN, JOHNSON LINE, STOCKHOLM, THE EAST ASIATIC COMPANY LTD. COPENHAGEN, BLUE STAR LINE LTD., LONDON." The bills of lading at the bottom show "Signed for the Master, Acting for the Owner," "By General Steamship Corporation, Ltd., as Agents Only."

The other contracting party shown is the shipper, Kelco Company, Clark, New Jersey, the complainant.

The shipments were made freight prepaid, and freight payments were made to the General Steamship Corporation Ltd., as agents only.

The complaint listed Johnson Scanstar as the single respondent, and it was served on the General Steamship Corporation, Ltd., 400 California Street, San Francisco, California, as agent for the respondent.

In the answering memorandum, it is stated that the response is made by *Johnson Scanstar, the trade name for a joint service of three common carriers by water in the U.S. foreign commerce*, and by Johnson Scanstar (North America), a partnership consisting of *Axel Johnson Corporation, the East Asiatic Co., Inc., and the Blue Star Line, Inc.* (emphasis supplied).

The three common carriers by water listed on the pertinent bills of lading following "Johnson Scanstar Joint Service of" are the *Johnson Line, the East Asiatic Company, Ltd., and the Blue Star Line, Ltd.* (emphasis supplied).

The respondents (including Johnson Scanstar, the joint service) who have responded to the complaint state that they are not common carriers by water in the U.S. foreign commerce within the meaning of the Shipping Act.

Respondents state that "Johnson Scanstar" is the trade name for a joint service operated by three common carriers by water in the U.S. foreign commerce pursuant to Federal Maritime Agreement No. 9973, namely, *Blue Star Line, Ltd., of the United Kingdom, the East Asiatic*

Company, Ltd., of Denmark, and Rederiaktiebolaget Nordstjernen (Johnson Line) of Sweden. The Commission's records, Approved Conference, Rate, Interconference, Pooling and Joint Service Agreements, September 1, 1980, lists Johnson Scanstar (J/S) as having the address of P. O. Box 7494 S-103 92 Stockholm, Sweden.

Insofar as the response is made by Johnson Scanstar (North America) and by its partnership members, these are not proper respondents herein, inasmuch as neither this partnership nor any of its partners own, operate, or control any vessels, have any tariffs on file, or otherwise act as common carriers or persons subject to the Shipping Act.

Johnson Scanstar (the joint service), located in Stockholm, through its agent, General Steamship Corporation, Ltd., located in San Francisco, is a common carrier subject to the Shipping Act.

The shipping contracts here in issue, the bills of lading, listed Johnson Scanstar Joint Service of \_\_\_\_\_ as the common-carrier-by-water party to the contract.

While the bills of lading list the vessels *MV-MEONIA* and *MV-FALSTRIA*, respectively, for the first and second shipments, there is no designation on the bills of lading of which underlying carrier of the three may have owned or used these vessels in this joint service.

There was and is no duty on the complainant to ascertain whether Johnson Scanstar (located in Sweden) was or is a corporation, partnership, or other type of entity sanctioned by the Swedish or other law. Suffice it was that complainant dealt with and paid the freight charges to the agent for Johnson Scanstar.

Even the respondents show how questionable their own argument is, in that they first listed on November 10, 1980, in the original answering memorandum, Blue Star Line, Ltd., as the owner and operator of the vessels *MEONIA* and *FALSTRIA*, and Blue Star Line, Ltd., as the signatory member of the Pacific Coast European Conference which issued on behalf of the members the tariff in issue. As of November 21, 1980, by letter amending their answering memorandum under the shortened procedure, the respondents state that the owner and operator of the two vessels above is the East Asiatic Company, Ltd., rather than Blue Star Line, Ltd.

The respondents cite the decision in Docket No. 76-25, *Trane Co. v. South African Marine*, 19 F.M.C. 374 (November 4, 1976), in which it was held that a complaint which fails to name as respondent a common carrier by water or other person subject to the Act, or to allege violation of section 18(b)(3) of the Act by a common carrier by water or conference of such carriers, is jurisdictionally defective and must be dismissed.

The present case has features which distinguish it from the case cited above. In the cited case, no common carrier was named as respondent, but only the general agent of three common carriers. The present



complaint differs in that the agent was not named respondent, and the respondent named as Johnson Scanstar, a joint service of three common carriers.

Furthermore, the complainant had no reasonable means of ascertaining which of the three underlying carriers, providing the Johnson Scanstar joint service, actually owned and operated the ships used.

It is concluded and found that, in effect, Johnson Scanstar, as a joint service, itself is a common carrier by water in the U.S. foreign commerce and was named properly as respondent for the alleged violation of section 18(b)(3) of the Act.

The joint service agreement of Johnson Scanstar (Exhibit 2 of respondent's answering memorandum) shows that the three parties agreed to operate as a group so as to insure uniformity of rates for the service, that the joint service normally would have only one vote when belonging to any conference, that the three parties would have common agents in all areas, that the three parties would share profits and losses from their operations in the joint service, and that the parties might use a uniform bill of lading, among other provisions. All of these provisions in the joint service agreement lead to the conclusion that these three parties to the joint service agreement collectively were acting as one common carrier through their joint service. Thus, the conclusion above seems proper that the complaint naming Johnson Scanstar as respondent named a common carrier by water in the U.S. foreign commerce. The complaint in the present proceeding named a common carrier, rather than only as agent, as did the complaint in the cited *Trane Co.* case.

Turning to the merits of the proceeding, the issue is whether the complainant has met its heavy burden of proof under the circumstances. The bills of lading, export declarations, packing lists and freight forwarder's requests for space, all described the commodities shipped as synthetic resins. The complainant's burden is to counter this evidence.

Long after the fact of shipment, the complainant now advises that what it advised the carrier and what it advised the U.S. Government in the export declarations was false.

The complainant now offers two invoices addressed to a company in Belgium, attachments Nos. 3 and 10 to the complaint, which described the one shipment of 200 drums as kelcoloid 0, and the second shipment of 1,090 drums as Kelzan M. Keltrol, Kelcoloid 0, Kelcoloid HVF, Keltrol F, and Kelzan.

The complainant also offers some of its product literature of unspecified date, and a page from an unspecified edition of a chemical dictionary.

The complainant states that Kelcoloid 0 (first shipment) as per its attachment No. 5 is an algin or alginate, and as per the chemical dictionary is propylene glycol alginate, that alginates are naturally

occurring carbohydrate high polymers, source of the most abundant source of natural resins found in vegetable gums such as sea-weed, Irish moss, kelp and other vegetables like cabbage, rutabagas and cauliflower, and that natural algin, natural alginates or natural resins, these cannot be classified as synthetic resins.

It is hard to believe that the products shipped were natural, when they were manufactured by the complainant and valued at over \$2,755.75 per 1,000 kilograms.

Even though concluding that the products shipped were not natural, and were manufactured or synthetic, that does not preclude finding that they were xanthan gum (part of the second shipment) and algin, viz., propylene glycol alginate (part of the second shipment), and all of the first shipment).

The question remains whether they were synthetic resins, or algin and xanthan gum.

The respondents contend that the complainant has not met its burden of proof.

The proper test is does the evidence show what actually moved. What actually moved was propylene glycol alginate, and xanthan gum, and there were tariff items which specifically listed these commodities. These specific tariff items were applicable on the shipments herein; first, because these tariff items more specifically described these commodities than did the tariff item which was charged, namely synthetic resin, and for the second reason that where two items in a tariff cover the same commodity, generally the shipper is entitled, other things being equal, to the tariff item providing the lower rate and charge.

The Commission's Office of Environmental Analysis has examined the complaint in this proceeding, and has determined that section 547.4(a)(22) of the Commission's "Procedure for Environmental Analysis" applies; and has determined further that "No environmental analysis needs to be undertaken nor environmental documents prepared in connection with this docket."

It is ultimately concluded and found that the complainant was overcharged \$4,597.33 on the two shipments herein; and that Johnson Scanstar, the joint service, was named properly as respondent.

(S) CHARLES E. MORGAN  
*Administrative Law Judge*

Washington, D. C.  
March 31, 1981

**FEDERAL MARITIME COMMISSION**

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**SPECIAL DOCKET NO. 748****APPLICATION OF WATERMAN STEAMSHIP CORPORATION  
FOR THE BENEFIT OF STOP-SHOCK, INC.**

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**NOTICE***May 4, 1981*

Notice is given that no exceptions were filed to the March 31, 1981 initial decision on remand in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the initial decision on remand has become administratively final.

Applicant shall waive charges, publish and file with the Secretary a tariff notice, and notify the Commission of its compliance in the time and manner required by the initial decision served November 5, 1981.

(S) JOSEPH C. POLKING  
*Acting Secretary*

**FEDERAL MARITIME COMMISSION**

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**SPECIAL DOCKET NO. 748****APPLICATION OF WATERMAN STEAMSHIP CORPORATION  
FOR THE BENEFIT OF STOP-SHOCK, INC.**

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Upon remand, initial decision to grant application for permission to waive collection of a portion of freight charged in the amount of \$20,784.75 affirmed.

**INITIAL DECISION ON REMAND<sup>1</sup> OF  
PAUL J. FITZPATRICK, ADMINISTRATIVE LAW JUDGE**

*Finalized May 4, 1981*

By its Order served February 25, 1981,<sup>2</sup> the Commission expressed concern over two matters that were determined as requiring clarification before approval can be granted to the requested waiver of freight charges in this proceeding. First, the Commission seeks a development of the record regarding the agreement entered into between the applicant and Stop-Shock, Inc., and the intent of the parties to exclude the port congestion surcharge. In that regard, the Order states: "Mere absence of mention of the surcharge in the telex agreement does not alone indicate that the parties had agreed not to apply it." And finally, the Commission is concerned with the type of transportation factors that might justify the applicability of a port congestion surcharge to some commodities and not to others.

Under the circumstances, the applicant was provided an opportunity to develop the record in the areas as discussed in the Order by the undersigned.<sup>3</sup> In response to that opportunity, Waterman submitted an affidavit of Mr. Charles G. Boyle, its Vice President-Export Cargo Mid East Service, who was personally familiar with the facts surrounding the booking of the shipment at issue since he computed the rate quoted to the shipper.<sup>4</sup>

In order to place the concern of the Commission in perspective a brief recitation of the facts is appropriate. The initial decision stated:

On March 11, 1980, Waterman's Dallas office communicated an upcoming movement of 1850 drums of liquid fabric softener, from Houston to Port Sudan, to its New York office and solicited interest and possible rates. On March 18 the New

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<sup>1</sup> 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).

<sup>2</sup> Order Remanding Initial Decision.

<sup>3</sup> Order Upon Remand served March 3, 1981.

<sup>4</sup> The affidavit was submitted on March 25, 1981.

York office informed its Dallas office "AGREEABLE OFFER RATE DLRS 140.00 A TON W/M PLUS APPLICABLE BFS." On April 15 Waterman's Dallas office confirmed the booking of 1850 drums of fabric softener at \$140 W/M plus bunker fuel surcharge (BFS). The 1850 drums were delivered to Waterman's loading berth between April 21 and May 8. Shipment was made on May 16, 1980, aboard the *George Whyte V/1*. Pursuant to Waterman's tariff (Freight Tariff 18-C from Atlantic and Gulf Ports to Gulf of Suez, Gulf of Aqaba, Red Sea and Gulf of Aden and to Points in Iraq via Aqaba, Jordan) cargo delivered to the vessel's loading berth shall be assessed the rate in effect at the time of delivery (Rule 3, 2nd Rev. p 13). There was also a port congestion surcharge of 30% to Port Sudan in effect in Waterman's tariff at the time of delivery (69th Rev. p. 31).

Although Waterman intended to exclude the port congestion surcharge, and its offer was based on imposing only the bunker fuel surcharge Waterman inadvertently filed a rate of "\$140 W/M PLUS SURCHARGES" on April 17 (April 17, 1980 telex and 88th Rev. p. 73). Surcharges without further qualification include the 30% port congestion surcharge to Port Sudan. On May 22, 1980, Waterman filed a corrected tariff on fabric softener excepting the item from Rule 190 the congestion surcharge (90th Rev. p. 73).

The shipper, Stop-Shock, Inc., by check dated June 18, 1980, paid Waterman \$80,405.40 after having deducted the amount invoiced for the port congestion surcharge.

Waterman's original invoice covering the shipment shows that it was erroneously rated: the 101 dispensing units were assessed the fabric softener rate when they should have been assessed the General Cargo rate plus all applicable surcharges. A bunker surcharge of \$22.50 was in effect at the time of shipment of 671 of the total 1,850 drums, not the \$20 invoiced. As a result Waterman seeks a waiver in the amount of \$20,784.75 representing only the port congestion charges erroneously applied. [Footnote reference omitted.]

Based upon consideration of this evidence, the initial decision provided for a granting of the waiver sought. Although the initial decision was silent on the point, the undersigned was aware of the booking practices of Waterman where surcharges are sometimes included within the base rate even though explicit reference thereto is absent from the booking contract. *U.S. Dept. of Agriculture v. Waterman S.S. Corp.*, 20 F.M.C. 645, 660 (1978). And the affidavit makes clear that the practice continues. The affidavit discloses that it was the definite intent of Waterman to include the 30% port congestion surcharge in the quoted rate of \$140.00 a ton W/M.

Mr. Boyle's affidavit states:

In March of 1980, I received an inquiry from Waterman's Dallas, Texas Sales Office requesting a rate for a movement of 1850 drums of liquid fabric softener from Houston to Port Sudan. There was no rate for liquid fabric softener in Waterman's tariff 18-C at the time of this rate request. Accordingly, I constructed a fabric softener rate by comparison to analogous commodities and utilizing my experience gained over many years in the shipping business.

Since our Dallas Sales Office advised that Stop-Shock was a new shipper and desired the lowest possible rate for its movement, I thought it preferable from a business viewpoint to include the congestion surcharge in the basic rate quoted rather than quote the lower base rate plus the congestion surcharge, i.e., \$108.00 plus \$32.00. I saw no reason to include the bunker surcharge in the basic rate because bunker surcharges are contained in most tariffs and are accepted by shippers and consignees as a modern day fact-of-life.

I advised our Dallas Sales Office of the rate I computed for Stop-Shock fabric softener movement via my March 18, 1980 telex (Enclosure 6 to September 10, 1980 Special Docket Application). As will be noted, I requested that our Sales Office secure the movement by offering a rate of "DLRS 140.00 A TON W/M PLUS APPLICABLE BFS," which rate factored in and included the applicable 30% Port Sudan congestion surcharge.

On April 15, 1980, our Dallas Sales Office telexed me (Enclosure 7, September 10, 1980 Application) that the rate quoted in my March 18, 1980 telex had been accepted and that the Stop-Shock fabric softener booking had been made on that basis.

The initial FMC tariff filing herein (Enclosure 12 to September 10, 1981 Application), which was accomplished by one of my subordinates, was a mistake. As will be noted, the telex filing made no mention of the applicability of any surcharges thereby making the basic \$140.00 W/M fabric softener rate subject to both the bunker and Port Sudan congestion surcharges assessed, respectively, by Tariff Rule 250 and Tariff Rule 190. This was not my intention, and I therefore requested our Legal Department to file the necessary Special Docket Application to prevent injustice to shipper Stop-Shock by virtue of its being required--unless this Application is granted--to pay freight charges containing double application of the congestion surcharge.

WATERMAN STEAMSHIP CORP. FOR THE BENEFIT OF      861  
STOP-SHOCK, INC.

I sincerely regret any confusion caused by this Application and hope my affidavit will provide the additional clarification requested for final and favorable action on this Special Docket Application request.

Based upon the submission of Waterman, the intent to exclude the port congestion surcharge is evident and the areas of concern expressed by the Commission have been clarified.

Accordingly, the application for permission to waive collection of a portion of the freight charges in the amount of \$20,784.75 is granted under the terms and conditions contained in the initial decision of this Administrative Law Judge served November 5, 1980.

(S) PAUL J. FITZPATRICK  
*Administrative Law Judge*

Washington, D. C.  
March 31, 1981

FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-42

NEW YORK TERMINAL CONFERENCE

v.

JAPAN/KOREA-ATLANTIC AND GULF FREIGHT CONFERENCE

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NOTICE

*May 14, 1981*

Notice is given that no appeal has been taken to the April 6, 1981 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  
*Acting Secretary*



**FEDERAL MARITIME COMMISSION**

NO. 80-42

NEW YORK TERMINAL CONFERENCE

v.

JAPAN/KOREA-ATLANTIC AND GULF FREIGHT CONFERENCE

**MOTION TO WITHDRAW COMPLAINT GRANTED  
PROCEEDING DISCONTINUED***Finalized May 14, 1981*

Complainant New York Terminal Conference, pursuant to Rules 73 and 147 of the Commission's Rules of Practice and Procedure, 46 C.F.R. §§ 502.73 and 502.147, has filed a Motion to Withdraw Complaint served March 6, 1981. The complaint against the Japan/Korea-Atlantic & Gulf Freight Conference (respondent) was served June 24, 1980, and alleges that respondent's tariff amendment of its Rule 114(A), which rescinds second and third period demurrage charges, results in violation of sections 15, 16 First, 17 and 18(b)(5) of the Shipping Act, 1916. The tariff amendment institutes a flat *per diem* rate on all import containers discharged by its carrier members in the import trade from ports in Japan and Korea to ports in the Atlantic and Gulf Coasts. Complainant seeks, among other things, that respondent cease and desist from the claimed violations of the Shipping Act, repeal of the tariff amendment, reparation for damages, and that the Commission establish future demurrage rates, charges, regulations and practices.

Petitions for leave to intervene were filed by and granted to the Port Authority of New York and New Jersey, Global Terminal and Container Services, Inc., and the Bureau of Investigation and Enforcement (Bureau). A prehearing conference was held on October 30, 1980, and procedural dates were established for the conduct of this proceeding.<sup>1</sup>

The motion, in addition to seeking approval of the withdrawal of the complaint, requests that it be "without prejudice to the rights of NYTC and its members to challenge at a later date in an appropriate proceeding before the Commission JKAG's tariff amendment which is the subject of this proceeding or any other tariff provision rescinding penal demurrage." The stated grounds for the relief sought are: (1) complainant's conviction that the amendment will "eventually destroy" consign-

<sup>1</sup> Prehearing Conference Report served October 31, 1980. See also Revised Procedural Schedule served January 12, 1981.

ees' incentive in prompt removal of cargo from the terminals; (2) the opinion that other steamship carriers and conferences would adopt similar rules which would lead to pier congestion and inefficient cargo handling throughout the Port of New York and New Jersey; (3) that during the period the amendment has been in effect,<sup>2</sup> the respondent alone has instituted the amendment so that complainant needs more time "to determine the effects of the . . . amendment." The motion concludes that under the circumstances and considering the benefit to all parties in avoiding the costs of litigation, the withdrawal is warranted.

The Bureau supports complainant's request. It points out that dismissals with prejudice are usually based upon factors of a clear record of delay, contumacious conduct by complainant, or a serious showing of willful default. Citing: *Consolidated Express, Inc. v. Sea-Land*, 19 F.M.C. 722, 724 (Complaint Dismissed, March 8, 1977), *aff'd* by Commission's Notice Not to Review, April 7, 1977. And the Bureau observes that the application of these considerations to the current record would not warrant a dismissal of the complaint with prejudice. The Bureau also observes that a dismissal of this nature would preclude complainant from later filing a complaint even if the current circumstances are altered with a resultant harm to the operations of the members of the conference.

The respondent filed an extensive reply<sup>3</sup> in opposition to the request that the withdrawal of the complaint be permitted "without prejudice." Basically it is argued that: (1) the motion is predicated upon the mere unsupported predictions of complainant's attorneys; (2) the motion is predicated upon allegations set forth in a sworn complaint which have since been shown to be utterly false and untrue; (3) contrary to complainant's contentions, there is no single or "historical" method of assessing demurrage at the Port of New York/ New Jersey; (4) contrary to complainant's contentions, review of documents produced by Maher Terminals, Inc., Global Terminals and Universal Maritime Services Corporation in response to discovery in this proceeding demonstrates respondent's tariff rule has produced no ill effects upon complainant, its members or the shipping public; (5) contrary to complainant's claim, respondent's rule does not encourage consignees to leave

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<sup>2</sup> Complainant states that although JKAG's tariff amendment was initially adopted, effective March 21, 1980, various orders in FMC Docket 79-86 caused its status to be uncertain until August 4, 1980, when JKAG reinstated the identical tariff amendment. It concludes that the amendment has been in effect from August 4, 1980, to date—a period of approximately seven months. Respondent, on the other hand, claims the tariff rule has been in force not for just seven months, but for over a year since March 21, 1980, when it was incorporated into respondent's tariff. It also points out that the complaint itself was filed on June 10, 1980—over nine months ago.

<sup>3</sup> Respondent's request for an extension of time to file a reply until March 30 was unopposed and granted. The reply (14 pages) includes an affidavit of Mr. Robert D. Grey, Chairman of the Japan/Korea-Atlantic and Gulf Freight Conference (17 pages) and Appendices A-G (47 pages).

their containers on terminal property for extended periods of time; (6) contrary to complainant's claim, the number of average days a container was on demurrage under the tariffs of other carriers at Maher's terminal did not decline in relation to the number under respondent's tariff rule; and (7) contrary to complainant's claim, it is not being deprived of substantial revenues from demurrage it would have received had respondent's tariff not been amended. The respondent concludes that it has been put to "considerable inconvenience and costs in legal fees and time expended by the Conference office" and that "it is quite evident that had the matter gone to trial, complainant would have been totally unable to show any ill effect from respondent's tariff rule."

It is evident from the arguments submitted by respondent that it views its opportunity to reply to the motion as a vehicle to evaluate existing discovery, draw conclusions therefrom, and in effect, say to the Commission the complainant should or would lose its case if the proceeding went to oral hearing. This may be so but prior to an evaluation of this nature it would seem, at the very least, that the complainant and intervenors might want a word or two themselves. In any event, it would be an unnecessary exercise and clearly inappropriate to appraise the record at this stage and draw conclusions therefrom.<sup>4</sup> A more appropriate consideration of the opposition to the motion should focus upon the arguments of respondent concerning the time, energy and expense incurred in defense against the complaint and whether a legitimate reason has been presented for complainant's need of more time to evaluate the effect of the amendment.

In general, the courts have exercised the power of dismissal of actions (a similar effect of dismissing this complaint with prejudice) with restraint and have found dismissal appropriate "only on the face of a clear record of delay or contumacious conduct by the plaintiff." *Durham v. Florida East Coast Ry. Co.*, 385 F.2d 366, 368 (5th Cir. 1967). Also when considering a dismissal without prejudice, the court bears in mind the interests of the party to be adversely affected, for it is that party's position which should be protected. 9 Wright & Miller, *Federal Practice & Procedure: Civil*, §§ 2362, 2364, at 149, 165 (1971). Furthermore, in order to succeed there should be a showing that there exists some plain legal prejudice "other than the mere prospect of a second law suit." *Holiday Queen Land Corp. v. Baker*, 489 F.2d 1031, 1032 (5th Cir. 1974).

Applying these principles to the arguments raised by respondent requires the approval of the withdrawal of the complaint without prejudice. First, the Bureau is correct that there is no clear record of

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<sup>4</sup> Curiously, after its lengthy treatment of the material, respondent observes: "While we believe that this reply should stand independent of this particular data, the analysis which is made in reliance upon it is indicative of the utter frivolity of complainant's claims."

delay, contumacious conduct by complainant, or a serious showing of willful default. *Consolidated Express, supra*. Second, the concern of the members of the complainant conference that other operators might institute the same action cannot be prematurely invalidated. Certainly a fair reading of the petitions to intervene filed on behalf of the Port Authority of New York and New Jersey, Global Terminal and Container Services, Inc., and the Bureau attest to apprehension of those interests to the imposition of the tariff amendment. And basically all complainant is saying is that the evidence at this stage is insufficient to prove its case since the facts have not developed as anticipated. That circumstance should not operate in a fashion to deny complainant an opportunity to seek recourse at a future time if it may be necessary to pursue its rights. Third, admittedly delay and expenses have been incurred by the respondent, but in balancing that with a denial of complainant's future recourse to this Commission if events dictate, then the balance clearly weighs in favor of the complainant.

Accordingly, the Motion To Withdraw Complaint is granted.

IT IS ORDERED, That the complaint in this proceeding is hereby withdrawn without prejudice;

IT IS FURTHER ORDERED, That the proceeding is discontinued.

(S) PAUL J. FITZPATRICK  
*Administrative Law Judge*

April 6, 1981

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 81-23  
GULF-UNITED KINGDOM FREIGHT CONFERENCE  
(AGREEMENT NO. 161-31)

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## DISCONTINUANCE OF PROCEEDING

*May 14, 1981*

This proceeding was instituted by order of the Commission served March 23, 1981, to determine the approvability under section 15 of the Shipping Act, 1916 of Agreement No. 161-31. Proponents subsequently have withdrawn the agreement in question and have moved for discontinuance of this proceeding.

Agreement 161-31 having been withdrawn, nothing remains to be litigated in this proceeding. The motion for discontinuance therefore is granted.

By the Commission.\*

(S) JOSEPH POLKING  
*Acting Secretary*

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\* *Commissioner Richard J. Daschbach, concurring.* I concur with the Commission's Order to Discontinue and applaud the Proponents' wisdom in withdrawing their agreement. The Commission's March 23, 1981 Order of Investigation and Hearing would have required the Proponents to address issues of questionable relevance to the instant agreement in excessive detail and at great cost and burden to themselves and the Commission itself. In the future we must temper our zeal to require proponents of section 15 agreements to describe every conceivable competitive contingency arising from their proposed activities with an awareness of the expense such far-reaching adjudication imposes upon all participants.

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 81-12**

**SPADA DISTRIBUTING COMPANY, INC.**

**v.**

**MATSON NAVIGATION COMPANY**

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**NOTICE**

*May 26, 1981*

Notice is given that no exceptions have been filed to the April 15, 1981 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. 81-12

SPADA DISTRIBUTING CO., INC.

v.

MATSON NAVIGATION CO.

Complaint dismissed for failure to establish violations alleged.

*George Spada* for complainant.

*Gary E. Koechler* for respondent.

**INITIAL DECISION<sup>1</sup> OF JOHN E. COGRAVE,  
ADMINISTRATIVE LAW JUDGE**

*Finalized May 26, 1981*

Spada Distributing Company, Incorporated, the complainant, is "a grower, shipper, distributor and exporter of agricultural commodities." The respondent, Matson Navigation Company, is a common carrier by water engaged in transportation of water between the West Coast of the United States and the State of Hawaii. The complaint filed by Spada accuses Matson of violating sections 16 First and 18(a) of the Shipping Act (46 U.S.C. 815, 817(a)). In paragraph VII of the complaint Spada says, "Complainant shall further consent to a shortened procedure according to section 502.181, Subpart K of the Shipping Act."<sup>2</sup> Rule 182 requires that complaints invoking the "shortened procedure" provided for in Subpart K shall have attached "a memorandum of facts and arguments separately stated" upon which the complainant relies. Spada's complaint was not accompanied by the memorandum required by Rule 182. Rule 183 provides that if the respondent to the complaint consents to the shortened procedure, it must submit an answering memorandum within 25 days of the date of service stamped on the complaint. Matson consented to the shortened procedure and timely filed its answering memorandum of facts and arguments. Finally, Rule 184 of Subpart K allows a complainant to file a reply to the respondent's answering memorandum. The time within which complainant could have filed a reply to Matson's answering memorandum has ex-

<sup>1</sup> 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).

<sup>2</sup> Spada is obviously referring to Subpart K of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.181, et seq.) not Subpart K of the Shipping Act.

pired and to date Spada has not submitted any further pleadings in the case.

The complainant bears the burden of proof here. *Western Publishing Co. v. Hapag Lloyd*, FMC Docket No. 283 (I) served March 30, 1972 (12 S.R.R. 1065); *Abbott Laboratories v. United States Lines, Inc.*, 18 F.M.C. 262 (1975). Spada's case consists solely of the unsupported allegations of its complaint.<sup>3</sup>

In its complaint, Spada alleges that it loaded "350 100 # (total weight 35,000 pounds net weight) bags of fresh potatoes" into two containers (Nos. 80014 and 85020) at its plant in Pasco, Washington. The containers were then trucked to Oakland, California, for loading aboard Matson's ship, *The Matsonia*. The containers were consigned to State French Fry in Honolulu on a freight collect basis. The containers were loaded aboard *The Matsonia* on September 29, 1980. The complainant then alleges:

Freight charges were paid by State French Fry in Honolulu in the amount of \$3,367.63. The overcharge was then deducted by State French Fry from the remittance made to complainant Spada.

Presumably the amount of "overcharges" deducted by State French Fry was \$1,820.43 since this is the amount claimed by Spada as reparation. It would appear that the gravamen of Spada's complaint is to be found in the following statement made in paragraph III:

That complainant did book this movement with Matson's office in Portland, Oregon and respondent did not inform complainant at any time of the exorbitant N.O.S. rates it secretly intended to assess this shipment. That complainant could have easily made arrangements for off-dock stuffing of all 350 100 # bags into one container for the total sum of \$100.00 and returned it to the Oakland CY for a total sum of \$50.00 in order that charges could be assessed on a CY-CY basis. Complainant also alleges that respondent had never informed complainant at any time of this N.O.S. rate of \$8.91 plus \$.54 per hundred-weight of surcharges (Item 2000 of Tariff 14G) being in or having gone into effect.

Complainant further alleges that respondent has not charged this rate to any other shippers (on full containerloads) in at least several years. The normal tariff rate of \$1,387.00 per vanload (35,000 pounds) is under Tariff 14G Item number 2066.

On the basis of these allegations Spada charges Matson with violations of sections 16 First and 18(a) of the Shipping Act.

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<sup>3</sup> Having itself invoked the procedures of Subpart K Spada cannot now be heard to argue unfamiliarity with those procedures. Spada's continued silence in the case leads to the quite reasonable assumption that it in fact has no case to plead.



SPADA DISTRIBUTING CO., INC. V. MATSON NAVIGATION 871  
CO.

On the basis of the allegations contained in its complaint, it would seem that Spada's dispute with Matson centers on the proper application of Matson's Westbound Container Freight Tariff No. 14-G (FMC-F No. 172). The facts of the shipment in question as established by the documentary evidence submitted by Matson are as follows.

Spada tendered 35,350 lbs. of potatoes to Matson's Oakland container freight station (CFS) for movement on *Matsonia* voyage 182 which departed for Honolulu on September 26, 1980. Rule 1(e) of Tariff No. 14-G provides that "Rates from CFS include container loading at the Container Freight Station. . . ." Spada was rendered the CFS service pursuant to its own booking instructions.<sup>4</sup>

Tariff 14-G contains no commodity rate for the CFS movement of fresh potatoes, thus the Refrigerated Cargo N.O.S. rate (Item 2000) was applicable to Spada's shipment.<sup>5</sup> The N.O.S. rate of 891/cwt together with a Bunker Surcharge of 3.36% and a Mainland Wharfage charge of 3.25/1,000 kilograms all of which were applicable to Spada's shipment under the provisions of Tariff 14-G then in effect resulted in the correctly assessed freight charges of \$3,367.63.

Under section 2 of the Intercoastal Shipping Act, 1933, and section 18(a) of the Shipping Act, Matson had no choice but to apply the relevant tariff provisions to Spada's shipment. See, e.g., *Gilbert Imported Hardwoods, Inc. v. 245 Packages of Guatambu Squares*, 508 F. 2d 1116 (5th Cir., 1978). Spada has offered no evidence to support its allegation that Matson has violated section 16 First.

The complainant Spada Distributing Company Incorporated having failed to establish the violations alleged in its complaint against Matson Navigation Company, Inc., said complaint is dismissed.

(S) JOHN E. COGRAVE  
*Administrative Law Judge*

Washington, D. C.  
April 15, 1981

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<sup>4</sup> Item 2066, called by Spada the "normal tariff rate," is applicable only where the shipper tenders loaded containers to Matson at the container yard and the consignee accepts delivery at the container yard. It should be remembered that the shipper, not the carrier, selects the mode of service.

<sup>5</sup> Original page 24 of Tariff 14-G defines the CFS as "the physical facility where goods are received by MNC [Matson] for loading into containers." A "containeryard" is defined as "the place where (1) loaded containers are received or delivered as provided in this tariff and (2) MNC assembles, holds, or stores its containers or trailers."

**FEDERAL MARITIME COMMISSION**

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**INFORMAL DOCKET NO. 949(1)  
BRISTOL MYERS COMPANY****v.****SEATRAN INTERNATIONAL, S.A.**

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**PARTIAL ADOPTION OF DECISION  
OF SETTLEMENT OFFICER***May 27, 1981*

The Commission has undertaken a review of Settlement Officer Aaron W. Reese's Decision dated January 29, 1981, awarding reparations without interest for Seatrain International, S.A.'s misrating of Bristol Myers Company's shipments of baby food.

Complainant alleged that Seatrain applied the correct tariff item for the cargo, but that it erroneously computed the freight charges on a measurement basis instead of a weight basis. In response, Seatrain indicated that it would have settled the claim directly with Complainant but for its 6-month tariff rule, Complainant having filed its over-charge claim on the seventh month.

The Settlement Officer awarded Complainant \$1,672.32 in reparations. He did not grant interest on the award, however, noting (1) that Complainant waited 16 months after receiving Seatrain's denial of its claim before filing its complaint with the Commission; and (2) that Complainant did not request an award of interest.

Although the Commission agrees with the Settlement Officer's award of reparations, it finds that his decision not to award interest was erroneous. Payment of interest for the period Seatrain has held the excess charges paid by Complainant will not unjustly enrich Complainant. It will merely compensate Complainant for being deprived of the use of its money. As such, the Commission's award of interest is a compensatory rather than punitive measure. Moreover, the Commission will not decline to make whole an injured party merely because it failed to request award of interest in its complaint.

Interest shall be awarded on the Settlement Officer's grant of reparations, to be calculated at the rate of 12%, accruing from the date of payment of freight charges.

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

IT IS FURTHER ORDERED, That Seatrain International, S.A. pay Bristol Myers Company 12% interest on the award of reparations, accruing from the date of payment of freight charges; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.\*

(S) JOSEPH C. POLKING  
*Acting Secretary*

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\* Commissioner James V. Day concurs in the award of reparation with interest but dissents from that portion of this Order which fixes the level of interest awarded at 12%. Commissioner Richard J. Daschbach did not participate.

**FEDERAL MARITIME COMMISSION**

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**INFORMAL DOCKET NO. 949(1)****BRISTOL MYERS COMPANY**

v.

**SEATRIN INTERNATIONAL, S.A.**

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**Decision of Settlement Officer Aaron W. Reese***Partially Adopted May 27, 1981**Reparation Awarded*

By complaint filed with the Commission's Secretary August 12, 1980, Bristol Myers Company (Myers) seeks reparation in the amount of \$2,437.27 for alleged overcharges on two shipments of baby food from New Orleans to Santo Domingo, D.R. The shipments moved on Seatrain International, S.A. (Seatrain) vessel WESER CARRIER under separate bills of lading dated July 26 and July 28, 1978. Ocean freight charges for the two shipments were paid by check dated August 30, 1978. The complaint was filed within two years after the cause of action accrued, as required by section 22, Shipping Act, 1916.

On April 2, 1979, Ocean Freight Consultants, Inc. submitted claims to Seatrain on behalf of Myers. Seatrain's denial, dated April 5, 1979, states:

Overcharge claims must be presented to the carrier within 6 months from date of shipment. You may file a complaint with the Federal Maritime Commission, Washington D.C. 20573.

The shipment under Seatrain bill of lading number 18 03499/5 included 12 pallets described as "Foods Canned Milk Base," weighing 14,060 pounds and measuring 560 cubic feet. The ocean freight charges for this portion of the shipment were computed at the rate of \$102.50/40'. This resulted in a charge of \$1,435.00. Myers contends that the applicable tariff provides that freight charges for this commodity are to be based upon weight rather than measurement. Myers' contention is correct.

The applicable tariff is the United States Atlantic & Gulf - Santo Domingo Conference Freight Tariff F.M.C. No. 1. Item 257, 36th revised page 281, effective April 1, 1978, provides that the rate basis for the commodity shipped by Myers is weight. Accordingly, the freight charge should have been computed on the basis of \$102.50/2,000 pounds. The correct freight charge for this portion of the shipment should have been \$720.58. In addition to the overcharge of \$714.42, computation of charges based upon measurement rather than weight

resulted in an additional overcharge of \$50.53 for bunker and terminal surcharges.

The shipment under Seatrain bill of lading number 18 03500/6 consisted of one container containing infants canned food weighing 40,000 pounds. The freight charges again were erroneously computed on the basis of measurement instead of weight, resulting in a charge for the infants food portion of the shipment, excluding surcharges, of \$2936.63. The proper charge, excluding surcharges, pursuant to item 257 of the applicable tariff, should have been \$1305.00 computed on the basis of \$65.25/2000 pounds, the volume rate provided for by item 257 of the tariff for a minimum shipment of 40,000 pounds. In addition, the application of a rate different than the rate clearly provided for by the applicable tariff, resulted in an overcharge of \$40.19 for bunker and terminal surcharges. Seatrain, in computing the total freight charges for the shipment under bill of lading number 18 03500/6, made an error in addition resulting in an additional overcharge of \$.50.

The overcharges complained of by Myers do not involve any dispute as to weight, measurement or commodity description. They were the result of the failure of Seatrain to apply the correct rate basis as clearly set forth in the applicable tariff, as well as an error in addition.

Seatrain, in its response to the complaint filed by Joseph J. Graul, Manager Audits and Tariffs, agrees that overcharges were assessed as claimed by Myers, and further stated:

We would further state that except for the six months tariff rule, we would have settled this claim directly with the claimant.

It is well settled that a six month tariff rule cannot bar the recovery of a valid claim when a complaint is filed with the Commission within two years after the cause of action accrued.

Accordingly, Bristol Myers company is entitled to reparation in the amount of \$2,437.27, computed as follows:

B/L No. 18 03499/5

Overcharge, ocean freight	-	\$714.42
Overcharge on surcharges	-	50.53
Total overcharge		\$764.95

B/L No. 18 03500/6

Overcharge, ocean freight	-	\$1,631.63
Overcharge on surcharges	-	40.19
Error in addition of charges	-	.50
Total overcharge		\$1,672.32

On January 5, 1981, the Commission repealed its May 14, 1980 policy statement entitled "Interest on Awards of Reparation." The Commission explained its action as follows:

Although the policy statement was not intended to establish a binding norm of awarding 12% interest in all instances, it has been repealed to underscore the fact that interest due on reparation awards is evaluated on a flexible, case-by-case basis.

The freight charges on the shipments at issue in this proceeding were paid on August 30, 1978. Seven months later Myers submitted a claim to Seatrain requesting a refund of the overcharges. Seatrain promptly denied the claim, the denial based solely upon the six months tariff rule, and advised that a complaint could be filed with the Commission. Seatrain's denial was dated April 5, 1979. It was not until August 12, 1980, approximately sixteen months later, that the complaint was filed with the Commission. To award interest for a period in excess of two years, from August 30, 1970 to the date the reparation being awarded herein is paid, is not warranted. There is no justification for rewarding Myers for its dilatoriness in prosecuting this claim. It is apparent that Seatrain would have settled the claim except for the six months tariff rule. Even though such rules cannot be invoked to bar recovery of valid claims when a complaint is filed with the Commission within two years after the cause of action accrued, as long as such rules are allowed to remain in filed carrier and conference tariffs carriers are bound to adhere to the terms of the tariff as filed; *Kraft Foods v. Moore McCormack Lines*, 17 F.M.C. 320, 322 (1974).

Another factor relevant to the issue of interest is that interest was not requested in the complaint.

Accordingly, no interest is awarded. In the event, however, Seatrain should unduly delay making the reparation awarded herein, the payment of interest would be justified. Therefore, it is ordered that if reparation in the amount of \$2,437.27 is not paid within thirty (30) days of the date of service of this decision Myers shall be entitled to interest at the rate of 12% per annum from the date of service to date of payment.

(S) AARON W. REESE  
*Settlement Officer*

January 29, 1981

# FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 771

APPLICATION OF LYKES BROS. STEAMSHIP CO., INC.  
FOR THE BENEFIT OF TEXAS TURBO JET, INC.

## ORDER ON REMAND

*May 27, 1981*

On February 19, 1981, the Commission served a notice of its determination to review the Initial Decision of Administrative Law Judge William Beasley Harris issued in this proceeding. That decision granted Lykes Bros. Steamship Co., Inc. (Lykes) permission to refund a portion of the freight charges collected from Texas Turbo Jet, Inc. (TTJ), on a shipment of aircraft engines carried from Leghorn, Italy, to Houston, Texas.

The relevant facts as developed from Lykes' application for permission to refund<sup>1</sup> and supporting documents are as follows: Lykes operates both an all-water port-to-port service from Italian and other Mediterranean ports to United States South Atlantic and Gulf ports under the tariff of the Med-Gulf Conference, as well as an individual intermodal joint water-rail service<sup>2</sup> from Mediterranean and Black Sea ports to United States Railroad Destination Terminals in several states including Texas.

In May 1980, Lykes' Dallas sales office entered negotiations with TTJ for the transportation of aircraft engines from Leghorn to Dallas. Subsequently, the following internal telex was sent to Lykes' New Orleans personnel:

DLS to NOLA OPR

Please relay the flwg msg. via teletype . . .

We will quote the following rate for aircraft engines microbridge from Italy to Dallas.

Aircraft engines, \$3600 lump sum/40 ft. cntr.

Bunker surcharge, 320 lump sum total 3920

Our agents in Leghorn are Coe & Clerici SPA . . .

<sup>1</sup> The application was filed under section 18(b)(3) of the Shipping Act, 1916 and under Rule 92(a) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.92(a)).

<sup>2</sup> Lykes Bros. Steamship Co., Inc. Import Joint Freight Tariff No. LYKU - ICC #310, FMC No. 99.

Attn. Peter Meneschi

Pls advise us of next shipment as these rates will only be filed upon receiving a firm booking.

By affidavit Lykes states that this arrangement was made known to TTJ.

On July 9, 1980 the shipment was delivered to the carrier, as evidenced by the bill of lading. The application further states that although "a formal commitment was extended to TTJ," Lykes' Sales Department and Mediterranean Traffic Department failed to communicate any details of the offer to Lykes' Mediterranean representative in Genoa. When the shipper, through its agent, booked the cargo at Leghorn, Lykes' Mediterranean office did not notify the New Orleans Traffic Department of the booking so that "the agreed upon thru rate was not filed in a timely fashion in Lykes' microbridge tariff."

Lykes' agent in Leghorn booked the shipment for a port-to-port Leghorn/Houston, all-water movement under the Med-Gulf Conference tariff at the rate of \$192.00 W/M, plus a Port and Terminal Service Charge, Open Top Container Charge, Bunker Adjustment Factor and Congestion Surcharge. Moreover, in lieu of two 40-foot containers which were specified in the internal telex quoted above, Lykes placed the cargo in four 20-foot containers. This further increased the cost of transportation to a total of \$29,760.53.<sup>3</sup> In order to obtain immediate delivery of the cargo, TTJ paid the charges in full and filed a complaint with Lykes requesting an explanation for the overcharge.

In his Initial Decision, the Presiding Officer, although noting some questions that remained unanswered, concluded that the application met the requirements of section 18(b)(3) of the Shipping Act, 1916, and that there was "an error in the tariff due to inadvertence in failing to file a new tariff which resulted in the necessity for refund."<sup>4</sup>

#### DISCUSSION

The Commission is unable to determine on this record whether the requirements of the first proviso clause of section 18(b)(3) of the Act have been met and whether the relief contemplated by that section may be granted.

The application, Lykes' bill of lading, and the affidavit supporting the application confirm that TTJ delivered the cargo to Lykes' agents in

<sup>3</sup> Lykes' invoice to TTJ shows charges in the amount of \$29,818.07, or a difference of \$57.54. This difference is apparently attributable to wharfage and is not at issue here.

<sup>4</sup> The Presiding Officer questioned whether delivery of the shipment was the notice to Lykes requested in the May 30, 1980 telex and whether TTJ advised its agent in Leghorn of the special rate agreed upon for this shipment. The Presiding Officer also mentioned "other issues raised by reference to offer and acceptance and the implication of business practices."



Leghorn. It appears, however, that neither TTJ nor Lykes advised their agents in Leghorn of the special arrangements made for this shipment. Lykes maintains that the lack of notice of the firm booking and its failure to timely file the intended rate in its intermodal tariff were caused by a breakdown in communications between its home office in New Orleans and its Mediterranean representatives in Genoa. Thus, while Lykes affirms that it made the offer to TTJ to carry the shipment of aircraft engines to Dallas in two 40-foot containers at the aggregate rate of \$3920, nothing in the record shows under what circumstances the offer was relayed to TTJ and whether TTJ notified Lykes of its acceptance before the date of the shipment.

Furthermore, although Lykes filed a tariff purporting to cover transportation to Dallas, the record contains no information on whether the cargo which the shipper picked up at Houston did in fact move to Dallas and if so, who assumed responsibility and costs of the inland transportation.

Finally, Lykes acknowledges that it placed the cargo in four 20-foot containers rather than the two 40-foot containers it promised TTJ. This raises the question of whether Lykes' use of containers which did not conform to the terms of the offer stated in the internal telex leaves this matter outside the coverage of section 18(b)(3).

Therefore, the proceeding is being remanded to the Presiding Officer for the purpose of further developing the record on these points, to wit:

(1) Whether the parties had in fact reached an agreement on the negotiated rate and, if so, the manner in which that arrangement was communicated and accepted by TTJ;

(2) Whether the shipment in question actually moved to Dallas, and if so, who arranged and paid for the inland transportation;

(3) Whether the inland transportation was provided by rail and/or motor carriers named as participants in Lykes' intermodal tariff and, if so, at what rates;

(4) Whether the substitution of four 20-foot containers for the two offered 40-foot containers was caused by an error of the type contemplated in section 18(b)(3) of the Shipping Act, 1916; and

(5) Whether (if it is ascertained that the parties had established an agreed rate for the shipment) the use of 20-foot containers for the shipment bars refund based on the new tariff filed with Lykes' application in this proceeding.

The Presiding Officer is directed to issue a supplemental decision addressing these issues and any other matters deemed relevant to the disposition of Lykes' application, such decision to be issued within 60 days from the date of service of this Order.

It is so ordered.

By the Commission.\*

(S) JOSEPH C. POLKING  
*Acting Secretary*

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\* Commissioner Peter N. Teige did not participate.

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 987(1)

J. I. CASE - INTERNATIONAL DIVISION

v.

SOUTH AFRICAN MARINE CORP.

## ORDER

*June 5, 1981*

The Commission determined to review the decision of Settlement Officer Donald F. Norris in which he denied the claim of J. I. Case International Division for freight overcharges allegedly collected by South African Marine Corp. on a shipment of four tractors from Charleston, South Carolina to Elizabeth, Republic of South Africa.

At the time of shipment, the applicable tariff <sup>1</sup> contained four different rates for various types of tractors.<sup>2</sup> Respondent rated the shipment at \$85.75 per 40 cubic feet. Claimant contends that it should have been rated at \$71.00 per 40 cubic feet, the rate payable on "Tractors, Farm Type." The Settlement Officer denied the claim on the basis that the proper rate depended on the "controlling use" to which the tractors were to be put and the "controlling use" could not be determined in this case.<sup>3</sup>

The shipment contained four tractors of the same type, weight and measurements. As shown on the manufacturer's leaflet, these tractors are clearly of a farm type rather than of a construction type. There is therefore no need to resort to a "controlling use" inquiry. In any event, the principle is well established that where an ambiguity exists as to the nature of a product or where a product comes within two classifications the shipper is entitled to the lower of the two rates.<sup>4</sup> In this instance, the shipment should have been assessed the rate of \$71.00 per 40 cubic feet provided for tractors of the farm type, and the collection

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<sup>1</sup> United States/South and East Africa Conference, South Bound Tariff No. 6, FMC No. 8.

<sup>2</sup> Item 5235 - Tractors, Farm Type - \$71.00; Item 5240 - Tractors Garden \$117.50; Item 5250 Tractors, Industrial, Towing or Warehouse & Parts N.O.S. - \$157.25; Item 5260 Tractors, N.O.S. \$85.25. Item 4310, which applies to Roadmaking, earthmoving or construction equipment also contains a rate of \$85.25 for Tractors, N.O.S., Gasoline, Kerosene, or Diesel Powered.

<sup>3</sup> The Settlement Officer explained that the "controlling use" could only be determined after the consignee in Africa had marketed the four tractors.

<sup>4</sup> *United Nations Children's Fund v. Blue Sea Line*, 15 F.M.C. 206 (1971); see also *Coca-Cola Inc. v. Atchison, T. & S.F. Ry. Co.*, 608 F. 2d 213 (5th Cir. 1979); *Indiana Harbor Belt R.R. v. United States*, 510 F. 2d 664 (7th Cir. 1975), cert. denied, 422 U.S. 1045 (1975).

by South African Marine Corp. of freight charges based on the \$85.25 rate applicable to Tractors N.O.S. violated section 18(b)(3) of the Shipping Act, 1916. Consequently, the decision of the Settlement Officer is reversed and J. I. Case International Division is awarded reparation from South African Marine Corp. in the amount of \$1,735.13 plus twelve percent interest from the date of the payment of the freight charges.

It is so ordered.

By the Commission.\*

(S) JOSEPH C. POLKING  
*Acting Secretary*

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\* Commissioner Richard J. Daschbach did not participate and issues a separate opinion.

*Commissioner Richard J. Daschbach's separate opinion:*

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

**FEDERAL MARITIME COMMISSION**

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**INFORMAL DOCKET NO. 987(1)****J. I. CASE - INTERNATIONAL DIVISION****v.****SOUTH AFRICAN MARINE CORP.**

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**DECISION OF DONALD F. NORRIS, SETTLEMENT OFFICER<sup>1</sup>***Finalized June 5, 1981**Reparation Denied*

By its complaint filed with the Commission during December 11, 1980, the J. I. Case - International Division (J. I. Case), through its registered practitioner agent, claims \$1,735.13 of the South African Marine Corporation (Safmarine), this amount representing an over-charge arising from a shipment of four "model 2090 tractors" and their "rims and parts" transported in a Safmarine vessel from Charleston, South Carolina to Port Elizabeth, Republic of South Africa pursuant to a bill of lading dated August 23, 1979. Freight and charges were prepaid by J. I. Case. The cargo was consigned to J. I. Case (South Africa) Pty., Ltd. (Case South Africa), J. I. Case's agent describes his principal as a manufacturer of construction machinery. J. I. Case describes Case South Africa as ". . . a wholly owned subsidiary of J. I. Case Company. They are primarily concerned with the marketing of J. I. Case agricultural and construction equipment, although they do manufacture a few components for the units."

There is no dispute or question as to the commodity shipped, its weight, or its measurement. At issue is what rate should have been assessed the tractors and their parts. Safmarine rated the shipment at the rate of \$85.75 per 40 cubic feet pursuant, probably, to tariff item No. 4310 applicable to road making, earthmoving or construction equipment, including "tractors, NOS," appearing in the United States/South and East Africa Conference's South Bound Freight Tariff No. 6, FMC No. 8. J. I. Case contends that the proper rating should have been \$71 per 40 cubic feet in accordance with tariff item No. 5235 applicable to "TRACTORS, Farm Type, Wheeled, Self-Propelled or

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<sup>1</sup> Both parties having consented to the informal procedure set forth in the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301 et seq.), this decision will become final unless the Commission elects to review it within 30 days of the date of service.

Mobile, Boxed or Unboxed.”<sup>2</sup> Safmarine is in agreement, and is prepared to process payment given the agent’s withdrawal of the complaint. The agent for J. I. Case has so requested. The Settlement Officer (S.O.) considers a request to permit a complainant to “withdraw” a case as tantamount to a request for its dismissal.

The circumstances in which a S.O. may dismiss a complaint are circumscribed by the Commission’s decision in Dockets Nos. 78-2 and 78-3, *Organic Chemicals (Glidden-Durkee) Division of SCM Corporation v. Atlantrafik Express Service & Farrell Lines, Inc.*, Order on Appeal, 18 S.R.R. 1536a. There, the Commission established the following, a precedent by which the S.O. considers himself bound:

“. . . The Commission has held in the past that approval of the settlement of claims under section 18(b)(3) could be made only upon a finding of a violation of that section. This policy appears to be unnecessarily restrictive. We believe that, even where section 18(b)(3) claims are involved, parties to the dispute should, under certain circumstances, have the opportunity to settle their disputes. To that end, and to insure that the Commission’s processes are not used to circumvent the requirements of the statute and that settlements and compromises do not serve as a means for carriers to disregard their obligations under the tariff, we will permit the settlement of a claim arising under section 18(b)(3) of the Act if the following conditions are met:

1. A signed agreement is submitted to the Commission;
2. The parties file with the settlement an affidavit setting forth the reasons for the settlement and attesting that the settlement is a bona fide attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1933, as amended, as the case may be;
3. The complaint on its face presents a genuine dispute and the *facts critical to the resolution of the dispute are not reasonably ascertainable.* (Emphasis added).

Here, the facts critical to the resolution of the dispute are ascertainable so that a dismissal pursuant to the doctrine cited and quoted above is inappropriate. Consequently, the Commission’s directive in Informal Docket No. 372(I), *Yasutomo & Co. v. Y. S. Line*, Order on Review of Dismissal, March 30, 1977 (Unpublished) applies, i.e., the S.O. is obliged to discuss “. . . the question of whether settlement by payment

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<sup>2</sup> No specific violation of section 18(b)(3) of the Shipping Act, 1916, was alleged by complainant inasmuch as none is required with respect to “overcharge” claims. See 46 C.F.R. 502.304, Appendix A. However, a carrier’s failure to apply the *correct* rate with respect to any particular shipment would be in violation of section 18(b)(3).

in full results in payment of applicable tariff rates under section 18(b)(3) of the Shipping Act . . . While settlement of litigation is to be encouraged, it is [the Commission's] responsibility to assure that such settlements in matters involving section 18(b)(3) do not result in payment of charges which would not otherwise be permitted . . . specific findings to this effect [must] be incorporated in the order of dismissal."

We turn now to the merits of the claim. The Conference's Tariff No. 6 is unambiguous to the extent that "tractors" may be assessed any of four rates dependent upon use. Under tariff item No. 4310, "Tractors, NOS, Gasoline, Kerosene or Diesel Powered . . . wheel or tracklaying" are accorded the same rate as other "road making, earthmoving or construction equipment" encompassed by that item if used in those capacities. The rate applied is the same as for "Tractors, NOS" under item No. 5260. The highest rated tractors are those intended for "industrial, towing or warehouse" use pursuant to item No. 5250. "Garden" tractors take a lower rate in accordance with item No. 5240. "Farm type" tractors take the lowest rate of all under item No. 5235.<sup>9</sup>

In theory at least, "[t]here is no better entrenched rule in the making of rates and ratings than the one that a commodity cannot lawfully be rated or classified according to the different uses to which it may be put." *Food Machinery Corp. v. Alton & SR.*, 269 I.C.C. 603, 606 (1948) citing *Eastern Clay Products, Inc. v. New York Central R. Co.* 243 I.C.C. 1 (1940). "However, the use for which a product is manufactured and sold can be most important factor in deciding the proper tariff classification of the product." *C.S.C. International v. Lykes Bros.*, 20 F.M.C. 552, 560, March 22, 1978. "When 'use' is a factor in deciding the proper designation of an article, it is the 'controlling use' that determines the nature and character of a shipment at the time tendered and the fact that an article may have other subordinate or secondary uses does not alter the nature of the product. See, *Continental Can Co. v. U.S.*, 272 F. 2d 312 (CA2, 1959)." *C.S.C. International*, 560, *supra*. As the S.O. views it, these are two of the three principles controlling resolution of the matter here. The third is that it is upon the complainant to ". . . set forth sufficient facts to prove with reasonable certainty and definiteness the validity of its claim by a preponderance of the evidence." Informal Docket No. 387(I) *Pan American Health Organization v. Moore-McCormack Lines, Inc.*, Report on Remand, slip decision, September 12, 1979.

At the time the tractors were tendered to Safmarine, neither the shipper nor the carrier seemed to have been concerned as to the

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<sup>9</sup> While not critical to the resolution of the matter here, the S.O. is compelled to observe that the Conference's tariff is lamentably lacking in precision in delineating usages. Most employed are more conceptual than descriptive in nature. A scale of tractor rates predicated upon dimensions, weight, horsepower, value, etc., would be far easier of application than the present scheme, and would obviate the possibility of those unjust discriminations which is the root and reason for the holdings in *Food Machinery Corp.* and *Eastern Clay Products, Inc.*, *supra*.



"controlling use" to which the tractors might be put. This is evidenced by the invoices and the bill of lading both of which are silent on the point. In support of its contention that the tractors are "farm type," U. I. Case has submitted a sheet of what appears to be sales literature, and a copy of the export declaration. The former dwells in considerable detail on the technical features of 2090 tractors but is absolutely silent as to their utility. There is a picture of a 2090 tractor towing something, perhaps a harrow although the S.O. cannot be certain given the poor quality of the reproduction and the fact that the S.O. is nautically rather than agriculturally oriented. Whatever, the S.O. is willing to concede the point, that 2090 tractors can be usefully employed on farms and, conceivably, even in large "gardens", several acres in size. The export declaration provides us with the "Schedule B Commodity" number, 692.3335. That number applies to "Tractors, new or used, [of a specified horsepower] . . . whether or not suitable for agricultural use."<sup>4</sup> However, this description in no way assists in determining what the "controlling use" of 2090 tractors is. The probability is that 2090 tractors can be used in a number of ways.

At the time the cargo here was tendered to Safmarine, it was consigned to Case South Africa. The latter is ". . . primarily concerned with marketing J. I. Case agricultural and construction equipment." Only after Case South Africa had finished "marketing" the four tractors here might we know to what controlling use they had been put.

In conclusion, the S.O. is of the view that the J. I. Case has failed to prove its case ". . . by a preponderance of the evidence." Accordingly, reparation is denied. So ordered.

(S) DONALD F. NORRIS  
*Settlement Officer*  
*Office of Informal Dockets*

March 19, 1981

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<sup>4</sup> As extracted from the *Statistical Classification of Domestic and Foreign Commodities Exported from the United States*, U.S. Department of Commerce, Bureau of the Census, Schedule B.

FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-86

NEWARK TRUCK INTERNATIONAL

v.

PRUDENTIAL LINES, INC.

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NOTICE

*June 8, 1981*

Notice is given that no exceptions have been filed to the May 5, 1981 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, that decision has become administratively final.

(S) JOSEPH C. POLKING  
*Acting Secretary*

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-86

NEWARK TRUCK INTERNATIONAL

v.

PRUDENTIAL LINES, INC.

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Reparation granted for violation of section 18(b)(3).

*Francis J. DeVito* for complainant.

*John F. McHugh* for respondent.

## INITIAL DECISION <sup>1</sup> OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

*Finalized June 8, 1981*

Complainant, Newark Truck International, charges respondent, Prudential Lines, Inc., with a violation of section 18(b)(3) of the Shipping Act, 1916, due, it is alleged, to the misapplication of "heavy lift charges." Complainant requested disposition of the case under the shortened procedure provided for in Rules 181 *et seq.* of the Commission's Rules of Practice and Procedure. The respondent "answered" the same 27 days after it was served by the Secretary of the Commission. The answer made no mention of complainant's request for shortened procedure.

On January 28, 1981, I issued an order which, based on the assumption that respondent may have misread the Commission's Rules, gave respondent until February 9, 1981, to submit the memorandum called for by Rule 184. Complainant was given until February 20 to file the reply memorandum allowed under Rule 185.

On February 19, 1981, counsel sent me a copy of a letter he had written to the Secretary in which he said that he had not received the memorandum required by my order; that he assumed no more pleadings were necessary; and that the case was then "resting on the original papers." A copy of the letter was also sent to respondent. To date I have heard nothing from respondent.

The complaint reads as follows.<sup>2</sup>

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<sup>1</sup> 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).

<sup>2</sup> Quotation marks have been omitted.

I. The Complainant is a corporation with its place of business at 560 Market Street, Newark, New Jersey. Complainant is in the business of selling new and used trucks, trailers and equipment, both domestically and internationally.

II. The Respondent above-named is a common carrier by water engaged in transportation between the United States and Egypt and carries on the business of shipping, forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water and as such is subject to the provisions of the Shipping Act, 1916, as amended.

III. That:

A. On or about November 25, 1979, Newark Truck International shipped nineteen (19) Fontaine Flatbed Trailers, Models PTW 3-5540 from the port of New York to Alexandria, Egypt via the Respondent, Prudential Lines, Inc.

B. The purchaser of the equipment was the Alexandria Port Authority, bid invitation #78/03, U. S. AID-Loan No. 263-K-031, Item A-2(b). The shipment was made under the Alexandria Harbour Improvement Project.

C. Prudential's bill #S1800 (see attached) indicates Heavy Lift Charges for Item Nos. 3-21 totalling \$9,810.87.

D. According to the bid specifications, permitted charges and freight tariff No. 1-FMC-47, page 202, 3rd revision (copy attached) effective date 11/2/79, "...Heavy Lifts Not Applicable."

E. Despite this and through oversight on behalf of both the Complainant and Respondent, \$9,810.87 was improperly charged and improperly paid.

F. Upon notice of the error that Heavy Lift Charges were not in effect, though Complainant was charged \$9,810.87 for the Heavy Lift Charges, Complainant contacted Respondent, who suggested they merely write requesting the return of the funds which were admittedly improperly charged and incorrectly paid.

G. Despite repeated demands for the money, the said \$9,810.87 has not yet been returned because the Respondent stated the claim was not presented within six months of the incident and as such no refund could be made.

H. See letter dated August 22, 1980 from Complainant to Respondent explaining the situation, all of which is self-explanatory.

I. See letter dated August 26, 1980 from Respondent to Complainant rejecting the claim.

J. By reason of the imposition of the improper charges, Respondent has violated Section 18B(3) in that it admittedly charged Complainant, in error, fees in excess of their tariff and has refused to return the overage on the basis of its unenforcible six month notice provision,

knowing same is inconsistent with the maritime commission's two year statute of limitation for such claims.

IV. That by reason of the facts stated in the foregoing paragraphs, Complainant has been subjected to the payment of rates for transportation and services which were, when enacted and still are (1) unduly or unreasonably preferential, prejudicial or disadvantageous in violation of Section 18B(3); (2) unjustly discriminatory or prejudicial in violation of Section 18B(3); and (3) unjust and unreasonable in violation of Section 18B(3).

V. The Complainant has been injured in the following manner: To his damage in the sum of \$9,810.87 as shown by proof of our payment of Check #18276 for \$25,000 dated January 11, 1980 and bank wire for \$69,714.73 dated February 11, 1980, totalling the original invoice of \$94,714.73, which was excessive by the sum of \$9,810.87.

I have reviewed the documents attached to the complaint, and they fully support the allegations made in the complaint. Moreover, the only basis for respondent's refusal to allow the claim was its reliance upon its "six months rule." From the evidence, it is clear that "heavy lift charges" were inapplicable to the shipment in question and that respondent's collection of those charges was in violation of section 18(b)(3) of the Shipping Act, 1916.

Accordingly, reparation in the amount of \$9,810.87 to be paid by Prudential Lines, Inc., is hereby awarded Newark Trucking International.

(S) JOHN E. COGRAVE  
*Administrative Law Judge*

Washington, D.C.  
May 5, 1981

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-74****IN RE: AGREEMENT NO. 5850 DR (W&S);  
NORTH ATLANTIC WESTBOUND FREIGHT ASSOCIATION  
WINES AND SPIRITS DUAL RATE CONTRACT**

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Respondents' Wines and Spirits Dual Rate Contract found contrary to the standards of section 14b of the Shipping Act, 1916 and permission for its use withdrawn.

*Howard A. Levy and Patricia E. Byrne* for North Atlantic Westbound Freight Association.

*Thomas E. O'Neill* for the National Association of Beverage Importers.

*Douglas W. Metz* for the Wine and Spirits Shippers Association.

*Paul J. Kaller and Alan J. Jacobson* for the Bureau of Investigation and Enforcement.

**REPORT AND ORDER***June 9, 1981*

**BY THE COMMISSION:** (LESLIE L. KANUK, *Acting Chairman*; RICHARD J. DASCHBACH, JAMES V. DAY, THOMAS F. MOAKLEY AND PETER N. TEIGE, *Commissioners*)

By Order served October 17, 1980, the North Atlantic Westbound Freight Association (NAWFA) and its member lines were directed to show cause why the Commission should not find Respondents' Wines and Spirits Dual Rate Contract (Agreement No. 5850 DR (W&S)) to be contrary to the standards of section 14b of the Shipping Act, 1916 (46 U.S.C. 813a), and either withdraw permission for its use or require it to be modified.

The basis for the Commission's Order to Show Cause was two-fold. First, the Commission expressed concern that the existing NAWFA Wines and Spirits Contract may be unjustly discriminatory or unfair as between shippers, exporters or importers, and may be contrary to the public interest because it specifically provides for consultations with only one segment of the wines and spirits imports industry, *i.e.*, the National Association of Alcoholic Beverage Importers (NAABI), to the exclusion of other segments. Second, the Commission questioned whether the Contract was in the public interest because NAWFA is unwilling to abide by its terms. The Commission noted that although the Wines and Spirits Contract provided for rate discussions to be held between NAWFA and NAABI, since at least 1978 NAWFA has been unwilling to consult with NAABI.

The proceeding was limited to the submission of affidavits of fact and memoranda of law, but provided a procedure for requesting an evidentiary hearing should any party believe one was required.

The Commission's Bureau of Investigation and Enforcement (then Bureau of Hearing Counsel) was made a party to the proceeding by the Commission's Order. The National Association of Beverage Importers (NABI), formerly NAABI, and the Wines and Spirits Shippers Association (WSSA) intervened and filed pleadings. All parties submitted memoranda of law pursuant to the Commission's Order, but only NAWFA filed an affidavit along with its memorandum.<sup>1</sup>

### POSITIONS OF THE PARTIES

Respondents do not contest the major allegations made in the Order to Show Cause,<sup>2</sup> nor do they request an evidentiary hearing. Rather, Respondents propose certain modifications to their Wines and Spirits Contract which they believe will resolve the Commission's concerns. The stated purpose of these modifications is to allow NAWFA to consult with all segments of the wines and spirits industry and thereby remove impediments to implementation of the contract. Specifically, the following amendments are proposed:

1. Deletion of NAABI as the sole group with whom rate consultation will occur and incorporation of NAWFA's "Procedures for Handling Shippers' Requests and Complaints" issued pursuant to Commission General Order 14 (G.O. 14).<sup>3</sup>
2. Deletion of a rate table attached to the contract and incorporation by reference of rates published in NAWFA's ocean freight tariffs.
3. Inclusion of new rate negotiation procedures. The requirement for rate change consultation with NAABI and the 45-day mutual agreement requirement<sup>4</sup> would be deleted. The incorporation of G.O. 14 "Procedures" would result in a procedure whereby any shipper could, upon notice of a rate increase, request a meeting or different rate action and NAWFA would determine whether it would act on that request within 45 days. A resulting rate reduction would then be published on 30 days' notice.
4. Amendment of the Contract to provide for the orderly transition of present signatories to the amended contract. Specific-

<sup>1</sup> The affidavit is that of Robert E. Benedict, NAWFA's U.S. Resident Representative.

<sup>2</sup> NAWFA states that it has met with wines and spirits shippers since 1977 but has refused to meet with NAABI, or any other shippers' association.

<sup>3</sup> G.O. 14 (46 C.F.R. Part 527), requires that ratemaking groups approved pursuant to section 15, Shipping Act, 1916 (46 U.S.C. 814) implement reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

<sup>4</sup> The existing Wines and Spirits Contract requires rate adjustments by mutual agreement of the parties within 45 days of the effective date of a rate increase.

ly, it is proposed that references to the expiration date of prior contracts be omitted from the amended contract, that the Commission direct that the proposed modifications be made by addendum to the existing contracts, and that shippers who do not give notice of termination within 90 days of the date such order is issued be deemed to have consented to the modifications.

The Bureau of Investigation and Enforcement (BIE) believes that the modifications proposed by NAWFA should resolve the concerns expressed in the Commission's Show Cause Order. The other technical changes proposed are viewed by BIE as appropriate and transition procedures outlined by NAWFA are also found acceptable. However, an alternative procedure wherein Contract signatories are provided a new integrated contract with a formal acceptance deadline is suggested.

NABI opposes NAWFA's suggested modifications. Its principal objection to the existing Contract is that NAWFA has refused to negotiate rates as required. NABI accordingly proposes that the Contract be expressly revised to require rate action upon complaint or request by a signatory. NABI further urges that the Contract be modified to make contract rates binding for one year and that the exclusive patronage requirement of the Contract be replaced with a 90 percent fixed portion requirement. NABI concludes that because NAWFA's proposed modifications render the Wines and Spirits Contract indistinguishable from the General Cargo Contract,<sup>5</sup> "unless its [NABI's] modifications for contract modifications are followed, the [former] contract should be cancelled."

WSSA also expresses the opinion that the changes to the Wines and Spirits Contract proposed by NAWFA effectively render it indistinguishable from the General Cargo Contract. It proposes modifications to the Contract similar to those proposed by NABI.<sup>6</sup> Otherwise, WSSA would prefer the cancellation of the Wines and Spirits Contract "in its entirety," with NAWFA being required to present the General Cargo Contract to all existing Wines and Spirits Contract signatories.

### DISCUSSION

The Commission finds that Respondents' Wine and Spirits Contract is contrary to the public interest and discriminatory and unfair as between shippers within the meaning of section 14b of the Shipping Act, 1916.<sup>7</sup>

<sup>5</sup> NABI states that the only difference between the two contracts would be the more stringent termination notice requirements of the Wines and Spirits Contract.

<sup>6</sup> WSSA seeks a three-year fixed rate period and a limited commitment of a majority of signatory shipments.

<sup>7</sup> Section 14b requires the Commission to withdraw any approved dual rate contract which is found to be "detrimental to the commerce of the United States or contrary to the public interest, or . . . unjustly discriminatory or unfair as between shippers, exporters, importers, or parts, or between exporters from the United States and their foreign competitors."



Therefore, use of Agreement No. 5840 DR (W&S) can no longer be permitted and will be withdrawn. The controlling facts set forth in the Order instituting this proceeding and not disputed by Respondents clearly support this action.<sup>8</sup>

NAWFA's Contract provides for rate negotiations with only one segment of the wines and spirits imports industry, *i.e.* NABI. As a result, other segments of the industry, whose interests might not necessarily be coextensive with NABI's, are bound by the results of its negotiations with NAWFA. In the event NABI and NAWFA fail to agree on rates, NAWFA can terminate the Contract and thereby abrogate the rights of other signatories who have no negotiation rights and who are unrepresented in the rate negotiation process. A contract that grants certain signatory shippers rate consultation and negotiation rights while denying such rights to other signatories is unjustly discriminatory and unfair as between shippers and contrary to the public interest on its face, particularly since section 14b expressly requires that dual rate contracts be "applicable to all shippers and consignees *on equal terms and conditions*" (Emphasis supplied).

Moreover, NAWFA's admitted failure to abide by the terms of its contract not only constitutes a breach of that contract, but evidences further conduct inconsistent with the public interest standard of section 14b. Although section 14b dual rate contracts have been determined by the Commission to be subject to the *Svenska* doctrine,<sup>9</sup> a less stringent justification is required to secure their approval when they contain the protective conditions found presumptively acceptable by Congress. *Agreement Nos. 150 DR-7 and 3103 DR-7*, 22 F.M.C. 378, 386 (1979), consolidated appeal pending *sub nom. SEAPAC Container Service, S.A. v. FMC* and *United States v. FMC*, D.C. Cir. Nos. 80-1248 and 80-1251. Unless justified, however, dual rate contracts are deemed contrary to the public interest because they are in effect tying devices and, as such, are *per se* violative of the antitrust laws.<sup>10</sup> Dual rate contracts are approved pursuant to section 14b on the basis that they will achieve positive public interest or transportation objectives. In order for these objectives to be met, however, it is necessary that the parties to these otherwise unlawful arrangements abide by their strict terms. Failure to

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<sup>8</sup> Because NAWFA has in effect admitted the determinative facts and waived a further evidentiary hearing, the Commission may appropriately dispose of the issues raised as matters of law. *American Export & Isbrandtsen Lines, Inc. v. FMC*, 334 F.2d 185 (9th Cir. 1964); *Admission to Conference Membership*, 9 F.M.C. 241 (1966).

<sup>9</sup> The *Svenska* doctrine is the proposition affirmed in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), whereby agreements which interfere with the policies of the antitrust laws will be disapproved as "contrary to the public interest" unless justified by evidence establishing that the Agreement, if approved, will meet a serious transportation need, secure an important public benefit or further a valid regulatory purpose of the Shipping Act, 1916. The burden is on proponents of such agreements to come forward with the necessary evidence.

<sup>10</sup> See *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958).

do so undermines the basis for approval and causes the arrangement to become contrary to the public interest within the meaning of section 14b. The Commission must not only ensure that the parties to approved agreements are properly operating within the scope of such agreements, but must also act to disapprove arrangements when the parties are not fulfilling their obligations thereunder. See *States Marine Line, Inc. v. Trans-Pac. Freight Conf.*, 7 F.M.C. 204, 210-211 (1962), *aff'd sub nom. Trans-Pacific Freight Conf. v. FMC*, 314 F.2d 928 (9th Cir. 1963).

While NAWFA's proposed modifications to its Wines and Spirits Contract may alleviate some of the discriminatory aspects of that Contract, they go well beyond the specific issues raised in the Commission's Order to Show Cause. In so doing, other aspects of the Contract are modified, especially the existing rate negotiation rights of shipper signatories. The result is a different arrangement, incorporating terms substantially altering the relationship between the parties in a manner not contemplated by the Commission in its approval of this particular dual rate system. Such a "new" arrangement should be evaluated under the procedures prescribed in 46 C.F.R. Part 538 rather than in the context of this narrow proceeding.

Resolution of all issues raised by the pleadings would also expand the scope of this proceeding beyond that contemplated in the Commission's Show Cause Order.<sup>11</sup> The Commission therefore declines to modify the Contract in this proceeding as suggested by NAWFA because of the extent of such modifications, the objections of the shipper parties to those modifications, the nature and limited scope of this proceeding, and the desirability of noticing those changes, pursuant to Commission rules, to other interested shippers not party to this proceeding.

In view of the foregoing, the Commission hereby withdraws permission for the use of the Contract. In order to permit orderly transition and to avoid prejudice to existing contract rights of signatories, the Commission is deferring the effective date of this Order for 90 days.

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<sup>11</sup> In addition to the disagreement that has arisen over the modifications proposed by NAWFA, an issue has been raised as to the applicability of the existing contract to intermodal shipments. The Commission, by Order dated September 17, 1973, permitted NAWFA to amend clause 2(a) of its Wines and Spirits Contract to cover intermodal shipments moving under through bills of lading if NAWFA wishes to offer contract rates on such shipments. WSSA has alleged that NAWFA has never offered intermodal contract rates. NAWFA has not responded to this allegation. Examination of NAWFA's tariffs reveals that NAWFA does publish separate inland rates for Great Britain, Northern Ireland and Eire and issues through bills of lading reflecting a combination of these rates. No tariff provisions can be found which offer a contract through rate. Thus, it appears that for over seven years NAWFA has restricted its contract rates for wines and spirits to port-to-port shipments.

The record of this proceeding, however, is insufficient to draw any firm conclusions as to whether the effect of the NAWFA Contract or its interpretation by Respondents have served to inhibit the use of independent intermodal services. It should be noted that an exclusive patronage dual rate contract confined to a carrier's all-water service does not prohibit contract shippers from utilizing competing intermodal services. *Lykes Bros. v. Far East Conference*, 19 F.M.C. 589, 594 (1977). However, a dual rate contract may not cover intermodal movements for which no service is provided. *Agreement Nos. 150 DR-7 and 3103 DR-7*, 22 F.M.C., *supra*, at 389.

Within that time, NAWFA is ordered to take appropriate actions to make Wines and Spirits Contract rates available to all shippers of those commodities under its General Cargo Contract.

NAWFA may of course submit a new request for permission to use a separate wines and spirits contract pursuant to the procedures provided in 46 C.F.R. Part 538. However, should NAWFA file such a request, it should be prepared to justify the existence of a separate wines and spirits contract both as a matter of fact and as a matter of law. Specifically, its application should explain why a "different" contract for wines and spirits is warranted.

**THEREFORE, IT IS ORDERED,** That permission for the use of Agreement No. 5850 DR (W&S) is withdrawn, effective 90 days from the date of this Order, and

**IT IS FURTHER ORDERED,** That within 30 days of the date of this Order the North Atlantic Westbound Freight Association take whatever action is necessary, including amendment of its applicable tariffs, to allow wines and spirits shippers to sign its General Cargo Contract and to make wines and spirits contract rates available to those signatories, and

**IT IS FURTHER ORDERED,** That within 45 days of the date of this Order Respondent North Atlantic Westbound Freight Association file with the Commission a written report stating what actions it has taken in compliance with the requirements of this Order.

**FINALLY, IT IS ORDERED,** That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING  
*Acting Secretary*

**FEDERAL MARITIME COMMISSION**

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INFORMAL DOCKET NO. 941(1)

INFORMAL DOCKET NO. 942(1)

J.T. BAKER CHEMICAL CO.

v.

ATLANTIC CONTAINER LINE

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**PARTIAL ADOPTION OF DECISION  
OF SETTLEMENT OFFICER***June 12, 1981*

The Commission has undertaken a review of Settlement Officer Jeremiah D. Hospital's Decision dated February 2, 1981, awarding reparations without interest for Atlantic Container Line's misrating of J.T. Baker Chemical Co.'s shipments of sodium hydroxide solution.

Complainant alleged that ACL misrated the cargo as "Chemical NES" when it should have been rated as "Caustic Soda," and that ACL denied Complainant's informal overcharge claim on the basis of its "6-month rule."

In response, ACL argued that Complainant was responsible for the misrating because it failed to declare the commodity by its generally accepted generic or common name ("caustic soda") as required in ACL's tariff rules. ACL requested the Settlement Officer not to award Complainant interest on any reparations granted. The Settlement Officer agreed, awarding \$453.14 in reparation but without interest, because "ACL was not entirely at fault in assessing an incorrect rate."

The Commission concurs with the Settlement Officer's award of reparations in these proceedings, but has determined that the failure to award interest was in error. The "fault" of the parties incident to the misrating is irrelevant to the award of interest, for the imposition of interest is compensatory rather than punitive. It is intended to make whole the complaining party. It is not intended to inflict a hardship on the carrier. It provides a means by which the complaining party is compensated for the use of excess monies held and enjoyed by the carrier.

Interest shall be awarded on the Settlement Officer's grant of reparations, to be calculated at the rate of 12%, accruing from the date of payment of freight charges.

**THEREFORE, IT IS ORDERED,** That the Decision of the Settlement Officer in these proceedings is adopted except as indicated; and

J.T. BAKER CHEMICAL CO. V. ATLANTIC CONTAINER 899  
LINE

IT IS FURTHER ORDERED, That Atlantic Container Line pay J.T. Baker Chemical Co. 12% interest on the award of reparations, accruing from the date of payment of freight charges; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.

By the Commission\*

(S) JOSEPH C. POLKING  
*Acting Secretary*

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\* Commissioner James V. Day concurs in the result but dissents from that portion of the order which establishes the level of interest awarded at twelve percent. Commissioner Richard J. Daschbach did not participate.

**FEDERAL MARITIME COMMISSION**

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**INFORMAL DOCKET NO. 941(I)****INFORMAL DOCKET NO. 942(I)****J. T. BAKER CHEMICAL COMPANY****v.****ATLANTIC CONTAINER LINE**

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**DECISION OF JEREMIAH D. HOSPITAL, SETTLEMENT  
OFFICER<sup>1</sup>***Partially Adopted June 12, 1981**Reparation Granted*

J. T. Baker Chemical Company (Claimant) is engaged in the business of the manufacture and distribution of various types of chemicals. On October 1, 1980, Claimant filed the instant complaints alleging that Atlantic Container Line (ACL), a common carrier by water, had overcharged it a total of \$453.14 on two shipments containing packages of sodium hydroxide solution.

The complaint in Informal Docket No. 941(I) states that ACL transported a shipment consisting of 40 packages of chemicals which included two pallets and 25 cartons of sodium hydroxide solution weighing 6,175 pounds and filling 122.3 cubic feet. This shipment moved from New York to Rotterdam aboard ACL's vessel "Atlantic Causeway" on prepaid bill of lading No. A70048 dated November 3, 1978.

The complaint in Informal Docket No. 942(I) states that ACL transported a shipment of 85 packages of chemicals which included 53 cartons of sodium hydroxide solution weighing 2,910 pounds and filling 66.9 cubic feet. This particular shipment moved from New York to Rotterdam aboard ACL's vessel "Atlantic Causeway" on prepaid bill of lading No. A70051 dated March 25, 1979.

Claimant states that ACL assessed a rate for "Chemical, NES" on each shipment of sodium hydroxide solution. Claimant argues that it should have been assessed the rate for "Caustic Soda, Packed" as it appeared in the applicable tariff.<sup>2</sup> Claimant points out that the legal

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<sup>1</sup> Both parties having consented to the informal procedure under subpart S 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.

<sup>2</sup> The earlier shipment moved under the North Atlantic Continental Freight Conference Tariff No. 29 FMC 4, while the latter moved under the Conference's Tariff No. 30, FMC 5 which superseded the former tariff.

label name for sodium hydroxide solution is caustic soda and it submitted a copy of a page from the Chemical Dictionary to support its argument.

In response to these complaints, ACL does not take exception to Claimant's argument that sodium hydroxide is caustic soda. To the extent ACL states that Claimant's charge is correct. ACL does point out, however, that its tariff rule 2J9 provides

"...Shippers are required to declare their commodities by their generally accepted generic or common name."

ACL feels it is unreasonable to expect a rate clerk to know that the two descriptions are synonymous.

It is well settled that in situations as presented here, it is what the Claimant can prove actually moved that is controlling. I am satisfied that Claimant has met its burden and I so find that the shipments of sodium hydroxide solution in question should have been assessed the rate for caustic soda. Accordingly, Claimant is awarded \$453.14 in reparation.

As for the matter of interest, it is apparent to me that ACL was not entirely at fault in assessing an incorrect rate because it did not know that sodium hydroxide and caustic soda are synonymous terms, accordingly, no interest will be awarded in these cases.

(S) JEREMIAH D. HOSPITAL  
*Settlement Officer*

February 2, 1981

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 77-19****CONSOLIDATED FORWARDERS INTERMODAL CORPORATION  
(AGREEMENT NO. 10235)**

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**ORDER PARTIALLY ADOPTING INITIAL DECISION***June 15, 1981*

The record in the above-captioned proceeding is before the Commission on Exceptions to the November 6, 1980 Initial Decision of Administrative Law Judge Norman D. Kline. The Initial Decision recommended disapproval of FMC Agreement No. 10235, a cooperative working arrangement among 39 independent ocean freight forwarders and nonvessel operating carriers (Proponents), enabling them to jointly own and manage a nonvessel operating carrier and cargo consolidation service under the name of Consolidated Forwarders Intermodal Corporation (CONFICO).<sup>1</sup>

Exceptions were filed by the Proponents and by two separate groups of intervenors which opposed approval of the Agreements.<sup>2</sup> Replies to Exceptions were filed by the Commission's Bureau of Investigation and Enforcement (BIE) and several other intervenors which also opposed approval of the Agreements.<sup>3</sup>

Oral Argument was heard by the Commission on March 31, 1981.

**POSITION OF THE PARTIES**

The Proponents argue that the Presiding Officer erred in: (1) requiring the Proponents to justify their Agreement under the *Svenska* doctrine;<sup>4</sup> (2) not finding that the Agreement was necessary to meet trans-

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<sup>1</sup> Jurisdictional aspects of this proceeding were addressed by the Commission in an earlier decision from which no appeal was taken. 21 F.M.C. 553 (1978).

<sup>2</sup> The intervenors filing Exceptions were the International Association of Nonvessel Operating Common Carriers and a group of ten North European steamship conferences.

<sup>3</sup> The intervenors filing only Replies were the Trans-Pacific Freight Conference of Japan/Korea, the Japan/Korea-Atlantic and Gulf Freight Conference and the Pacific Coast European Conference. The International Association of Nonvessel Operating Common Carriers, the North European conferences and the North Atlantic Mediterranean Freight Conference et al. also filed Replies. No Reply was submitted by the Proponents.

<sup>4</sup> The *Svenska* doctrine is the proposition affirmed in *Federal Maritime Commission v. Aktiobolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), whereby section 15 agreements which interfere with the policies of the antitrust laws will be disapproved as "contrary to the public interest" unless justified by evidence establishing that the Agreement, if approved, will meet a serious transportation need, secure an important public benefit or further a valid regulatory purpose of the Shipping Act, 1916. The burden is on proponents of such agreements to come forward with the necessary evidence.



portation needs, secure public benefits or further a valid regulatory purpose within the meaning of the *Svenska* doctrine; (3) not requiring evidentiary support for the positions advanced by the Protestants; (4) suggesting that the Agreement would be approvable if there were only six rather than 39 Proponents; (5) misconstruing Proponents' arguments regarding the "trustworthiness" of nonvessel operating carriers; and (6) not approving the Agreement on the condition that those Proponents which presently operate as nonvessel operating carriers be omitted from the joint venture.

BIE supports the Initial Decision in all respects. The Intervenors contend that the Initial Decision should be adopted by the Commission in all respects save one -- the discussion at pages 935-938 concerning the "Type of Alternative Agreement Which Could be Approved." This material is alleged to be irrelevant and overly broad. The Intervenors and BIE both stress the dearth of evidence regarding CONFICO's intended operations, their probable competitive impact, and any transportation benefits which would be realized by approval of the Agreement.

#### DISCUSSION

Other than the objections to the Presiding Officer's discussion of preferred types of nonvessel operating carrier joint ventures at pages 935-938, the arguments raised on exceptions were previously made to the Presiding Officer and correctly and adequately disposed of in the Initial Decision.

Agreement No. 10235 is a joint venture among competitors. As such, it is subject to justification under the *Svenska* doctrine, even though joint ventures are not necessarily *per se* violative of the antitrust laws. *Euro-Pacific Joint Service (Agreement Nos. 9902-3 et al.)*, 21 F.M.C. 911 (1979). The anticompetitive potential of joint ventures is well recognized and the information necessary to evaluate the purpose and probable impact of such agreements must be provided by the proponents of such agreements. It is therefore appropriate that the burden of going forward be placed upon the Proponents in this instance.

The Initial Decision recognizes and applies this established approach to joint ventures and otherwise treats the evidentiary and legal arguments of the parties in a thorough and accurate manner. The burden of justifying Agreement No. 10235 was on the Proponents and they failed to meet it. Under these circumstances, the evidentiary basis for the Protestants factual allegations need not be closely examined. Accordingly, the Initial Decision will be adopted by the Commission with certain modifications.

The Initial Decision is a complete and well-reasoned treatment of the issues presented. However, because the statements found at pages 935 through 938 of the Initial Decision, to which various parties took

exception, are not necessary to support the result reached, portions of those pages will not be adopted. Where deletions have been made from the Initial Decision, they have been made to eliminate any possible confusion regarding the precedential value of the Presiding Officer's statements -- especially concerning procedural matters -- and not to endorse or condemn the underlying principles upon which they are based.<sup>5</sup>

**THEREFORE, IT IS ORDERED,** That the Initial Decision issued in this proceeding is adopted with the exception of the following portions:

- 1) All material beginning with the eighth word on line 23 of page 935 and continuing through line 20 of page 938, with the exception of footnote 23; and <sup>6</sup>
- 2) The final paragraph on page 940.
- 3) Headnote 5 on page 905.

The amended Initial Decision, as supplemented by this Report and Order, constitutes the Commission's final decision in this proceeding; and

**IT IS FURTHER ORDERED,** That the Exceptions of Consolidated Forwarders Intermodal Corporation, the International Association of Nonvessel Operating Common Carriers, and the North European steamship conferences are granted to the extent indicated above, and denied in all other respects; and

**IT IS FURTHER ORDERED,** That Agreement No. 10235 is disapproved; and

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

By the Commission.

(S) JOSEPH C. POLKING  
*Acting Secretary*

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<sup>5</sup> Each joint venture proposed under section 15 must be justified on its own merits; the numerous factors affecting the applicability of the *Svenska* test do not lend themselves well to prognostication as specific as that found in pages 935-938 of the Initial Decision.

<sup>6</sup> Footnote 23 is expressly being retained as part of the Commission's final decision as two separate paragraphs commencing after line 23 of page 935.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 77-19

## AGREEMENT NO. 10235 - CONSOLIDATED FORWARDERS INTERMODAL CORPORATION

Thirty-nine forwarders are seeking approval of a joint venture by which a corporation they have formed will operate an NVO-consolidation service. These proponents claim that their Agreement to do this does not require the type of proof of need, benefits, and purposes mandated by the so-called Svenska doctrine, that their Agreement has minimal anticompetitive effects, is required to protect the forwarders against NVOs who take business away from them, has many benefits and serves valid regulatory purposes. I find that the Agreement has not been shown to merit approval as follows:

- (1) The Agreement is a joint venture among parties engaged in the same line of business. As such, it is inherently anticompetitive and highly suspect under antitrust law. Hence, it requires justification under the Svenska test whether or not it is per se violative of antitrust law.
- (2) The evidence offered in support of approval is thin and contradictory, long on argument but short on facts. The main reason for approval, furthermore, is based upon allegations that the NVO industry is untrustworthy because it will "wean away" the forwarders' business, therefore the forwarders need a "safe" NVO. Approval of the Agreement, on such evidence, would be tantamount to the Commission's announcing that it agrees that NVOs are to be so characterized and that all 39 forwarders need protection because they fear NVO competition.
- (3) Most of the purported benefits stemming from the Agreement are achievable by any individual forwarder who becomes an NVO. It is not necessary for all 39 to band together to achieve such benefits.
- (4) There is no persuasive evidence showing why it is necessary for all 39 forwarders to form this NVO, i.e., why each individual forwarder cannot commence an NVO service without joint action.
- (5) Although the subject Agreement is too large and inherently anticompetitive to be supported by the limited type of evidence and contradictory arguments offered in support, a more limited agreement confined to truly needy forwarders who cannot by themselves offer NVO services, which they need to remain competitive, deserves favorable consideration if supported by specific, probative evidence.

*Gerald H. Ullman*, for Proponents.

*Donald L. Flexner, Elliott M. Seiden, and Janice M. Reece*, for Protestant United States Department of Justice.

*Stanley O. Sher and John R. Attanasio*, for Protestants North Atlantic Mediterranean Freight Conferences et al.

*Howard A. Levy and Patricia E. Byrne*, for Protestants North Atlantic United Kingdom Freight Conference et al. except Seatrain International, S.A.

*Charles F. Warren and George A. Quadrino* for Protestants Trans-Pacific Freight Conference of Japan/Korea et al.

*David C. Nolan and J. Michael Cavanaugh*, for Protestants Pacific Coast European Conference et al.

*Raymond P. deMember*, for Protestants International Association of NVOCCs et al.

*Alan J. Wohlstetter*, for Protestant Express Forwarding and Storage Co., Inc.

*Paul J. Kaller and C. Douglass Miller*, for Bureau of Hearing Counsel.

## INITIAL DECISION<sup>1</sup> OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

*Partially Adopted June 15, 1981*

This is an investigation instituted by the Commission on May 23, 1977, essentially to determine the approvability of an agreement originally among 51 licensed independent ocean freight forwarders who desired, among other things, to form a corporation which would operate a common carrier service by water known as CONFICO (Consolidated Forwarders Intermodal Corporation). This common carrier service, furthermore, was to be provided by CONFICO without CONFICO's owning or operating vessels, in other words, as a so-called NVOCC or NVO operation (nonvessel operating common carrier). The agreement in question, designated as No. 10235, was originally executed on March 24, 1976, by 51 signatories, although the corporation known as CONFICO was actually formed by 52 shareholders. The agreement was filed with the Commission under pertinent regulations governing the processing of such agreements on April 23, 1976, and following staff processing during which a number of protests against approval were received, the Commission instituted this formal proceeding.

The background to the formation of CONFICO which led to the filing of the subject agreement has been described by the Commission in its original Order of Investigation and Hearing, in an interim decision which the Commission served on December 13, 1978 (Docket No. 77-19, *Agreement No. 10235 - Consolidated Forwarders Intermodal Corporation*, 21 F.M.C. 533 (1978)) and by several parties in their briefs. In short, that background is as follows.

### PROCEDURAL AND FACTUAL BACKGROUND

In April 1967, a corporation known as Forwarders Intermodal Corp. (FICO) was organized under the laws of the State of New York. Its basic purpose was "to engage in the business of consolidating, unitizing, containerizing, distributing and transporting freight and shipments in export and import commerce. . . ." FICO consisted of some 49 shareholders who were licensed forwarders located in the Port of New York. On or about July 1967, FICO filed Agreement No. 9646 with the

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<sup>1</sup> 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).

Commission providing for the formation of a "conference" to carry on the business authorized in its charter. This agreement was approved by the Commission on September 26, 1967. According to the Commission's interim decision, the shareholders of FICO had agreed, on May 23, 1967, to restrict ownership in the corporation to licensed freight forwarders and to restrict sale or other disposal of stock by requiring an offering of shares to the corporation for repurchase before a shareholder could sell the shares. Any licensed forwarder could become a FICO shareholder by buying shares at a price set by the Board of Directors. In December 1967 FICO commenced operations as a consolidator of export shipments and a breakbulk agent on imports at Port Newark. This operation lasted until September 1968, when, according to Mr. G. Feste, the President of the successor company CONFICO, FICO ceased this activity because of inability to obtain labor from the ILA.

On or about October 25, 1968, FICO merged with a similar corporation owned by ten other licensed forwarders known as Confreight, Inc.<sup>2</sup> This latter company operated under FMC-approved Agreement No. 9645 which closely resembled Agreement No. 9646 and was also approved by the Commission in September 1967. According to the Commission's interim decision, both FICO and Confreight had operated as NVOs under tariffs filed with the Commission until shortly before the merger. The Confreight agreement and tariff were cancelled, however, prior to the merger. The FICO agreement was cancelled on August 11, 1970, according to the Commission. After the merger, the corporation was known as Consolidated Forwarders Intermodal Corp. (CONFICO) which began to operate a variety of services, including some sales agency services from 1968 until September 1973, when it agreed to act as sales agent for one carrier, American Export Lines, Inc., on exports and to perform a deconsolidation, documentation service on imports. The arrangement with that carrier, however, terminated in October 1974.

On or about June 1975, CONFICO's Board of Directors decided to commence operations as an NVO and consolidator. FICO, the previous company, had operated as an NVO before the FICO agreement (No. 9646) was canceled in August 1970. However, the shareholders of CONFICO wished to resume operations as an NVO and consolidator and deconsolidator of export and import traffic. Pursuant to this decision, CONFICO filed an NVO tariff with the Commission on or about

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<sup>2</sup> As the Commission noted, however (Interim Report and Order, p. 6 n. 9), the changes in membership affecting Agreement No. 9646, the previous FICO agreement, whose purposes were basically continued after the merger, were not submitted to the Commission for approval. Protestants North Europe Conferences (North Atlantic United Kingdom Freight Conference et al.) (NEC) point out not only that the merger between FICO and Confreight was not submitted to the Commission for approval but that neither were the corporate articles and by-laws of FICO nor the amendments to the FICO agreement occasioned by the merger. (NEC Answering Brief, pp. 4, 5.)

November 25, 1975; however, because of objections raised by the Commission's staff, the tariff was withdrawn and Agreement No. 10235, signed by all but one stockholder, was filed with the Commission in April of 1976, as previously noted.

While the subject Agreement was being processed by the Commission's staff, CONFICO commenced a consolidation service on or about February 1, 1977, at certain piers in the Port of New York, in which CONFICO consolidated shipments into containers at the piers for dispatch to overseas destinations. However, CONFICO terminated this consolidation service long before the Commission's interim decision ordered it terminated, apparently stopping it some time in or before November 1977. Since that time, while awaiting final disposition of the Agreement which would authorize it to resume NVO operations, CONFICO has been acting as general agent for an NVO known as Unimodal, Inc., a corporation owned by Australian freight forwarders, chartered under California law.<sup>3</sup>

#### THE FIRST PHASE OF THE DOCKETED PROCEEDING

As noted, the Commission instituted a formal proceeding on May 23, 1977, to determine the approvability of Agreement No. 10235 and thus the ability of CONFICO to file an NVO tariff and offer an NVO service in addition to consolidation and related activities. The Commission's Order of Investigation and Hearing states that under the terms of the subject agreement, CONFICO, on behalf of its shareholders, will engage in the following activities at the Port of New York, and at other unspecified ports and inland points in the United States:

(1) Assemble and consolidate export cargo into containers or unit loads for tender to vessel operating carriers either as an NVOCC or as a "consolidator" working on a fee or allowance basis; and/or

(2) Break bulk or deconsolidate import cargo for distribution within local port areas or arrange for the transportation of containers or individual shipments to inland points of destination.

Furthermore, according to the Commission's Order, approval of the Agreement would also permit the shareholders, acting through the corporation, to meet, discuss, and agree with any other person subject to the Shipping Act, 1916, on matters of mutual interest with the proviso that adoption of any agreements would require a majority vote of the shareholders and Commission approval before implementation.

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<sup>3</sup> Mr. Guttorm Feste, President and Chief Operating Officer of CONFICO, testified that Unimodal, Inc., is a California corporation with its principal office in San Francisco, which also conducts operations in Chicago and Los Angeles and is owned by a number of Australian ocean freight forwarders and customs brokers. Approval of the Unimodal formation was not sought from the Commission under section 15 before it commenced operations as an NVO. As general agent for Unimodal, CONFICO solicits forwarders for less-than-carload (LCL) cargo for the NVO operation to Australia, Japan, Hong Kong, Singapore, other Pacific destinations and in the North Atlantic trade, and performs other activities relating to the general agent's functions.

Finally, membership in CONFICO and participation in any activity contemplated by the Agreement would be restricted to current CONFICO shareholders and any other Commission-licensed ocean freight forwarder who applies for membership.

The filing of the Agreement generated protests from several different groups consisting of forwarder/NVOs and 38 Conferences of ocean carriers, according to the Commission's Order, all of whom were named as Protestants in the proceeding. Later other groups intervened so that eight individual companies or groups of companies and the Commission's Hearing Counsel protested approval of the Agreement. The number of active Protestants currently consists of eight parties identified as follows: The United States Department of Justice (DOJ); the North Atlantic Mediterranean Freight Conference and associated conferences (NAM); the North Atlantic United Kingdom Freight Conference and associated North European Conferences (except Seatrain International, S.A.) (NEC); Trans-Pacific Freight Conferences of Japan/Korea and Japan/Korea-Atlantic and Gulf Freight Conference (TP); Pacific Coast European Conferences, et al. (PCEC); International Association of NVOCCs (NVOCCs); Express Forwarding and Storage Co., Inc. (Express); and the Commission's Bureau of Hearing Counsel (Hearing Counsel). All oppose approval of the Agreement although Hearing Counsel, in its last brief, suggest that a more limited agreement might be approvable and that they are not opposed in principle to joint ventures among freight forwarders of this type. (Hearing Counsel's Answering Brief, pp. 19-20.)

Opposition to approval of the subject Agreement at the beginning of the docketed proceeding was described by the Commission under several categories. One or more of the Protestants attacked the Agreement on several grounds. They perceived the Agreement to be a "joint venture" within the meaning of the antitrust laws, specifically, section 7 of the Clayton Act, 15 U.S.C. 18, which prohibits corporations from acquiring stock or assets of other corporations in such a way as "may substantially lessen competition or tend to create a monopoly." Protestants argued that the creation of an NVO by the many forwarder-shareholders would create a larger NVO/forwarding combination which would be capable of engaging in destructive competition with NVOs and forwarders not affiliated with CONFICO. Protestants insisted furthermore that proponents of CONFICO must justify approval of the Agreement under the standards enunciated by the Supreme Court in *F.M.C. v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), commonly known as the Svenska case, meaning that Proponents must show that their agreement is required by a serious transportation need, is necessary to secure important public benefits, or furthers a valid regulatory purpose of the Shipping Act, 1916. Some Protestants argued that CONFICO's proposed inland operations would require separate

approval from the Interstate Commerce Commission so that this Commission's approval would contravene another statute.<sup>4</sup> Other protests expressed concern over the lack of specificity in the written Agreement as submitted and questioned whether the Commission had before it the complete understanding of the parties signatory to the Agreement and whether the Commission could ascertain what activities Proponents would actually be conducting. Other protests questioned whether CONFICO needed to obtain a license to act as a forwarder as required by section 44 of the Act and whether dividends paid to shareholders of CONFICO might be prohibited under section 44(e) of the Act. Many other Protestants urged the Commission to consider the potential economic power which they believed would accrue to a large group of forwarders operating an NVO service and whether outside carriers such as NVOs would lose business to forwarder owners of CONFICO because forwarder owners of CONFICO might steer cargo to CONFICO rather than to other NVOs. The Commission itself expressed concern that CONFICO might be conducting some operations such as consolidation without approval under section 15 of the Act.

In view of the foregoing protests and concerns, the Commission ordered this proceeding to determine:

- (1) Whether Agreement No. 10235 is a true and complete copy of the understandings or arrangements between the parties;
- (2) Whether the parties have in any manner entered into and implemented any agreement or agreements, understandings, and/or arrangements without prior approval, in violation of section 15 of the Act; and
- (3) Whether Agreement No. 10235, or agreements, understandings, or arrangements between the parties shall be approved, disapproved, or modified under the provisions of that section.

#### THE JURISDICTIONAL ISSUE

From the inception of this proceeding in May 1977 to December 13, 1978, a dominant issue for resolution emerged relating to the Commission's jurisdiction over the subject Agreement. After an early prehearing conference held in June 1977, then presiding Judge Stanley M. Levy established a procedure to resolve this issue including opportunity to pursue certain discovery against Proponents in an effort to develop facts adequate to a determination of the legal questions involved. After

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<sup>4</sup> I do not find merit to this particular contention and will not return to it. Approval of an agreement by this Commission does not authorize violation of another statute. This Commission can grant authority to carriers or forwarders to act concertedly but the parties must obviously comply with any other applicable laws. The Interstate Commerce Act does not require this Commission to refuse a group of forwarders authority to seek I.C.C. approval of any segment of their operations, if such approval is necessary. See *Freight Forwarder Agreement 71-7*, 17 F.M.C. 302, 308-309 (1974).

Moreover, sometimes I.C.C. approval of an inland intermodal service is not required. See *IML Sea Transit Ltd. v. U.S.*, 343 F. Supp. 32 (N.D. Cal. 1972), and *Japan Line Ltd. v. U.S.*, 393 F. Supp. 131 (N.D. Cal. 1975).



time had been allowed for the obtaining of facts and for further comments by the parties on the adequacies of the record in relation to the jurisdictional issue in question, Judge Levy issued his ruling on May 25, 1978, granting Proponents' motion to dismiss the proceeding on jurisdictional grounds. (See Motion to Dismiss Granted, May 25, 1978.) In brief, Judge Levy found that the Agreement was essentially one whose purpose was the formation of a corporation. As such, he found that it was not an agreement in the nature of an ongoing relationship but rather one more in the nature of a stock acquisition or merger which would not fall within any of the types of agreements set forth in section 15 of the Act. He furthermore found that the Agreement did not fall under section 15 categories concerning rate-fixing, special privileges or advantages, or pooling of earnings, or that it would stifle competition within the meaning of any of the seven categories enumerated in section 15. In Judge Levy's view, the primary thrust of the Agreement was not that of an ongoing joint venture but rather "[t]he primary thrust and underlying purpose of Agreement 10235 is the corporate formation of CONFICO to operate as an NVOCC." (Ruling cited, p. 9.)

In its Interim Report and Order, cited above, on December 13, 1978, the Commission reversed Judge Levy. The Commission did not agree that the subject Agreement was a simple act of forming a corporation. Rather, for purposes of determining jurisdiction, the Commission found that the Agreement was an ongoing joint venture and that, as such, it was both a "cooperative working arrangement" and an agreement "controlling, regulating or preventing competition." (Interim Report, p. 13.) The Commission found the Agreement indistinguishable for jurisdictional purposes from another agreement among six forwarders who formed a corporation seeking inland forwarding authority from the I.C.C., which agreement the Commission had approved under section 15. (*Freight Forwarder Agreement 71-7*, 17 F.M.C. 302 (1974), known as "*Customs Forwarders, Inc.*") The Commission described certain aspects of the Agreement which they felt would give the shareholders of CONFICO a "competitive advantage," would enable them to control prices they and other customers would pay to CONFICO for consolidation services and the amount they would receive as forwarder compensation from CONFICO ("brokerage"). The Commission found that the Proponents would continue to operate and compete as separate entities but would be "continually obligated to make decisions concerning their joint management of CONFICO--decisions which will also relate to the management of their own businesses." (*Id.*, p. 13). The Commission further observed:

Proponents' decision to conduct their joint venture through the medium of corporate democracy does not, however, mask the ongoing nature of Agreement No. 10235. A closely held

corporation cannot be operated without the active participation of its shareholders. . . . The establishment of CONFICO's policies under the Agreement presents a constant need and opportunity for cooperation between Proponents which warrants Commission supervision. (*Id.*, p. 14).

The Commission further stated that CONFICO's Board would "frequently be engaged in detailed discussions, planning sessions and agreements concerning competitively significant matters" and that the "powers delegated to the Board . . . must be attributed to CONFICO's shareholders under the circumstances." (*Id.*, at pp. 15, 16.) (Footnote omitted.)

Although the Commission's interim decision was not intended to determine whether Agreement No. 10235 deserved to be approved on its merits and had commented that "nothing presently indicates that CONFICO or the Proponents will (or will not) prove to be superior competitors by virtue of Agreement No. 10235" (*Id.*, p. 12), the Commission indicated concern over the effects on competition which might flow from CONFICO if the Agreement were ultimately approved. In this regard the Commission stated:

This sharing of costs is intended to improve Proponents' ability to compete with nonparties, may reduce the likelihood of Proponents individually entering the consolidation business in the same area, and might also have the effect of raising entry barriers to potential competitors. A freight consolidation business could also be employed to unduly prefer or prejudice shippers, carriers, or other persons that deal with Proponents in a Shipping Act capacity. (*Id.*, at pp. 17, 18.) (Footnote omitted.)

Having made the previous statements, the Commission proceeded to find Agreement No. 10235 subject to the requirements of section 15 of the Act and ordered CONFICO to terminate its consolidation services while the question of approvability of the Agreement was pending in the proceeding. The Commission stayed the proceeding for 60 days to permit Proponents to seek judicial review, an action which they did not, however, take. After the expiration of the 60-day period, three further conferences were held, further evidence was sought, and a hearing was held. On February 28, 1980, upon the retirement of Judge Levy, the case was assigned to me. On March 4, 1980, I presided over a final conference, which had been scheduled by Judge Levy, at which time the parties requested that the record be closed without cross-examination of Proponents' two witnesses who had testified earlier. Problems relating to outstanding discovery requests were resolved and provision was made for further evidence to be added to the record including identification of current shareholders of CONFICO and Proponents of the subject Agreement. Although the written Agreement, as

originally submitted, was admittedly not quite consistent with the scope of Proponents' intentions regarding trade areas to be served and names of Proponents and was inadequately drafted in the opinion of some Protestants, I granted Proponents' request that the proceeding not be dismissed so that the Agreement would not have to be redrafted and refiled. Instead, I ruled that the proceeding should go forward to determine whether the Agreement should be approved on its merits and on the basis of the evidence furnished by Proponents' two witnesses and Proponents' answers to discovery requests. (See Notice of Rulings Made, March 6, 1980.)<sup>5</sup> Thereafter, a briefing schedule was established, additional evidence was received, and the case became ripe for decision.

### DISCUSSION AND CONCLUSIONS

As noted earlier, the Commission framed three issues for determination in this case, the first relating to the question whether the subject Agreement was true and complete, the second, whether the parties had implemented any agreements without approval by the Commission, and the third, whether the subject Agreement or any other agreements or understandings among the same parties should be approved under section 15 of the Act. The primary issue, however, is the third. Since the Commission has ordered CONFICO to terminate its consolidation services by its interim decision, no one argues that Proponents are carrying out their Agreement without approval by the Commission. Furthermore, although some Protestants argue that Agreement No. 10235, as submitted, does not contain the entire agreement or understanding because it does not contain the earlier charter and by-laws of the predecessor FICO corporation and is furthermore vague and indefinite, these defects could be corrected, if, as a matter of law, they should have been included in the draft Agreement as submitted and if the entire package thereafter became fully understandable. However, if the Agreement, even with these earlier documents incorporated therein, could not be approved on the basis of the evidence presented in its support, there is no point in amending or clarifying a vague and incomplete text. The important question, therefore, is whether an agreement among 39 licensed forwarders essentially to operate an NVO and consolidation service can be approved on the present record. Since I find that the record does not support approval, the problems with draftsmanship, which could be corrected, are not the determining factors in this decision.

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<sup>5</sup> I also ruled that if the subject Agreement were to be approved, such approval would have to be limited to the 39 Proponents whom their counsel identified as being active Proponents, although the original Agreement had shown 51 Proponents.

## THE TWO BASIC ISSUES CONCERNING APPROVABILITY

As becomes apparent from a reading of the post-hearing briefs, there are essentially two basic issues, the first a question of applicable law and the second a question of adequacy of the evidence in support of approval. Thus, as to the first issue, Proponents contend that the *Svenska* case, cited previously, does not apply here. In other words, Proponents apparently contend that they do not have to present evidence of need, benefit, or valid regulatory purpose flowing from their Agreement on pain of having it declared contrary to the public interest, as the *Svenska* case would require. Stated in another way, Proponents seem to be arguing that their Agreement is not the type of *per se* violation of the antitrust laws nor is it otherwise violative of those laws so that it is *prima facie* contrary to the public interest. Presumably this argument means that before the Commission can disapprove the Agreement, Protestants must show how the Agreement would be detrimental to commerce, contrary to the public interest, or otherwise contravene the standards of the Shipping Act, 1916, which Proponents do not believe they have done.

Proponents contend that *Svenska* is inapplicable to their particular Agreement on several grounds. They argue that their Agreement is not *per se* violative of the antitrust laws (as the obnoxious rules in *Svenska* were, at least the "tying" rule in that case). Furthermore, they argue, the Agreement in no way "seriously interferes" with the purposes of the antitrust laws, as did the rules in *Svenska* (390 U.S. at 250). Their Agreement, so they say, does not eliminate or stifle competition nor is it intended to do so. All they seek to do, so they say, is establish one NVO which will act alone and not concertedly with any other person to fix rates or practices. Furthermore, there is no adverse effect on competitors. Four, originally eight, of the Proponent shareholders of CONFICO are NVOs themselves who, say Proponents, will continue operating.<sup>6</sup> No forwarder shareholder is required to patronize CONFICO. Any licensed forwarder can become a shareholder if it chooses. Discussions among forwarder shareholders are usual and harmless and if they lead to anything, they would have to be filed for approval with the Commission. If the shareholders fix CONFICO's rates or broker-

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<sup>6</sup> There is a curious confusion as to what Proponents are also offering NVO services themselves. Proponents, as late as August 1980 (Reply Brief, p. 3) state that eight Proponent forwarders are also NVOs, citing witness Feste (Ex. 3, p. 4). But Mr. Feste's testimony was written in April 1979. Counsel for Proponents stated in April 1980 (Ex. 7) that 12 shareholders are no longer Proponents. Included in the list of 12 are four forwarder-NVOs. Therefore, it would seem that only four Proponent-forwarders also offer NVO services. Other parties believe that the number of remaining forwarder-NVOs are three (Hearing Counsel) or eight (NAM group). Hearing Counsel rely on answers to interrogatories whereas DOJ and I have compared Ex. 3 with Ex. 7. Although Ex. 7 shows that one shareholder-forwarder-NVO withdrew from CONFICO as inactive and insolvent, three others simply withdrew, returning their stock to the corporation. Query, does this mean that some NVO Proponents do not really need CONFICO?

age, this is *de minimis* in its competitive impact. Furthermore, the entire operation of CONFICO is minuscule since the percentage of exports handled by CONFICO shareholders is puny, for example, in 1978 amounting to only 2.5 percent of exports to the world. Furthermore, most forwarder-owners of CONFICO have not even patronized CONFICO which is acting as general agent of an NVO known as Unimodal, Inc., as I have noted above. Only 33 percent of the CONFICO members patronized this Unimodal service. In short, Proponents claim that they merely wish to set up an NVO service which will have minimal anticompetitive effect and would in fact be rather puny compared to the totality of cargo being exported. There is therefore no triggering of antitrust concerns and no need to apply the Svenska standards.

The reply by Protestants, as one might expect, presents a vastly different picture. According to them, we are dealing here with a joint venture among 39 forwarders who control much more cargo than Proponents intimate (for example, *not less than* 8.2 percent of exports through New York to Northern Europe and the Mediterranean). These 39 forwarders are engaging in a joint venture, as the Commission held in its interim decision. The courts and commentators have consistently found joint ventures to be replete with anticompetitive dangers, as the Commission itself acknowledged in that decision. Eight of the forwarders themselves are NVOs and, as the courts note, this fact is likely to dampen competition between the parents and their progeny. In other words, it is not likely that these eight NVOs will wish to compete with their offspring NVO, CONFICO. As a joint venture, according to Protestants, the CONFICO arrangement contains all the inherent anticompetitive dangers noted by courts in addition to the dampening of competition between the parent NVO-forwarders and the offspring CONFICO NVO. Any forwarder-owner of CONFICO contemplating establishing its own NVO service will most likely not do so since it would be competing with CONFICO which the forwarder partly owns. Therefore, new NVO services will be discouraged. Even aside from the observations of the courts and other authorities regarding the anticompetitive dangers of joint ventures in this case, argue Protestants, the tendency is obviously present for the forwarder-owners of CONFICO to steer cargo to CONFICO rather than to an outside NVO. Indeed, the primary purpose of the Agreement, as Proponents themselves reiterate, is to establish a so-called "neutral" NVO, i.e., one whom the 39 forwarders can trust will not "wean away" their business. In other words, how can it be argued that the Agreement will have no anticompetitive effects when the primary purpose of the Agreement is to satisfy a supposed need for these 39 forwarders to avoid having to use the services of NVOs whom they do not trust because they fear that such NVOs are likely to "wean away" the underlying shippers for themselves? As Protestants also argue, the forwarder-owner of CON-

FICO would also tend to prefer CONFICO over an outside NVO since the forwarder-owner stands also to share in the profits of CONFICO through dividends.

Additional dangers to joint ventures are pointed out by Protestants. For example, joint venturers who would be fixing CONFICO's rates to shippers and brokerage payments to forwarders through the Board of Directors would also be thrust into "dangerous proximity" to discuss other aspects of their businesses, as the Court noted in *Northern Natural Gas Company, et al. v. Federal Power Commission*, 399 F. 2d 953, 972 (D.C. Cir. 1968). Other anticompetitive dangers flowing from approval of the CONFICO agreement are argued by Protestants. For example, the concentration of traffic handled by the 39 forwarders who would tend to utilize CONFICO would enhance CONFICO's power in its dealing with underlying vessel operating carriers. Non-shareholder NVOs, without the backing of 39 sources of cargo, might be placed at a competitive disadvantage when negotiating with underlying vessel operating carriers or might otherwise have difficulties in competing without such a source of business flowing from 39 owner-forwarders. In the view of another group of Protestants (NEC), furthermore, the entire CONFICO arrangement is both horizontal price fixing which would violate section 1 of the Sherman Act *per se* because shareholder NVOs would be determining prices of another NVO (CONFICO) regardless of the corporate facade and would also constitute a tendency to monopolize on a vertical level by establishing a combination of forwarders, consolidators, and NVO operations in CONFICO which together constitute a sizeable segment of the export industry. Moreover, Agreement No. 10235, in the view of NEC, constitutes a *prima facie* violation of section 7 of the Clayton Act because of its qualitative and quantitative anticompetitive effects and because of the dangerous incipient trend toward concentration which it demonstrates.

#### APPLICATION OF THE SVENSKA DOCTRINE

I find Proponents' contentions that their Agreement is somehow exempt from application of the *Svenska* doctrine requiring specific justification for approval to be without merit. Proponents would have the Commission find their Agreement to be a relatively harmless arrangement by which a single NVO would be established which would provide first-class, efficient NVO-consolidation services for shippers and would cause no undue concentration of power or have adverse effects on competition. But, as Protestants have argued above, and as this Commission and the courts have so often recognized, joint ventures are very dangerous things indeed and though the courts have not yet

held them to be *per se* violations of antitrust law,<sup>7</sup> they possess so many inherent anticompetitive characteristics and are so suspect that they must be evaluated most searchingly before they are allowed to pass muster under section 7 of the Clayton Act.

Contrary to Proponents' description of their Agreement as one which is neither *per se* nor otherwise violative of antitrust law, the Commission has already made findings which point out the inherent dangers in joint ventures and specifically, in this particular joint venture which is Agreement No. 10235. In its interim decision, as discussed above, the Commission found this Agreement to be subject to section 15 because it was a "cooperative working arrangement" as well as an agreement "controlling, regulating, or preventing competition," and furthermore described the many ongoing aspects of the CONFICO arrangement which would require careful monitoring by the Commission because of the many anticompetitive aspects of such an arrangement and the "tendency of such agreement to lessen or control competition between the parties." Rather than treat this Agreement as something having minimal impact on competition, the Commission took three pages to describe its serious concerns with the effects of the Agreement. (See Interim Report and Order, pp. 13-16.) Moreover, the Commission paid special attention to the warnings of the Supreme Court in the leading case on joint ventures as they relate to the antitrust laws, namely, *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964). The Commission stated that "[c]ourts and commentators have removed all doubts that joint ventures tend to lessen or 'control' competition between the parties" (*Id.*, at pp. 15-16), and cited the following language from the Court's decision in *Penn-Olin*:

. . . [T]he formation of a joint venture and purchase by the organizers of its stock would substantially lessen competition--indeed foreclose it--as between them, both being engaged in commerce. This would be true whether they were in actual or potential competition with each other and even though the new corporation was formed to create a wholly new enterprise. Realistically, the parents would not compete with their progeny. 378 U.S. at 168.

The *Penn-Olin* decision is a good place to begin if one wishes to understand at a glance why joint ventures are so suspect and why they

<sup>7</sup> In *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 23 (1979), the Supreme Court held that "joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." In *United States Lines, Inc. v. Federal Maritime Commission*, 584 F. 2d 519 (D.C. Cir. 1978), the so-called "Euro-Pacific" case, the court distinguished between market divisions which are *per se* violations of antitrust law and "a joint venture to be considered under a rule of reason. . . ." 584 F. 2d at 530. In *Freight Forwarder Agreement 71-7* ("*Customs Forwarders, Inc.*"), cited above, the Commission refused to hold that a joint venture is a *per se* violation of the Clayton Act or the policies of the antitrust laws. 17 F.M.C. at 310.

are considered to be so intrinsically dangerous to competition. Elsewhere in that decision the Court explained:

The joint venture, like the "merger" and the "conglomeration," often creates anticompetitive dangers. It is the chosen competitive instrument of two or more corporations previously acting independently and usually competitively with one another. . . . If the parent companies are in competition, or might compete absent the joint venture, it may be assumed that neither will compete with the progeny in its line of commerce. Inevitably, the operations of the joint venture will be frozen to those lines of commerce which will not bring it into competition with the parents, and the latter, by the same token will be foreclosed from the joint venture's market. 378 U.S. at 169.

The inherent dangers of joint ventures have been recognized by other authorities. These authorities acknowledge the danger that the joint venture is likely to prefer its owners, as well as the joint owners preferring to do business with their progeny, as the Supreme Court noted above. Furthermore, because of the proximity of the owners engaged in the same business, there is danger of exchanging price information and engaging in other dangerously anticompetitive activities. Finally, there is a probable effect on limiting entrants to a market and possible price manipulation. See e.g., Pitofsky, *Joint Ventures Under the Antitrust Laws*, 82 Harv. L. Rev. 1007, 1030-1038 (1969), and cases cited therein *Northern Natural Gas Company v. Federal Power Commission*, 399 F. 2d. 953, 972 (D.C. Cir. 1968). In the last case cited, for example, the court commented on the fact that in joint ventures parties are exposed to the risk of engaging in other activities relating to their business merely because of their close relationship as joint venturers. In this regard the court stated:

The joint venture puts the parents, particularly if they are competitors, in dangerous proximity to discuss and act jointly on aspects of their business apart from the joint venture and creates an aura of cooperative team spirit which is apt to dampen competitive fires between the firms involved. . . . 399 F. 2d at 972. (Footnote omitted.)

The court made special mention of the fact that in the joint venture involved in that case, officers of the joint-venture company would also be officers of the individual owners, a situation which could lead to the cited danger. *Id.* The Commission, in its Interim Report and Order (p. 14) noted that Proponents' elected representatives would comprise CONFICO's Board of Directors, who would "frequently be engaged in detailed discussions, planning sessions and agreements concerning competitively significant matters." As Protestants NEC comment, moreover, the current members of CONFICO's Board are officers or direc-



tors of its shareholders as well as signatories of the Agreement. (NEC, Answering Brief, p. 41.)

Given the preceding context and analysis of joint ventures under the antitrust laws and specifically, section 7 of the Clayton Act, one would be hard pressed to conclude that Proponents of a joint venture subject to section 15 of the Shipping Act need not proffer supporting evidence showing the need, benefit, and purpose of their agreement even if there were no Protestants. We need not ponder the matter further, however, for the Commission and the Courts have now indicated that the *Svenska* test should apply whether or not an agreement is *per se* violative or otherwise violative of antitrust policies. Moreover, the Commission has specifically held that joint-service agreements need supporting evidence in justification regardless of the question whether they are *per se* violative. In *Agreement Nos. 9929-2, et al.*, 19 SRR 415, 419 (1979), the Commission conditionally approved a joint-service agreement between two vessel-operating common carriers by water. The Commission described the Agreement in question (Agreement No. 10266-2) as a "joint service arrangement" which "are viewed as arrangements for dividing markets and are also presumed to reduce potential, if not actual competition between the participants." The Commission then stated that "[t]he Commission will therefore require an appropriate justification without regard to whether their particular proposal constitutes a *per se* violation of the antitrust laws." The Commission noted in its Order Partially Adopting Initial Decision that the "Presiding Officer found the Agreements to be subject to the Commission's *Svenska* doctrine." (Footnote omitted.)<sup>8</sup> Thus, the application of the *Svenska* test was not withdrawn by the Commission merely because one of the agreements in that case was a joint-service arrangement. On the contrary, the Commission imposed limiting conditions on the agreement as prerequisites for approval because of inadequate supporting evidence or vagueness in the agreement's language, specifically found need, benefit, and purpose otherwise relating to the agreement, and moreover, defined those terms. 19 SRR at 420 n. 21.

In another joint-service case, *United States Lines, Inc. v. Federal Maritime Commission* ("Euro-Pacific"), cited above, the court made clear that the Commission was obliged to scrutinize agreements submitted under section 15 to determine their impact upon antitrust laws regardless of whether the agreements were *per se* violative of antitrust laws or merely possibly violative of those laws under the "rule of reason" test. The court implied that a joint-service arrangement might be one that should be viewed under the "rule-of-reason" test rather

<sup>8</sup> The Commission, earlier in its decision, described Agreement No. 10266-2 as a joint-service arrangement between two carriers whereby the carriers would share revenues and expenses from joint operations of ships under a trade name to be selected. 19 SRR at 417.

than as a *per se* violation of antitrust laws but, more importantly, the court did not care under which category of antitrust law such an agreement fell. It held that the Commission must carefully examine antitrust consequences regardless of category and find offsetting benefits consistent with the public interest and the purposes of the Shipping Act. In these respects the court stated:

Whether the arrangement established . . . is viewed as a division of markets and illegal *per se* under the antitrust laws, or as a joint venture to be considered under a rule of reason, it is clear that serious antitrust issues are posed by its implementation. 584 F. 2d at 530.

Elsewhere the court stated that the Commission's duty extended beyond scrutinizing only *per se* violative agreements in search of justification, stating:

The responsibility delegated to the Commission by Congress is not simply to guard against *per se* violations of the antitrust laws; it is to protect the public interest which may be adversely affected by all forms of anticompetitive arrangements. 584 F. 2d at 531.

In another portion of the court's opinion the court alluded to its test in an earlier case (*Isbrandtsen v. United States*, 211 F. 2d 51, 57), which was the genesis of the later *Svenska* test, requiring the Commission to make sure that section 15 agreements not invade the policies of antitrust laws any more than necessary to carry out the purposes of the Shipping Act. In so doing the court again announced its view that this requirement did not depend upon a finding that an agreement was *per se* violative of antitrust laws. Indeed, the court made the very sensible observation that an agreement might restrict competition more severely than *per se* type violations depending upon the circumstances. Therefore, the Commission had to be on its guard against all restrictive agreements when seeking to determine what, if any, beneficial purposes they served. Thus, after referring to *Svenska* and noting that *per se* violations of antitrust law certainly required careful scrutiny by the Commission, the court applied the same test to other agreements which were not *per se* violative, stating:

But the fact that a given practice is considered under a rule of reason, rather than as a *per se* violation, does not mean that the dangers to competition in any particular circumstance are necessarily lower; clearly certain practices which are not *per se* violations may, depending upon the facts of the particular case, restrict competition more severely than would *per se* restraints. As a result, any determinative line drawn at *per se* violations cannot adequately serve to fulfill the Commission's responsibility to protect the public interest, and to ensure that the agreements entered into by carriers do not restrict compe-

tion any more than is necessary to serve the public consistent with the purposes of the Shipping Act. 584 F. 2d at 529 n. 31. See also the court's opinion at p. 531 where it stated:

But the fact remains that the agreement in this case on its face raised serious antitrust questions and presented the potential nowhere denied by the Commission, that competition would be unduly restrained. If the Commission chooses not to determine whether competition will in fact be restrained substantially, then it must at least demonstrate that it has considered the antitrust implications and has found that the public interest supports approval notwithstanding the possible anticompetitive effects.

Obviously Proponents' Agreement, a joint venture among persons in the same line of business, as described above, cannot be exempted from application of the *Svenska* requirement and must be scrutinized carefully by the Commission. Perhaps there is an innocuous agreement which cannot reasonably be considered to have any significant effects on competition in fact or in theory, but Agreement No. 10235 among 39 freight forwarders to establish an NVO-consolidation operation, when four or so of the forwarders themselves are also NVOs, is certainly not that innocuous agreement. The point is not that the respondents have no obligation to provide evidence of need, benefit, or purpose. They obviously do. The question really is how deep and probative should their evidence be to offset the invasion of our national philosophy favoring free and open competition embodied in the antitrust laws. (The Commission has recognized that the quantum and quality of proof required to justify an anticompetitive agreement may vary depending upon the extent to which the agreement invades the prohibitions of the antitrust laws. See *Agreement No. 8760-5*, 17 F.M.C. 61, 62 (1973); *Agreement No. 57-96*, 20 F.M.C. 289, 300 (1975).)

I conclude therefore that the so-called *Svenska* test is fully applicable to determine the approvability of the subject Agreement. That test, as created by the Commission and as approved by the Supreme Court, is stated by the Court as follows:

The Commission has formulated a rule that conference restraints which interfere with the policies of antitrust laws will be approved only if the conferences can "bring forth such facts as would demonstrate that the . . . rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." See 10 F.M.C. at 45. *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 243 (1968).<sup>9</sup>

<sup>9</sup> There is no need to discuss in detail the origins of the so-called *Svenska* test or to engage in a long discussion concerning whether someone must first find that an agreement is in fact or in law violative

It would also be well to consider the Commission's original statements which ultimately led to enunciation of the doctrine. *Mediterranean Pools Investigation*, 9 F.M.C. 264, 290 (1966), the Commission formulated this balancing test:

[T]he question of approval under section 15 requires (1) consideration of the public interest in the preservation of the competitive philosophy embodied in the antitrust laws insofar as consistent with the regulatory purpose of the Shipping Act and (2) a consideration of the circumstances and conditions existing in the particular trade involved which the anticompetitive agreement seeks to remedy or prevent. The weighing of these two factors determines whether the agreement is to be approved.

I must therefore weigh the evidence proffered by Proponents in favor of approval of their Agreement to determine if it offsets the anticompetitive effects inherent in their joint venture and consider the particular circumstances and conditions which their Agreement seeks to remedy or prevent. It is furthermore important to consider the quantum and quality of the evidence submitted by Proponents, as I have noted. Moreover, as the court in *United States Lines, Inc. v. Federal Maritime Commission*, cited above, observed (584 F. 2d at 530 n. 35), it is important that the evidence not be merely general and "conclusory" or that it be "unsupported by any facts included in the record" if an anticompetitive effect appears likely, as it does in this case. As these cases and other decisions of the Commission clearly demonstrate, furthermore, Proponents are obliged to submit probative evidence showing clear factual connections between the asserted problem which the Agreement purports to remedy and the means by which the Agreement will correct such problem. Without such evidence the Commission has disapproved or modified agreements, for example, by removing one

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of the antitrust laws rather than simply being contrary to the policies of the antitrust laws which preserve and promote free and open competition to trigger *Svenska*. A study of the genesis of the so-called *Svenska* doctrine shows that its roots go back to the *Isbrandtsen* case (211 F. 2d 51, 57) and to the Commission's decision in *Mediterranean Pools Investigation*, 9 F.M.C. 264, 288-290 (1966), and *Investigation of Passenger Travel Agents*, 10 F.M.C. 27 (1966). All of these cases are concerned with invasions of anti-trust policies and the prohibitions of those laws. These as well as later decisions of the Commission continually require a balancing of evidence showing needs, benefits, or valid purposes to offset invasion of the national philosophy favoring free and open competition. See, e.g., *Agreement Nos. 9847 and 9848*, 14 F.M.C. 149, 155-156 (1970); *Inter-American Freight Conference*, 14 F.M.C. 58, 61 (1970); *Agreement No. 9835*, 14 F.M.C. 203, 207 (1971); *Agreements Nos. 9718-3 and 9731-5*, 19 F.M.C. 351 (1976). Although usually considered *per se* violative of antitrust laws, not all of the agreements in these cases were clearly such. However, as I have discussed, it does not matter whether they were *per se* violative of antitrust laws or merely significantly restrictive or anticompetitive. In either event the Commission is obliged to balance evidence of justification for approval of the agreements against their invasion of antitrust policies. As the court stated in *United States Lines, Inc. v. F.M.C.*, cited above, furthermore, the Commission must balance the evidence in support of approval against "antitrust implications" even if "the Commission chooses not to determine whether competition will in fact be restrained substantially. . . ."

party from a three party joint service,<sup>10</sup> refusing to allow a dual-rate contract to be applied to shippers desiring to use different modes,<sup>11</sup> limiting joint-service vessel capacity,<sup>12</sup> disallowing an unduly broad geographic scope,<sup>13</sup> or denying approval because the evidence in support of an agreement is merely conjectural or theoretical.<sup>14</sup>

### THE INADEQUACIES OF THE EVIDENCE SUBMITTED BY PROponents

Notwithstanding their argument that the *Svenska* test does not apply, Proponents have submitted evidence in support of approval. However, as measured by the various tests described above, the type of evidence submitted by Proponents I find to be seriously deficient. It is generally long on argument and self-serving puffing but rather short on facts. Furthermore, it is continually contradictory. Considering the fact that Proponents wish approval of a joint venture among 39 forwarders to establish a "super-NVO," as one group of Protestants calls it, which originally sought authority to operate in every export trade in the world, I find such evidence terribly inadequate in view of its anticompetitive implications. I find furthermore that underlying this Agreement there is a sound idea. However, this particular Agreement has not been shown to be necessary to carry out the idea without serious anticompetitive consequences. I conclude that this Agreement is simply not approvable even with limiting amendments proposed by Proponents' counsel but that another, more limited and better justified agreement seeking to preserve small forwarders who may truly need to join forces to offer an NVO service, if fully supported by probative evidence, may well deserve favorable consideration. I now explain.

The evidentiary record in this proceeding is actually quite small. It consists merely of affidavits of two witnesses, Messrs. Bowen and Feste, Chairman of the Board and former President of CONFICO, respectively, together with requests for information submitted by other parties and CONFICO's responses. Other than this evidence, the record contains a copy of the Agreement itself (Exhibit 4) and a statistical analysis prepared by the Commission's staff showing certain traffic aspects, and a clarifying statement of Proponents' counsel explaining who are now to be considered Proponents of the Agreement as compared to shareholders of CONFICO and the original signatories to the Agreement. The evidence and arguments proffered by Proponents can

<sup>10</sup> *Agreement Nos. 9902-3, et al.*, 21 F.M.C. 911 (1979).

<sup>11</sup> *Agreement Nos. 150 DR-7 and 3103 DR-7*, 22 F.M.C. 378 (1979).

<sup>12</sup> *Agreement No. 9929-3*, 19 SRR 84 (1979).

<sup>13</sup> *New York Freight Bureau Intermodal Agreement*, 22 F.M.C. 319 (1979).

<sup>14</sup> *Agreements Nos. 8200, 8200-1, 8200-2, 8200-3*, 21 F.M.C. 959 (1979); *Agreement No. 17-34*, 21 F.M.C. 750 (1979).

be categorized under following purported benefits (Proponents' Opening Brief, pp. 13-20):

- (1) Providing a "neutral service";
- (2) Substantial savings to the less-than-carload shippers;
- (3) Providing expertise;
- (4) Reducing pilferage, congestion and shut-outs;
- (5) Providing split delivery service;
- (6) Offering single carrier responsibility and one charge from the interior;
- (7) Benefitting the small forwarder;
- (8) Establishing an international network;
- (9) Strengthening the forwarding industry.

Proponents also offer the following as serious transportation needs which the CONFICO arrangement will purportedly meet (Proponents' Opening Brief, p. 21):

- (1) Reducing labor costs for steamship lines by consolidating at off-pier warehouses;
- (2) Reducing risk of pilferage and congestion and shut-out of cargo by utilizing off-pier consolidation premises;
- (3) Reducing multiple bills of lading issued by a steamship line to a single CONFICO bill of lading;
- (4) Relieving underlying vessel-operating carrier of responsibility for loss or damage to cargo because CONFICO will assume it;
- (5) Saving the vessel-operating carrier from having to process and pay claims of LCL shippers and from the cost of soliciting the LCL market.

Proponents conclude their presentation with additional arguments. Thus, they contend that CONFICO would be unique compared to other NVOs who are not bonded and possibly not financially responsible, unlike CONFICO, which would be backed by 39 licensed forwarders. Furthermore, they contend that there are at least three NVOs who file tariffs who are owned by overseas forwarders. These forwarders did not have to obtain section 15 approval; therefore, why should Proponents? Also, Conferences approved by the Commission are opposing approval of this Agreement but they have "cartel" powers and are "dominated by foreign lines." These facts are "noteworthy," according to Proponents. (Proponents' Opening Brief, p. 24.) CONFICO serves a valid regulatory purpose, argue Proponents, because, being owned by American forwarders, its records would always be available to the Commission, unlike the records of foreign forwarders who own NVOs. Finally, an NVO service operated by an American CONFICO will help restore the American merchant marine and improve our balance of payments. (Proponents' Opening Brief, pp. 24-25.)

As I noted earlier, the evidentiary record is rather thin and is long on argument but short on facts. Furthermore, it is internally contradictory and frequently specious, i.e., apparently valid but not really so. Virtually all Protestants have shown the serious shortcomings in the evidence submitted by Proponents. All of the supposed benefits and needs, on careful analysis, appear either to be unsupported by facts of record, do not show that an Agreement such as CONFICO is necessary to achieve them, or are simply arguments of a conclusory nature. Moreover, the very first "benefit," namely, that the Agreement is necessary to establish a "neutral" or "safe" NVO, is based upon allegations and innuendoes that attack the integrity and character of the entire NVO industry. Other alleged benefits that would flow from approval of the Agreement establishing a CONFICO NVO service merely show that all NVO services are beneficial and helpful to small shippers who do not have enough cargo to fill a full container. Thus, the benefits concerning "substantial savings to LCL shippers," "reducing pilferage, congestion," "providing split delivery," "offering single carrier responsibility," are fine objectives. However, these benefits can and do flow from the operations of any NVO. In other words it is not necessary for 39 forwarders to form a CONFICO NVO to attain these benefits. Any NVO, including the four shareholders of CONFICO who are already operating under NVO tariffs, presumably are providing "substantial savings to LCL shippers," "reducing pilferage," "providing split delivery service," "offering single carrier responsibility," "strengthening their forwarder business," etc., and there is no showing why any individual NVO-forwarder cannot establish an international network if it wishes. In other words, as Protestants correctly note, these benefits are inherent in the operation of any NVO. Even Proponents admit this.<sup>15</sup> What is missing is evidence showing that it is necessary for all 39 forwarders to form a CONFICO to provide NVO services. It is not necessary for Proponents to go outside the evidence of record to cite reports and studies praising the services of the NVO industry, as Proponents have done. No one is disputing the fact that NVOs provide fine services and fulfill needs for small LCL shippers. Indeed, this Commission itself has specifically lauded NVOs and found their operations to be in the public interest to such an extent that the Commission forbade a number of conferences from discontinuing so-called consolidation allowances paid to NVOs under their existing conference agreements. See *Cancellation of Consolidation Rules Published in the Freight*

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<sup>15</sup> Thus, Proponents state:

"While other NVOs provide the same basic services as CONFICO . . ." (Proponents' Opening Brief, p. 22). Proponents then try to distinguish CONFICO as unique because of purported expertise, special competency, and financial responsibility accruing to CONFICO because it is owned by 39 active forwarder-signatories.

*Tariffs of Conferences*, 20 F.M.C. 858, 867-868 (1976); see also the discussion of the advantages and benefits of off-pier NVO-consolidation contained in Docket No. 77-23, *Agreement No. 10294*, 19 SRR 1113, 1135-1136 (I.D. 1979); proceeding discontinued as moot, September 17, 1980, 23 F.M.C. 246.

Perhaps the most disturbing aspect of the evidence proffered by Proponents' witnesses and their arguments is that the first alleged "benefit" which appears to be the main reason for the 39 forwarders to attempt to operate an NVO service is based upon an allegation that NVOs with whom the 39 forwarders deal are not trustworthy and are unethical because the NVOs will attempt to "wean away" business from the forwarders by approaching LCL shippers directly and bypassing forwarders once these NVOs get LCL business via the forwarders. Proponents claim that there is "danger" to the forwarder when he employs non-CONFICO NVOs but "no such danger to the forwarder when he employs CONFICO as the NVO." (Proponents' Opening Brief, p. 14). Proponents even insinuate that these non-CONFICO NVOs are unethical, stating that the CONFICO arrangement is needed so that all forwarders, shareholders or non-shareholders of CONFICO, will feel free to use CONFICO "without fear that their cargo will be unethically solicited." (Proponents' Reply Brief, p. 19). Are Proponents really alleging that the NVO industry is unethical and untrustworthy? If so, where is the evidence supporting this aside from the general accusations of CONFICO's two witnesses? If NVOs are really that bad, moreover, why would forwarders who are not shareholders of CONFICO give CONFICO their business, as Proponents claim they would do?<sup>16</sup> Why wouldn't CONFICO also try to "wean away" the business from non-shareholder forwarders? Furthermore, even if there is some type of unethical jungle out there in the NVO industry, why do the four forwarder signatories to CONFICO who operate their own NVO service need a CONFICO to protect their accounts? Do they fear that their own NVO will "wean away" cargo from themselves as forwarders? This is one of the many contradictions in Proponents' evidence and arguments which destroy the credibility of that evidence and belief in the validity of the arguments.

If we put aside for the moment these allegations about untrustworthy, unethical NVOs whom the 39 forwarders purportedly fear, we can consider the argument on a different basis but again it offers no support for approval of the Agreement. As Protestants have

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<sup>16</sup> Proponents state:

Other NVO services obviously, are available but Confico is unique in one respect--it is the only NVO service owned by forwarders and as such, it will encourage forwarders, shareholders and nonshareholders alike, to obtain the benefits of an NVO service for their exporters without fear that their cargo will be unethically solicited. (Proponents' Reply Brief, p. 19).



pointed out (see especially the NAM group, Answering Brief, p. 22) the argument merely means that the forwarders wish to be insulated from the threat of competition. In other words, by providing a "safe," "neutral" NVO such as CONFICO supposedly would be, the forwarder-owner of CONFICO would feel free to give its business to CONFICO, keep it away from other NVOs, and therefore not live in fear of losing that business to the non-CONFICO NVO. But is protection against competition adequate justification for approval of a 39-party agreement, especially when some of the 39 already operate as NVOs themselves and presumably would have no need for a CONFICO? Does the shipping public benefit because the forwarder-shareholder of CONFICO fears outside NVOs and will be motivated to keep shippers' cargo away from them, if possible, even if such NVOs offered superior service and lower charges? Remember, too, that Proponents had argued earlier that their Agreement does no violence to antitrust laws because it is not anticompetitive and should not be subjected to the *Svenska* test. What, then, do they call this type of restraint of trade, an agreement whose main purpose is to alleviate fears of forwarders by giving them reason to steer business to one NVO and avoid doing business with outside NVOs whose competition they fear? Again, we have a contradiction in Proponents' evidence and arguments which undermines their case.

As in the case of Proponents' arguments that the benefits of an NVO service could be provided by approval of the CONFICO agreement and the argument that approval of CONFICO is necessary to protect the 39 forwarders from unscrupulous NVOs, Proponents' case continues to be undermined by a single, recurring question, i.e., why can't these purported needs or benefits be achieved without concerted action by 39 forwarders? In other words, why can't any forwarder offer an NVO service individually, thus avoiding the need to seek section 15 approval? The record contains confusing answers to this question? First, Proponents themselves reiterate that "anybody with desk space and a telephone can establish an NVO operation even though he has no knowledge of the business nor adequate working capital." (Proponents' Opening Brief, p. 16.) But then Proponents argue that some forwarders need CONFICO because they are too small to offer a frequent and regular container service? (Proponents' Opening Brief, p. 19.) Proponents thus argue that CONFICO will be a reliable, trustworthy, financially sound NVO, unlike those outside NVOs with their desks and telephones but then imply that maybe those NVOs are really not so weak and unattractive since they must be attracting enough business to offer a frequent and regular NVO container service which some of the 39 Proponents apparently cannot do by themselves.

Of course, there is another question that should be asked, namely, does the record show a serious transportation need for the establish-

ment of another NVO, especially a "super-NVO" fed by 39 forwarders. No shippers testified, or as far as I can tell from the record, were even asked if they wanted or needed another NVO. The fact that 39 forwarders fear competition from non-CONFICO NVOs does not mean that the shipping public is suffering from inadequate NVO service presently. (On the contrary, Proponents themselves argue that the Commission's records will show "a steady flow of NVO tariffs being filed. . ." (Proponents' Reply Brief, p. 4).) But even if the record showed a shortage of NVO service, it is not clear that the establishment of the joint-venture CONFICO NVO with its inherent tendency, common to all joint ventures, to discourage the forwarder-owners of CONFICO from commencing new NVO services in competition with their offspring, would ultimately ensure that shippers would have a greater selection of competing NVOs from which to choose.

But, argue Proponents, even if any NVO offers essentially the same service as CONFICO, CONFICO would be "unique" because it would be backed by 39 licensed forwarders and would consequently possess "expertise" and would be "financially responsible." Furthermore, they argue, only CONFICO with its forwarder connections could establish an international network of forwarders to handle each others's containers to ensure efficient handling of freight to destination. (Proponents' Opening Brief, pp. 22-23.) Here again the argument is short on facts, undermined by inconsistencies, and based in part on unsupported allegations. Again it is apparently charged that non-CONFICO NVOs are somehow financially unsound, apparently Proponents' "desk and telephone" characterization of NVOs implicitly returning. But does the record contain facts showing the financial condition of the NVO industry? Are they supported by large backers, are they well capitalized corporations? Have they been going bankrupt and causing shippers to suffer financial harm? If so, where is the evidence? I cannot officially notice all of these alleged facts or rely upon some hidden knowledge of which Protestants are unaware and which they have no chance to refute. The courts strongly condemn this type of decisionmaking. See *United States Lines, Inc. v. Federal Maritime Commission*, cited above, 584 F. 2d at 533-535.

Furthermore, as some Protestants have noted (see NAM group, Answering Brief, pp. 24-25), the fact that CONFICO is owned by numerous forwarders does not establish that the corporation CONFICO will necessarily be financially responsible. A prime reason for the information of a corporation in the first place is to limit the liability of its shareholders. But note again another contradiction in Proponents' arguments. Proponents claim that they are merely forming one NVO and are not planning to engage in rate-fixing among several NVOs or to file joint NVO tariffs. In other words, CONFICO is supposed to be a single corporate NVO with one tariff serving shareholders and non-

shareholders alike. But now Proponents argue that the knowledge and skills of the 39 forwarders will be utilized by CONFICO to assure shippers of competency and financial soundness and also enable CONFICO to establish inland services and an international network with other forwarders in destination countries. Does this not tend to confirm the findings of the Commission in it's Interim Report and Order as well as the contentions of Protestants that what we have here is an ongoing cooperative working arrangement among active forwarder participants who will be continually meeting to make joint decisions? Moreover, will the forwarders be providing the skilled labor to operate the NVO service? Are outside non-CONFICO NVOs presently unable to find skilled labor or administrative help to operate their businesses without turning to forwarders to assist them? Are all present NVOs unable to make arrangements with overseas forwarders for efficient movement of containers to inland destinations in foreign countries? Are not some of them corporations or forwarder-owned or affiliated themselves or, even if not, don't foreign forwarders talk to them? I have no reason to doubt that CONFICO could provide a responsible, sound NVO international service. But I also have no record evidence that such NVO services are not already being provided, that they cannot be provided without approving CONFICO's arrangement, or that there is a serious transportation need for CONFICO to commence such services because of a present dearth of them. In short, since there are so many inherently anticompetitive effects to this joint venture, I cannot find probative evidence to offset those considerations or, as the Commission stated in *Mediterranean Pools Investigation*, cited above (9 F.M.C. at 290), find "the circumstances and conditions existing in the particular trade involved which the anticompetitive agreement seeks to remedy or prevent."

The final category of arguments proffered by Proponents again are deficient in factual support and suffer from more inconsistencies. Thus, Proponents contend that there are at least three NVOs operating in the United States who are owned by foreign forwarders, namely, Scanfreight, Inc., Eccla, and Unimodal, Inc. (The last named, as noted previously, now employs CONFICO as its general agent.) Proponents complain that these foreign forwarders, assuming that they are also engaged in joint ventures, did not have to go through section 15 proceedings to commence operations, so why can't Proponents begin to start their CONFICO service without all this litigation? There are, of course, several answers to this question. First, we are in an American forum and must observe American law until that law is changed. If each of the named NVOs is operated by a consortium of foreign forwarders rather than a single forwarder or holding company, there may be no foreign antitrust laws that hinder those companies from acting concertedly. Furthermore, foreign freight forwarders are not

licensed by this Commission. Does that mean that we should suspend our antitrust laws or the Shipping Act when 39 forwarders in this country enter into a joint venture that is highly suspect under American antitrust law? Should we also suspend the licensing requirements and other regulations applicable to American freight forwarders under section 44 of the Act because foreign forwarders are not so regulated or indeed because American NVOs are not required to be licensed? If American laws are causing some unfairness or are hindering American companies from competing with foreign businesses, the answer is not to stop administering the laws which implement current national policy and congressional will but to seek amendment of them. Moreover, in this case, the record does not even show that the three foreign-owned NVOs are causing competitive harm to American NVOs or forwarders. Indeed, one of them, Unimodal, Inc., is not only an American corporation but also employs CONFICO. All that Proponents complain about is the fact that, being in America and subject to American laws, they have to show that they satisfy the requirements of those laws whereas their foreign counterparts are supposedly free of such restrictions. But, to repeat, neither I nor this Commission is free to ignore the prevailing national policies embodied in our antitrust laws favoring free and open competition, including competition among the 39 forwarders, and strongly suspecting joint ventures such as Agreement No. 10235.<sup>17</sup>

Proponents argue also that approval of CONFICO would assist the American merchant marine and our national balance of payments. These are valid regulatory purposes, according to Proponents. Such arguments are also defective, however. The Agreement does not promise that CONFICO, when it tenders full containerloads to underlying vessel-operating carriers, will always select American carriers. Indeed, Proponents keep telling us that their Agreement is not restrictive of competition, another inconsistency in their arguments. Therefore, there is no assurance that in the real competitive world CONFICO will not select foreign vessel-operating carriers. Indeed, as Proponents themselves have argued, the ocean carrier Conferences are "dominated" by

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<sup>17</sup> Proponents also complain that "some 32 steamship conferences dominated by foreign lines and representing every major trade have employed their resources and legal talent in a determined bid to prevent CONFICO from getting off the ground. Why should these conferences be allowed to use their cartel powers to prevent an NVO operation by a firm owned by U. S. forwarders while NVOs owned by overseas forwarders can offer a service practically overnight?" (Proponents' Opening Brief, p. 24.) I do not know how an attack on the motivation or right of these Conferences to protest approval will help determine the merits of approvability of the Agreement in question. The case for approval must rest on the evidence introduced by Proponents in support thereof, not on unarticulated innuendoes about the motives of Protestant Conferences. Moreover, as Proponents must be aware, American law permits groups of people to seek legislative or administrative help concertedly from their Government under their First Amendment rights without fear of antitrust prosecution absent unusual circumstances. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mineworkers v. Pennington*, 381 U.S. 657 (1965); *Calif. Motor Transport v. Trucking Unlimited* 404 U.S. 508 (1972).

foreign carriers. Therefore, isn't it more likely that CONFICO will have to select the best, available ocean carrier service regardless of flag? Yet Proponents argue that "CONFICO, being American owned, will without doubt support our carriers *whenever possible*." (Proponents' Opening Brief, p. 25.) (Emphasis added.) Why will CONFICO be any more likely to do this than are American exporters? In short, while this objective, aside from antitrust considerations inherent in a policy seeking to avoid doing business with certain carriers, might seem like a valid regulatory purpose, this Agreement is far from a guarantee that assistance to the American merchant marine is probable. Also, the old question returns, namely, why establish a CONFICO for this purpose? Can't individual American-owned NVOs or forwarders try, whenever possible, to use American carriers, without acting in a joint venture?

Proponents' argument that approval of the CONFICO agreement will help our balance of payments is similarly strained. Proponents contend that, unlike foreign-owned NVOs, a large share of revenue earned by CONFICO will remain in this country. But a large portion of any NVO's costs is the ocean freight it pays to the underlying ocean carrier, which, as noted, may well be a foreign carrier. Also, conversely, if a foreign-owned NVO selects an American carrier and pays its rates, that carrier's revenue will also stay in this country. But again, aside from these problems with the argument and the unproven assumptions on which it is based, why must the 39 forwarders form a CONFICO to keep revenue in this country? Do not four of them who are also NVOs already keep revenue derived from their individual NVO operations in this country?

Finally, Proponents argue that CONFICO would serve a valid regulatory purpose because, unlike NVOs owned by overseas forwarders, CONFICO's records would be available to the Commission. Even if one assumes that there will be a need to scrutinize the records of an NVO like CONFICO any more than there is a need to look at any NVO's records, was it a purpose of the Shipping Act to require a single NVO, as Proponents claim CONFICO would be, to set up records? Is this what is supposed to benefit the shipping public? Do shippers care if CONFICO makes its records available to the Commission or are they more interested in a selection of good NVO services in a climate of free and open competition? Accessibility of records, is, of course, important and possibly could be required as a condition of approval. But justification of an anticompetitive agreement requires probative evidence of a specific need, benefit, or purpose which is relevant to specific conditions and problems which the agreement will remedy, as the Commission noted in *Mediterranean Pools Investigation*, cited above. I am not aware from this record that there is currently a problem or harm resulting to the shipping public or competing NVOs because three foreign-owned NVOs, one of which is a corporation chartered in this

country, are owned by foreign companies whose records are located overseas. Again, however, if there is such a problem, do we solve the problem of obtaining overseas records by approving this joint-venture CONFICO arrangement? I fail to see the relevance.

#### SUMMARY OF WEAKNESSES AND CONTRADICTIONS IN PROponents' CASE

As I have indicated above and discuss more fully below, there seems to be a sound idea underlying the CONFICO arrangement but the subject Agreement is simply too large and inherently anticompetitive to be supported by the type of case which Proponents have introduced. I cannot overlook the many contradictions in the evidence and arguments which undermine the case for approval and have already alluded to a number of them. For example, Proponents argue that anyone can easily become an NVO with "a desk and telephone" but they also say that small forwarders cannot become NVOs because of lack of sufficient cargo. Also, Proponents argue that non-CONFICO NVOs are feared by the 39 forwarders because these NVOs allegedly will "wean away" business from the forwarders. Therefore, they say, the forwarders need a "safe," "neutral" NVO like CONFICO. But they also contend that outside forwarders have and will use CONFICO's NVO service. But why didn't or won't these outside forwarders fear that CONFICO would "wean away" their business and why will CONFICO, unlike all other NVOs who are alleged to be "weaners," behave differently. Then, too, Proponents argue that the 39 forwarders need the "neutral" CONFICO NVO. But they also argue that their Agreement is not anticompetitive because these forwarders do not promise to give all of their business to CONFICO, and, indeed, assert that only 33 percent of these have supported CONFICO. Then what is this alleged need for CONFICO? Apparently 67 percent of the shareholders did not feel it. Also, Proponents argue that an individual forwarder has a great incentive to offer its own NVO service because of the large revenue it derives from such an operation, aided by consolidation allowances and lower FAK containerload rates offered by ocean carriers to NVOs. Indeed, Proponents argue that the Commission's tariff records "will indicate a steady flow of NVO tariffs being filed, many of which are by forwarders or affiliated firms." (Proponents' Reply Brief, p. 4.) But then why argue that CONFICO is necessary to motivate the forwarder to begin an NVO business or that CONFICO will provide an example which other forwarders will wish to emulate, as Proponents also argue? (Proponents' Reply Brief, pp. 4, 5.) Proponents call it "pure conjecture that the shareholders will lose their incentive to become NVOs, if any are so inclined." (Proponents' Reply Brief, p. 3.) In other words, what is the need for a CONFICO if there is so much incentive for forward-

ers to become NVOs individually as indeed four forwarder Proponents have become?

There are more contradictions. For example, Proponents argue that their joint venture will not give the shareholders of CONFICO any competitive advantage, contradicting the Commission's findings in its Interim Report and Order. (Proponents' Opening Brief, pp. 10-11.) If so, then why would any forwarder wish to form CONFICO and why especially would small forwarders, whom Proponents claim cannot form NVO services by themselves, wish to be parties to CONFICO? If there is no advantage to CONFICO, why don't these small forwarders stay out of it? And if the offering of a financially sound, expert NVO service is one of the objectives of CONFICO, why do four forwarders who already offer NVO services have to be parties to the CONFICO arrangement?

In their final brief, Proponents repeat their attempts to persuade that their Agreement is really very beneficial with minimal anticompetitive consequences. They ridicule the idea that the 39 forwarders who constitute perhaps only 6 percent of all New York-located forwarders will constitute any type of monopoly and emphasize that the burdens of proof imposed on Proponents by the *Svenska* doctrine which applies to *per se* violations of antitrust laws should not be applied to this joint venture having such little impact on competition. Again, however, Proponents ignore the problems which courts and other authorities have consistently recognized as characteristic of joint ventures which are inherently anticompetitive and furthermore overlook the fact that during 1978 Proponents handled not less than 8.2 percent of U. S. exports via the Port of New York to Northern Europe and the Mediterranean, as I have earlier noted.<sup>18</sup> As the Court noted in the *Penn-Olin* case, furthermore, section 7 of the Clayton Act was enacted to stop incipient anticompetitive activity, not just monopolies, before harm could develop. As the Court stated:

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<sup>18</sup> Proponents ridicule the idea that their Agreement has any tendency to "monopoly" because of the relatively small number of forwarders involved compared to all forwarders operating in the relevant market areas (perhaps 6 percent of all New York-area forwarders) and what they consider only minimal traffic handled by these 39 forwarders (not less than 8.2 percent of traffic moving out of New York to North Atlantic and Mediterranean destinations). No one is arguing that the Agreement will produce only one NVO and destroy all other NVOs. But the courts and Congress are concerned over anticompetitive tendencies and are much more fearful of joint ventures or mergers under section 7 of the Clayton Act than Proponents indicate. As the NEC group have shown, it is not enough merely to show only 8.2 percent or 6 percent of a market but one must carefully analyze the relevant market both quantitatively and qualitatively. Sometimes, a merger is found unlawful even if there are numerous competitors to a merged company and that company would handle only 7.5 percent of the market. See *United States v. Von's Grocery*, 384 U.S. 270 (1966). Vertical mergers are even more dangerous, i.e., manufacturer acquiring retailer, analogous to the present Agreement whereby the forwarder would acquire the NVO. In *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), a vertical and horizontal merger was found unlawful even though the combined market share of the two merging wholesalers and retailers of shoes was only 4.5 percent and 8 percent respectively.

The grand design of . . . [section 7] . . . was to arrest incipient threats to competition which the Sherman Act did not ordinarily reach. It follows that actual restraints need not be proved. The requirements of the amendment are satisfied when a "tendency" toward monopoly or the "reasonable likelihood" of a substantial lessening of competition in the relevant market is shown. Congress made it plain that the validity of such arrangements was to be gauged on a broader scale by using the words "may be substantially to lessen competition" which "indicate that its concern was with probabilities, not certainties." 378 U.S. at 170-171.

But Proponents argue that CONFICO is a necessary joint venture because the 39 forwarders fear giving their business to outside NVOs who "wean away" business, as I have noted. Is it not the case, then, that in fact as well as in theory there will be restraints on competition, namely, a tendency for the 39 to steer cargo to CONFICO rather than outside NVOs and conversely that CONFICO will not attempt to obtain a freight forwarder's license? As the Court also noted in the *Penn-Olin* case in a passage I have cited earlier:

Inevitably, the operations of the joint venture will be frozen to those lines of commerce which will not bring it into competition with the parents, and the latter, by the same token will be foreclosed from the joint venture's market. 378 U.S. at 169.

In their Reply Brief, however, Proponents contend that the various parties opposing approval of their Agreement are relying upon "pure speculation" or "pure conjecture" when these Protestants argue that approval of the Agreement will most likely result in having the 39 forwarders steer cargo to CONFICO and not to outside NVOs and that approval will discourage forwarder-shareholders of CONFICO from beginning their own NVO services. But, to repeat, Proponents themselves feed these contentions by arguing that the 39 need a "safe" NVO and that "small" forwarder-shareholders cannot enter the NVO business by themselves. Proponents also deny that CONFICO would use information from outside, non-shareholder forwarders to assist its forwarder-owners in obtaining the business of these outside forwarders. Yet, as noted previously, Proponents argue that the nature of NVOs is to "wean away" business from unaffiliated forwarders. As discussed, the courts and other authorities on joint ventures continually point out the very dangers that Proponents claim to be supported only by "speculation" or "conjecture" on this record, and their own evidence and arguments often contradict their denials of these anticompetitive tendencies. Moreover, the Supreme Court itself in the *Svenska* decision recognized that the Commission was entitled to draw reasonable inferences from the record as a whole absent positive proof or complete evidence, stating:



“Conjecture” of this kind, when based on inferences that are reasonable in light of human experience generally or when based on the Commission’s special familiarity with the shipping industry, is fully within the competence of this administrative agency and should be respected by the reviewing courts. 390 U.S. at 249.

As Proponents have argued and as I have agreed, all joint ventures are not unlawful or even *per se* violative of antitrust law. Proponents cite the *Penn-Olin* case, among others, to support that contention. But in *Penn-Olin*, the Court did demonstrate that it expected the lower court to consider a number of factors before deciding whether the joint venture violated law, among them, as Proponents themselves state (Proponents’ Reply Brief, pp. 12-13): “(1) the reasons and necessities for the existence of the joint venture; 2) the joint venture’s line of commerce and the relationship thereof to that of its parents; and 3) such other factors that might indicate potential risk to competition in the relevant market. 378 U.S. at 177.” Perhaps, as Proponents state, there is no tendency to monopoly involved in this joint venture. But the tendency to prefer CONFICO whenever possible has been shown by Proponents’ own witnesses and arguments. Certainly there should be evidence of the “reasons and necessities” for *all 39 forwarders*, including those who already provide NVO services, to be included in the joint venture. I fail to see such evidence. On the other hand, a smaller agreement limited to those forwarders who really need a CONFICO NVO service to compete effectively but who cannot provide such service on their own may be approvable, as I now discuss.

#### WHAT TYPE OF ALTERNATIVE AGREEMENT COULD BE APPROVED

I agree with Hearing Counsel that it is not necessarily wrong if a group of freight forwarders wish to offer a joint NVO-consolidation operation, at least under Shipping Act principles. Such an idea apparently has been suggested by a noted authority on freight forwarders, who happens to be Proponents’ counsel in this case, Mr. Gerald H. Ullman.<sup>19</sup> The idea apparently was discussed in Mr. Ullman’s work, *The Ocean Freight Forwarder the Exporter and the Law*, p. 40 (Cornell Maritime Press, Inc., 1967). (See Answering Brief of the NAM group, p. 12.) In that work, however, Mr. Ullman conceded that “the forwarders may be regulating or controlling competition with respect to the shipments each furnishes to the NVOCC entity in that each will in all likelihood be agreeing to use the NVOCC container service and not an

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<sup>19</sup> After having criticized Proponents’ case and arguments, I can at least recognize that Mr. Ullman, the author of a work on the freight forwarder industry and a long time advocate and spokesman for that industry, is, I believe, a recognized authority in this field as well as a respected practitioner before this Commission.

outside competing service." Mr. Ullman replies that the quoted passage was speaking generally and not about this particular Agreement, which, he asserts, contains no agreement by the forwarders to use the CONFICO NVO service exclusively. (Proponents' Reply Brief, p. 14.) Be that as it may, as I have already noted, the likelihood of the 39 forwarders steering their business to CONFICO is strong, notwithstanding the absence of any specific language in the text of the Agreement. However, the underlying idea may not be so bad if it will enhance or preserve competition in the forwarder as well as NVO industry.

The reader may notice that I did not address myself to two of the alleged benefits that would flow from approval of Agreement No. 10235. These are Nos. 7 and 9, namely, "benefitting the small forwarder" and "strengthening the forwarding industry." Of all the alleged benefits, these appear to be the only ones which may not be achievable by separate action on the part of certain individual forwarders. In other words, any forwarder who can establish an NVO service by himself can offer the many inherent benefits of an NVO-consolidation service which Proponents have itemized or can set up his own NVO service if he fears loss of business to outside NVOs. But if there are so-called "small" forwarders whose existence is in jeopardy because they need to offer an NVO service in connection with their forwarding operations in order to remain competitive but cannot do so relying on their own resources, they may need to act jointly. The preservation of competition was certainly one of the objectives of the Shipping Act, 1916, as the Alexander Report illustrates in its discussion of the reasons for recommending section 15 of the Act.<sup>20</sup> It is also beyond argument that the antitrust laws have the same objective. As the Supreme Court stated in the *Penn-Olin* case:

Overall, the same considerations apply to joint ventures as to mergers, for in each instance we are but expounding a national policy to preserve and promote a free competitive economy. 378 U.S. at 170.

In *United States v. Brown Shoe Co.*, 370 U.S. 294, 344 (1962), another leading case arising under section 7 of the Clayton Act, the Court stated:

It is competition, not competitors, which the Act protects. We cannot fail to recognize *Congress's desire to promote competition through the protection of viable small locally owned businesses.* (Emphasis added.)

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<sup>20</sup> See the "Alexander Report," p. 415, quoted in Pike & Fischer, *Shipping Regulation*, p. 51:31. The Committee expressed a desire to preserve "open competition" and a concern over "elimination of the weak" ocean carriers unless the conference system were permitted, albeit under careful regulation.

In the one previous case involving an agreement among forwarders to establish a corporation for the purpose of offering an added carrier service in a joint venture, the *Customs Forwarders, Inc.* case, cited above, 17 F.M.C. 302, the Commission found that the joint venture would enhance the six forwarders' competitive viability without significant anticompetitive effects, the six needing to add an inland I.C.C. "Part-IV forwarder" (i.e., carrier operation) to their forwarding services to remain competitive. The Commission paid careful attention to the *Penn-Olin* case, however, to make sure that the evidence of need offset the anticompetitive effects inherent in joint ventures.

If a new Agreement is submitted which is not based on fear of competition from "unethical" or unscrupulous NVOs and related allegations and which is shown to be necessary to enable certain small forwarders to remain competitive, it may merit approval as did the agreement among the six forwarders in the *Customs Forwarders, Inc.* case. Such an agreement might preserve competition, not endanger it. The record in this case, however, is not adequate to establish that there is a need for such an Agreement nor, if so, what particular forwarders need to be parties to remain competitive.

As with the rest of the record, the evidence concerning the question whether the subject Agreement would benefit the "small" forwarder or strengthen the financial position of the forwarding industry is threadbare and contradictory. It consists essentially of general statements of Mr. Bowen, Chairman of CONFICO, that some of the forwarder members of CONFICO are too small to offer a regular NVO service because they do not attract enough cargo to consolidate into containers and his further statement that an added NVO service would enhance forwarders' financial positions. There is also some evidence that a number of the original forwarder parties to Agreement No. 10235 are insolvent or inactive (Exhibit 7) and some statistical data offered by Hearing Counsel showing that a few forwarders control a majority of the total business of CONFICO's shareholders and that only six forwarder shareholders out of 38 answering interrogatories tendered full containerload shipments in 1978. (Hearing Counsel's Answering Brief, p. 4.) These statistics do not show by themselves exactly what forwarders need an added NVO service. Nor do they show the financial position of each of the 39 forwarders, nor how much traffic they need to attract to offer an NVO service, whether their history shows them capable or likely of attracting sufficient business on their own to set up their own regular NVO service, nor whether any particular forwarder is in competitive trouble because he cannot offer an NVO service, etc. There is also the problem mentioned above, namely, that Proponents also assert that anyone with a desk and telephone can start an NVO business, an assertion which undermines their argument that some small forwarders need a CONFICO NVO service because they cannot start

one themselves. This particular state of the record concerning small forwarders is understandable since the case did not focus on their particular needs but on many other considerations, as discussed.

If a new Agreement is submitted which is truly needed to preserve a certain number of small forwarders and which will, notwithstanding its nature as a joint venture, on balance, preserve and promote competition rather than destroy it, such an Agreement, if clearly and understandably drafted and supported by specific probative evidence regarding the needs of each forwarder, would deserve favorable consideration under either the Shipping Act or even section 7 of the Clayton Act. As the *Penn-Olin* case shows, the Clayton Act does not forbid joint ventures provided that adequate evidence showing enhancement of competition is shown.<sup>21</sup> Furthermore, since the jurisdictional issue will not delay any subsequent proceeding and since the courts have advised the Commission that it has flexibility to fashion an efficient proceeding which may avoid the need for trial-type hearings,<sup>22</sup> any new proceeding need not consume anywhere near the length of time that the present one has consumed, especially if the Commission advises needy forwarders of the type of evidence required to support approval and the individual proponents furnish that evidence promptly.<sup>23</sup>

#### ULTIMATE CONCLUSIONS

Proponents seek approval of a joint-venture Agreement by which 39 freight forwarders have formed a corporation which will perform NVO and consolidation services. As a joint venture among parties, some of whom are also NVOs, such an enterprise is considered by authorities in the field of antitrust law to be inherently dangerous to competition,

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<sup>21</sup> On remand from the Supreme Court, the District Court in the *Penn-Olin* case dismissed the Government's complaint against the joint venture there under consideration. The District Court's decision was later affirmed by the Supreme Court. See 246 F. Supp. 917, affirmed, 389 U.S. 308 (1967).

<sup>22</sup> See, e.g., the comments of the court in *United States Lines, Inc. v. Federal Maritime Commission*, cited above, 584 F. 2d at 536-537.

<sup>23</sup> As I noted earlier, Proponents have offered some limiting amendments to their Agreement in an effort to gain approval. They offer to restrict operations to the North Atlantic trade, limit intermodal authority east of the Mississippi, limit the term of the Agreement to 5 years, and delete the authority to carry on discussions with other persons subject to the Act. (Proponents' Reply Brief, p. 20.) These suggestions are helpful but inadequate. The record still does not contain sufficient evidence to justify an Agreement among all 39 forwarders, even with such limitations, since it still depends upon the same allegations and general conclusions and does not specify forwarders who really need to add an NVO service by means of CONFICO rather than by means of their own individual resources.

Another serious problem, which I have not discussed before because the Agreement is otherwise not approvable, is the fact that the Agreement is unclear in certain respects. The NEC group of Protestants correctly point out deficiencies and inconsistencies between Agreement No. 10235 and the previous FICO agreement. The Commission's Interim Report and Order noted some of the problems. Furthermore, it is unclear as to what happens to shareholders of the CONFICO corporation who are not signatories to the Agreement or who are not actively forwarding. In other words, one cannot be sure exactly what the entire Agreement consists of nor how the 39 Proponents will be acting in relation to other shareholders of CONFICO. As the NEC group correctly states, the Commission must know exactly what it is authorizing. (See discussion in the NEC Answering Brief, pp. 14-33.) Any future Agreement should eliminate these ambiguities.

having tendencies to freeze competition by discouraging the parents of the corporation from competing in the same line of business with their offspring and vice versa, encouraging the parents to deal preferentially with the offspring NVO to the detriment of outside NVOs, and exchanging information relating to the forwarders' businesses, among other things. For that reason joint ventures are highly suspect under the Clayton Act and must be carefully scrutinized to ensure that they enhance rather than prevent competition.

In view of the suspicion in which joint ventures are held under antitrust law, this Agreement must be carefully examined under the *Svenska* test to determine if the evidence shows a need, benefit, or valid regulatory purpose which will offset the significant invasion of antitrust policies. The *Svenska* test, which was actually created by the Commission, applies whether or not an agreement is *per se* violative of antitrust law or policies. Furthermore, the courts and the Commission expect not only a careful scrutiny of the antitrust consequences but specific probative evidence showing need, benefit, or purpose. Such evidence is not present in this case.

The evidence proffered by Proponents in support of their Agreement is long on argument but short on facts and is replete with generalities and weakened by contradictions. Most of the purported benefits of the Agreement would be achieved by any NVO without the need for this joint venture. Moreover, the main reason for the establishment of CONFICO, namely, to set up a "neutral" or "safe" NVO, is based upon an allegation that NVOs today cannot be trusted not to "wean away" business from the 39 forwarders. Approval of the Agreement therefore would be tantamount to giving credence to this allegation, thus casting aspersions on an entire NVO industry on the basis of self-serving accusations and, moreover, would merely be insulating Proponents from the fears of competition from an NVO industry which the Commission has previously lauded as serving the public interest.

Proponents' evidence and arguments do not answer the recurring question, namely, why cannot these various, alleged benefits of a CONFICO NVO service be achieved by any individual Proponent-forwarder by such forwarder's merely expanding into the NVO business. Among the many contradictions in their evidence is the dual assertion that CONFICO is necessary to enable these 39 forwarders to commence an NVO service but that anyone with a desk and telephone can become an NVO and that, indeed, the Commission's tariff records will show a plethora of NVO tariffs being filed without the need for section 15 agreements. There is, in short, no persuasive evidence that shows that all 39 forwarders must be parties to CONFICO or that indeed the shipping public even needs another NVO service. In place of evidence, furthermore, Proponents complain about the fact that they are required to seek approval under section 15 of the Shipping Act whereas foreign

forwarders, who have formed a few NVOs, did not have to seek such approval. Proponents also claim that approval of CONFICO would aid the American merchant marine and help our balance of payments and that CONFICO should be approved because its records would be available to this Commission. None of these arguments withstands the slightest critical analysis. There is still no showing of need for a 39-forwarder-owned NVO and there is no persuasive evidence showing that CONFICO would deal exclusively with American-vessel-operating carriers, nor a showing that revenue cannot be kept in this country by any forwarder who establishes an NVO service without entering into a multiple-party joint venture. The solution to the problem of obtaining documents from overseas locations, furthermore, is not solved by approving a 39-party Agreement.

Although the 39-party Agreement under consideration is too large and inherently anticompetitive to be supported by the type of thin evidence and contradictory arguments presented in its support, the basic idea of small forwarders organizing a joint venture to provide an NVO service without which they might not be able to survive in their competitive market is not unsound provided that the individual forwarders are unable to provide the NVO service by means of their own resources. If a more limited agreement among truly needy forwarders were submitted, backed by specific probative evidence showing need and enhanced competition, it would deserve favorable consideration. No such agreement or evidence has been submitted in this proceeding, however.

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

Washington, D. C.  
November 6, 1980

# FEDERAL MARITIME COMMISSION

DOCKET NO. 79-74

## JAPAN/KOREA ATLANTIC & GULF CONFERENCE INTERMODAL AMENDMENT (AGREEMENT NO. 3103-67)

A steamship conference serving Japan and Korea via U.S. Atlantic and Gulf ports failed to demonstrate a legitimate transportation need, public benefit or regulatory purpose for an agreement authorizing the members to set rates for intermodal traffic moving through such ports. The Proponents particularly failed to justify the agreement's unlimited geographic scope, its indefinite duration, and its 120-day restrictions on member lines wishing to offer intermodal services not offered by the conference.

*Charles F. Warren and George A. Quadrino* for Japan/Korea Atlantic & Gulf Conference.

*Neal M. Mayer, Paul D. Coleman and Peter J. King* for Seatrain Pacific Services, S.A.

*J. Robert Ewers, Paul J. Kaller and C. J. Swedarsky* for the Bureau of Investigation and Enforcement.

### REPORT AND ORDER

*June 17, 1981*

BY THE COMMISSION: (LESLIE L. KANUK, *Acting Chairman*; RICHARD J. DASCHBACH,\* JAMES V. DAY, THOMAS F. MOAKLEY AND PETER N. TEIGE, *Commissioners*)

On July 20, 1979, the Commission instituted an investigation into the approvability of Agreement No. 3103-67 under section 15 of the Shipping Act, 1916 (46 U.S.C. 814).<sup>1</sup> Agreement No. 3103-67 is a proposal to amend the organic agreement of the Japan/Korea Atlantic & Gulf Conference (JKAG) by permitting its eleven member lines to agree upon rates and practices for through intermodal transportation from ports in Japan and Korea to interior points in the United States via Atlantic and Gulf Coast ports.<sup>2</sup> Approval of the Agreement was pro-

\* Commissioner Daschbach only concurs in the result and will issue a separate opinion.

<sup>1</sup> The Agreement was filed March 22, 1978, followed by the Proponents' justification statement on June 9, 1978. On November 29, 1978, the Commission issued an Order disapproving the Agreement unless JKAG made a timely request for further hearing. Such a request was filed by JKAG in which it also requested that the proceeding be limited to an exchange of affidavits and memoranda on the question of whether its proposed intermodal service would be commercially accepted by shippers. The Commission's July 20, 1979 Order of Investigation and Hearing stated that implementation of a conference intermodal service alone could not justify price fixing and that all aspects of the Agreement and its competitive impact would be examined.

<sup>2</sup> The JKAG member lines are: Barber Blue Sea Line; Japan Line, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Korea Shipping Corporation; Lykes Bros. Steamship Company, Inc.; Mitsui O.S.K. Lines, Ltd.;

tested by Seatrain Pacific Services, S.A., a nonconference ocean carrier then participating in the trans-Pacific trades via U.S. Pacific Coast ports.<sup>3</sup> Seatrain and the Commission's Bureau of Investigation and Enforcement (Protestants) participated in this proceeding as opponents of approval.

### BACKGROUND INFORMATION

JKAG has previously possessed intermodal ratemaking authority. From January 18, 1973 until its fourth short-term extension agreement expired on November 18, 1978, the Conference could lawfully discuss and take action with respect to intermodal service to interior points located anywhere in the United States.<sup>4</sup>

During this period JKAG failed to carry any intermodal cargo and only one of its members established an intermodal service of its own,<sup>5</sup> despite the fact that a September, 1976 JKAG study revealed that 27% of the Conference's cargo ultimately moves to "ascertainable inland destinations" beyond port areas and is susceptible to intermodal carriage.<sup>6</sup> A Conference intermodal tariff was first published effective November 15, 1977 and offered service via Atlantic Coast ports to four interior points -- East St. Louis, Chicago, Louisville and Cleveland -- at rates which simply combined JKAG's all-water rates with railroad Plan II 1/2 rates. This "combination rate" service did not achieve commercial acceptance because shippers could frequently negotiate more favorable inland rates than JKAG's Plan II 1/2 rates and because JKAG's service generally took longer than Pacific Coast routings. The JKAG intermodal tariff was cancelled on November 18, 1978 upon the expiration of Agreement No. 3103-64.

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A. P. Moller-Maersk Line; Nippon Yusen Kaisha; Orient Overseas Container Line, Inc.; United States Lines, Inc.; and Yamashita-Shinnihon Steamship Co., Ltd.

<sup>3</sup> Seatrain was purchased in early 1981 by interests controlled by C. Y. Tung and continues to operate as a nonconference carrier in the Far East/U.S. Pacific Coast trades under the name of "SeaPac."

<sup>4</sup> The Commission's approval of Agreement No. 3103-64 was remanded and then reversed in *Seatrain International, S.A. v. Federal Maritime Commission*, 584 F.2d 546 (D.C. Cir. 1978) and 598 F.2d 289 (D.C. Cir. 1979).

<sup>5</sup> Lykes Bros. began offering barge/ocean, rail/ocean and motor/ocean service to a large number of inland points via Gulf Coast Ports in 1976 (Tariff FMC Nos. 95, 99 and 103). It has emphasized the first of these services because of its experience and capabilities for providing LASH-type services on inland waterways.

<sup>6</sup> October 5, 1979 Opening Affidavit of Robert D. Grey at 6-7 and Appendix B. JKAG's study failed to reveal the actual destinations of any of this inland cargo, however. Between 1972 and 1978, JKAG's containerized carryings increased from 32% to 90% of its total cargo. Minilandbridge (MLB) and other intermodal cargo is virtually 100% containerized. In 1978, JKAG offered 90 vessels (70% of which were containerships), 305 sailings, 378,772 twenty-foot equivalent units of container space and 72,336,401 cubic feet of breakbulk space. *Id.* at 4-5.

JKAG's evidence consisted of six affidavits by Conference Chairman Robert D. Grey. These were dated June 9, 1978, July 31, 1978, October 5, 1979 (Opening), October 5, 1979 (Supplemental), October 13, 1979 (Paragraphs 39-41 only) and March 26, 1980, and will hereafter be cited as "Grey Affidavits I-VI."



The JKAG carriers all belong to the larger Trans-Pacific Freight Conference of Japan/Korea (PFC), which competes with JKAG's all-water service through Pacific Coast ports of entry.<sup>7</sup> Until recently, carriers in the PFC trade did not offer intermodal service to U.S. interior points.<sup>8</sup> Cargo ultimately destined to the interior was handled under Overland Common Point (OCP) or minilandbridge (MLB) rates and moved inland under separate bills of lading at the shipper's expense.<sup>9</sup> Nonconference carriers in the TPFC trade such as Seatrain, Fesco, Neptune Orient Lines, and, more recently, Sea-Land Service, Inc., have aggressively and successfully competed for MLB cargo by offering attractive Freight All Kinds rates with quantity discount provisions.<sup>10</sup>

JKAG's carryings dropped from 4 million to 2.3 million revenue tons between 1971 and 1979.<sup>11</sup> Although JKAG faced competition from 11 nonconference Atlantic and Gulf Coast carriers when the record closed, this decline in business is attributable more to intermodal competition from Pacific Coast carriers than to local competition.<sup>12</sup> The shorter and frequently faster MLB routings to Atlantic and Gulf ports have grown impressively since they were first instituted by Seatrain in 1972.<sup>13</sup>

Six JKAG lines operate the same vessels in both the TPFC and JKAG trades and do not appear to have favored MLB cargo over JKAG cargo.<sup>14</sup> The five remaining JKAG lines are required by the Japanese government to operate separate ships in each of these trades and therefore have an interest in preserving the viability of both routes.

<sup>7</sup> TPFC has 18 members. In addition to the JKAG lines, these are American President Lines.; East Asiatic Line; Hapag-Lloyd, A.G.; Knutsen Line; Korea Maritime Transport Company; Phoenix Container Lines; and Showa Line.

<sup>8</sup> E.g., Star Shipping A/S's interior point tariff first took effect on July 4, 1979 and offers service to Denver, Kansas City, St. Louis, Minneapolis and Chicago. TPFC did not begin a conference interior point service until June 25, 1980 (FMC Tariff No. 8).

<sup>9</sup> OCP cargo is rated on a port-to-port basis and is restricted to cargo which subsequently moves to interior points east of the Continental Divide. OCP services have existed for many years. See *Overland/OCP Investigation*, 12 F.M.C. 184 (1969). MLB cargo is intermodal cargo rated on a through route basis to Atlantic or Gulf port cities. In 1977, 54% of TPFC's revenue tonnage moved under OCP or MLB rates. Grey Affidavit I at 4. This TPFC non-Pacific Coast traffic totalled 3,454,622 revenue tons and exceeded JKAG's total carryings for that year by 128%. *Id.* at 7.

<sup>10</sup> Sea-Land resigned from both the JKAG and TPFC conferences in March, 1980 and operates exclusively through Pacific Coast ports with all-water, OCP, MIB and interior point services. Seatrain has not belonged to either conference since it began intermodal operations.

<sup>11</sup> Grey Affidavits II, III and VI. Conference carryings have fluctuated appreciably in recent years. In 1978, JKAG handled 3.4 million revenue tons compared to 2.7 million in 1977 and 2.3 million in 1979. *Id.*

<sup>12</sup> *Id.* A significant portion of today's MLB cargo previously moved by all-water service in the JKAG trade. Only one nonconference carrier in the JKAG trade (Evergreen Line) is a fully containerized operator, although Yangming Marine Line also possesses significant container capability. Other probable causes for JKAG's decline in tonnage include temporary trade conditions such as United States import quotas, and its members' shift from breakbulk to specialized container vessels.

<sup>13</sup> Grey Affidavit II at 7-8.

<sup>14</sup> Grey Affidavit III at 13-15 and Appendix F, Grey Affidavit V, and Grey Affidavit VI at 5-6.

## POSITION OF THE PARTIES

*The Proponents*

JKAG contends that Agreement No. 3103-67 has been justified under the *Svenska* doctrine because:<sup>15</sup>

1. Competition for cargo moving in intermodal configurations has been intense, especially on the part of nonconference carriers which charge discount rates and have steadily increased their capacity in the TPFC trade. These practices could cause instability in the TKAG trade.
  - a. JKAG presently faces interior point competition from four carriers (Lykes Bros., Evergreen Line, United States Lines and Maersk Line) in the JKAG trade. Several other nonconference lines with partial container capacity might easily expand into intermodal operations. Moreover, interior point service via Pacific Coast ports was recently instituted by TPFC and several substantial nonconference lines such as Seatrain.
  - b. Sea-Land and Zim Navigation Company have withdrawn from both JKAG and TPFC, increased their carrying capacities and compete as independents. Hanjin Container Line also resigned from TPFC.
  - c. The trade is unbalanced in favor of eastbound, which exacerbates the economic effects of JKAG's cargo losses to Pacific Coast carriers.
2. A JKAG interior point service would be a "better quality" service than MLB for cargo ultimately destined to interior points. Even without price inducements, the ability to offer an interior point service would assist JKAG in its fight to retain the cargo it has been losing to the lower priced OCP and MLB services of Pacific gateway carriers.
3. Through intermodal carriage provides many advantages to shippers.
4. JKAG will promptly implement an intermodal service featuring an additional service point (Detroit) and rates reduced by \$8.00 a ton from those charged in its 1977-1978 tariff. The intermodal tariff would also contain a relatively low "Cargo, N.O.S." rate which should attract many items now assessed higher commodity rates under JKAG's all-water tariff.
5. JKAG lines are firmly committed to all-water service and none of them "favor" the intermodal cargoes they carry as

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<sup>15</sup> *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), affirmed the need for proponents of anticompetitive section 15 agreements to demonstrate the existence of offsetting transportation or other public benefits. Agreement No. 3103-67 provides for price fixing which is anticompetitive *per se*. *United States v. Socony Vacuum Oil Co., Inc.*, 318 U.S. 150 (1940).

TPFC members; they wish to maximize their carryings and preserve a stable environment in both trades.

6. JKAG would extend its self-policing activities to intermodal cargo, thereby increasing the effectiveness of its policing of port-to-port cargo. It is now possible for port-to-port rebates to take the form of concessions on inland transportation arrangements which are beyond the Conference's jurisdiction.
7. JKAG would accept conditions limiting the Agreement's term to a period as short as 18 months.
8. The number of interior points served should increase as JKAG gains experience and shipper acceptance. Present authority is therefore required to set rates for the entire United States so the Conference can respond to customer needs promptly and discourage its members and other competitors from serving points adjacent to those it is authorized to serve. Competition of this sort would be inconsistent with a stable trading environment.
9. At least 120 days' notice of member line services not covered by the Conference tariff is necessary because member lines should share all of their new service plans with the Conference instead of developing them unilaterally. Cooperation is what conference membership is all about.

#### *The Protestants*

Seatrain and the Bureau of Investigation and Enforcement oppose approval because:

1. It is not enough that interior point service be generally useful to the shipping public; it must be demonstrated that a *conference* service is necessary to produce the benefits in question. JKAG has not done this.
2. There is no evidence of present rate or service instability in the JKAG trade which requires an extension of the Conference's price-fixing authority.
3. Although JKAG tonnage has declined since Pacific Coast intermodal service began, there is no evidence that the JKAG carriers are operating at a loss or at injurious utilization levels.
  - a. All-water cargo losses have been offset by the large cargo gains of the Trans-Pacific Freight Conference to which the JKAG lines also belong. JKAG vessels may also be carrying cargo from Hong Kong, or the Philippines which offsets any loss of Japan/Korea cargo.
  - b. There is no significant interior point competition in the trade. The intermodal service offered by Lykes Bros. and Evergreen is restricted to Gulf Coast ports and Evergreen's carryings have been insubstantial. The new intermodal tariffs filed by Sea-Land, Zim, Yangming, U.S.

Lines, Maersk Line and TPFC are not necessarily attracting any cargo.

4. Approval would prevent intermodalism from developing in the JKAG trade. The proponent lines have intentionally favored their TPFC cargo over their JKAG cargo and generally demonstrated a disinterest in developing successful intermodal services through Atlantic and Gulf Coast ports.
  - a. JKAG's proposed price reductions will not be large enough to match the better rail divisions and multiple container discounts available from MLB carriers.
  - b. No convincing evidence of shipper support has been presented for the limited type of intermodal service proposed by JKAG.
  - c. A Conference intermodal service using Plan II 1/2 railroad rates would further discourage railroads from negotiating lower inland rate divisions with nonconference carriers or shippers.
  - d. The Agreement contains needlessly restrictive provisions such as the 120-day notice clause.
5. Further evidence must be adduced before the Commission can conclude that a sufficient transportation need public benefit or regulatory purpose is present.<sup>16</sup>

#### DISCUSSION

Many of JKAG's arguments were considered and found wanting on November 29, 1978 when Agreement No. 3103-67 was conditionally disapproved. The Conference's more recent submissions tend to be repetitious and sparse on substantiating facts, as are Seatrain's assertions. Although the further hearing has produced updated statistics concerning cargo trends, a proposal to reduce JKAG's anticipated intermodal rates by \$8.00 per ton, and a description of significant competitive developments in the JKAG and TPFC trades, this information is insufficient to establish the presence of a serious transportation need, important public benefit or valid regulatory purpose justifying control by JKAG of intermodal services in this trade.

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<sup>16</sup> Seatrain and the Bureau of Investigation and Enforcement submitted contingent hearing and discovery requests on September 25, 1979 and October 1, 1979, respectively. Although disparaging the quality of evidence JKAG had introduced and claiming that the Agreement was unapprovable under the circumstances, the Protestants nonetheless stated that they wished to further examine current trade conditions in the event the Commission was not inclined to disapprove the Agreement. These requests do not comply with the procedures established in the July 20, 1979 Order of Investigation either in terms of specificity or chronology and will be denied. The burden of going forward in this investigation is on JKAG and, if Protestants believe that particular aspects of JKAG's case are factually incorrect or inadequate, the burden shifts to them to clearly demonstrate these deficiencies to the Commission. Discovery and hearing requests must be unequivocal, specific and immediate. They are not devices by which litigants may establish a hedge position.

Conference control of intermodal rates and practices cannot be justified exclusively on the grounds that through intermodal service generally benefits shippers and the commerce of the United States. Individual conference members and nonconference carriers can also provide this type of transportation service. Some particular need for conference control over interior point service is necessary. *Seatrains International, S.A. v. Federal Maritime Commission*, 598 F.2d 289 (D.C. Cir. 1979). Similarly, the probability that an anticompetitive practice (that is, a conference intermodal tariff) will actually be implemented cannot alone justify the practice. *Seatrains International S.A. v. Federal Maritime Commission*, 584 F.2d 546 (D.C. Cir. 1978). Another circular, and therefore unacceptable, argument advanced by JKAG concerns the advantages of an intermodal service subject to self-policing. Effective self-policing is a statutorily mandated aspect of all conference agreements. The mere fact that approval of Agreement No. 3103-67 would result in the self-policing of JKAG's proposed intermodal service is not sufficient to justify approval.<sup>17</sup>

The most meaningful portion of JKAG's case pertains to actual operating conditions in the trade, but even this information does not support the broad authority requested by the Conference.

The fact that the tonnage handled by JKAG lines has declined since 1971 is not itself proof that these lines are economically threatened, needed vessel capacity is being withdrawn from the trade, regular port-to-port service is being disrupted or other benefits inherent in the conference system are likely to become unavailable to the shipping public.<sup>18</sup> Even with the resignation of Sea-Land and Zim Israel from JKAG early in 1980, this record does not support a finding that the continued availability of frequent, dependable service in sufficient quantity and variety to meet the needs of the trade is jeopardized by the absence of conference intermodal authority.<sup>19</sup>

Because OCP and certain MLB cargoes move to inland destinations only under separate inland bills of lading and at the shipper's expense, it is unnecessary for JKAG to obtain additional ratemaking authority to "meet" these types of competition. JKAG's position relative to OCP or MLB services is controlled by the relationship between the Pacific gateway rates and JKAG's all-water rates to Atlantic and Gulf Coast

<sup>17</sup> If port-to-port rebates by JKAG members are going undetected because they involve inland transportation concessions, this suggests that the Conference's current self-policing practices may be inadequate.

<sup>18</sup> JKAG has not revealed its share of the all-water market for containerized cargo, projected its share of the intermodal cargo market, or furnished vessel utilization or revenue information.

<sup>19</sup> The Shipping Act, 1916, is premised on the Congressional finding that steamship conferences typically produce important transportation benefits, but it does not follow that the expansion or even preservation of any particular arrangement will always serve the public interest. This is especially true when a conference complains of pressure from naturally competitive forces arising outside of its own trade area.

ports.<sup>20</sup> Yet JKAG has chosen not to compete by means of rate reductions and it is apparent that JKAG's previous intermodal tariff was designed more to protect the level of the Conference's all-water rates than to attract new intermodal traffic. See Grey Affidavit II at 20, III at 18-19. When faced with inflexible pricing decisions by participating railroads, JKAG refused to reduce the ocean portion of its intermodal through rates and limited its intermodal service to points considerably distant from the port communities to which the majority of its cargo has historically been destined.<sup>21</sup>

Accordingly, there is no basis for concluding that JKAG's limited and indirect intermodal service -- at prices which would at best equal those of MLB -- can attract sufficient cargo to materially affect the Conference's fortunes. This is especially true when the proposed JKAG rail/water service via Atlantic Coast ports is compared with the newly established interior point services of Pacific Coast carriers. No matter how much JKAG promotes its indirect route to Chicago, it will be hard pressed to compete with the much shorter service available from Pacific gateways.<sup>22</sup>

In short, JKAG has not justified its Agreement. A proposal to provide an intermodal service from the Far East to any inland point in the United States via Atlantic and Gulf Coast ports<sup>23</sup> and to prevent member lines from instituting intermodal service innovations on statutory notice<sup>24</sup> is unduly broad in its potential for anticompetitive results

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<sup>20</sup> See Grey Affidavit II at 14. A shipper wishing cargo delivered to Cleveland, Ohio via an OCP, MLB or JKAG all-water service must compute its total transportation costs the same way in each case. The ocean carrier's tariff rate is determined and added to an inland carrier's tariff rate for separately arranged transportation from the applicable port terminal to Cleveland.

<sup>21</sup> Carriers which offer competitively priced through rates to interior points within 100-300 miles of Atlantic and Gulf Coast ports are most likely to reap the fruits of intermodalism in the JKAG trade. See Grey Affidavit III Appendix G (Marubeni Corporation). However, shorter interior point routings at viable rates could have the effect of enticing port-to-port shippers away from JKAG's all-water service and putting downward pressure on its all-water rates.

<sup>22</sup> This conclusion has a double-edged impact. It discredits the claim that the proposed Agreement will be JKAG's salvation in its struggle with independent lines for containerized cargoes and also indicates that the limited intermodal service JKAG initially proposes may not significantly impair the competitive opportunities of West Coast intermodal carriers.

<sup>23</sup> JKAG does not propose an intermodal service via Gulf ports or a service destined to any community located west of the Mississippi River or east of the Allegheny Mountains. There are no transportation benefits associated with JKAG control over intermodal practices in large areas of the country which the conference does not wish to serve or from which shipper demand will not develop (e.g. destination points west of the Continental Divide).

<sup>24</sup> Article 1(b) of Agreement No. 3103-67 allows JKAG members to commence individual interior point services of a type not offered by the Conference only after providing JKAG 120 days advance notice of their decision, whereas section 18(b) of the Shipping Act, 1916 (46 U.S.C. 817(b)) and the Commission's tariff regulations (46 C.F.R. Part 536) allows public tariffs covering new services to become effective 30 days after filing. The Commission has held that any requirement for advance notice to a conference other than customary tariff filing is unreasonable because it hinders the development of intermodal innovations. *American West Africa Freight Conference (Agreement No. 7680-36)*, 18 S.R.R. 339, 342 (1978). The present record includes no information supporting JKAG's assertion that advance notice of member line innovations is necessary to accomplish Agreement No. 3103-67's basic objective of ameliorating excess rate competition. The availability of 120 days advance notice is not

and has insufficient potential for transportation benefits. The public interest in developing intermodal transportation does not extend to services of unjustified anticompetitive scope which would unnecessarily impair the full economic fruition of technological innovations.

Conference control of intermodal ratemaking is most likely to provide public benefits not available from intermodal service provided by individual carriers and can therefore be justified under section 15, when such authority will result in efficient geographical routings; operational economies and improvements (e.g., faster voyages and turnarounds, better utilization of vessels, better cargo handling methods); more regular and reliable service; and commercially attractive rates covering a wide variety of commodities. Such control may also be justified when there is evidence of record concerning cargo availability and service trends which make it clear that to deny the conference its requested intermodal authority will inevitably jeopardize the regular and dependable service currently provided by the conference. Finally, the Commission must be satisfied that there is an absence of predatory intent on the part of the conference or particular anticompetitive effects reaching beyond the generalized prohibition against price-fixing. When reliable *evidence* establishes the presence of these factors, section 15 favors the extension of the regulated, open conference system prescribed by the Shipping Act to include intermodal transportation naturally associated with the port-to-port trade served by an existing conference.

As with other types of joint through traffic, an effective conference intermodal service will ordinarily be priced so as to offer the shipper a discount from otherwise applicable combination rates and provide the carrier with cargo it would not otherwise receive at its port-to-port rates. Based upon the present record, the JKAG trade does not appear suited for the implementation of a broad-based, intermodal service. In any event, JKAG has failed to demonstrate that it would provide such a service.

**THEREFORE, IT IS ORDERED,** That Agreement No. 3103-67 is disapproved pursuant to section 15 of the Shipping Act, 1916; and **IT IS FURTHER ORDERED,** That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING  
*Acting Secretary*

## DOCKET NO 79-74

## JAPAN/KOREA ATLANTIC AND GULF CONFERENCE (JKAG)

## INTERMODAL AMENDMENT (AGREEMENT NO. 3103-67)

## ORDER OF DISAPPROVAL

*Commissioner Richard J. Daschbach, concurring.*

I concur only in the result of the Commission's June 17, 1981 Order disapproving JKAG's application for intermodal ratemaking authority (Agreement No. 3103-67). The proponents have offered little probative evidence to support their request for intermodal authority since the Commission conditionally disapproved their proposed agreement on November 29, 1978.

However, I cannot subscribe to the Commission's rationale for disapproval in its June 17 Order, which would establish criteria for the approval of conference intermodal agreements which stifle rather than stimulate the growth of intermodalism in the U.S. foreign commerce, extend beyond the scope of the Commission's statutory authority, and conflict with previous Commission decisions (see, e.g., *Pacific West-bound Conference (Agreement No. 57-96 - Extension of Intermodal Authority)*, 19 F.M.C. 291 (1976)).

My views on the principles which should guide the Commission's evaluation of applications for conference intermodal authority are expressed in greater detail in my dissent to the Commission's June 8, 1981 Order conditionally disapproving the American West African Freight Conference's (AWAFC) extension of intermodal authority (Agreement No. 7680-39). These principles underscore the need for different approaches to AWAFC's request for intermodal authority, which the Commission should have approved, and JKAG's instant application.

My dissent to the AWAFC Order stated that: "it is unnecessary for a conference to demonstrate that it is the *best* vehicle for the development of intermodalism in a given trade if it can make the showing that its intermodal authority is more likely to promote than impede intermodal traffic in the trade. Such a showing is made more compelling if the conference demonstrates that intermodal service will be necessary to preserve its continued competitive viability."

JKAG has failed to make any such showing, and its request for intermodal authority is thus clearly distinguishable from the request of the American West African Freight Conference in Agreement 7680-39. JKAG's capacity to develop a viable intermodal service in the trade has been rendered suspect by its failure to use its intermodal authority during the five-year period (1973-1978) of its existence.

Furthermore, the suspicion that JKAG's intermodal authority might impede rather than stimulate the growth of intermodal traffic is height-



ened by its proposed 120-day "notice" restriction on member lines wishing to offer intermodal services not offered by the conference. The Commission has consistently rejected such provisions in the past due to their pre-emptive nature and the potential they create for a conference to "sit" on its intermodal authority and frustrate its member lines' efforts to develop intermodal service in a given trade. AWAFc had no such provision in its proposed agreement.

Further suspicion is cast upon JKAG's ability to foster intermodal growth in the trade due to the membership of all JKAG's carriers in the larger Trans-Pacific Freight Conference (TPFC) and the consequent possibility that they are more deeply committed to TPFC's new intermodal service. Although no single conference must prove that it is the *best* vehicle for developing intermodalism in a given trade, the JKAG carriers' participation in TPFC's active intermodal service clearly distinguishes their request for intermodal authority from that of the American West African Freight Conference, whose member lines have no such divided loyalties.

Finally, there is no evidence that JKAG's competitive viability will be seriously impacted by denial of its request for intermodal authority.

These points alone form a substantial basis for disapproving Agreement No. 3103-67. However, the Commission's June 17 Order incorporates most of the same complex and unrealistic proposed criteria for approval contained in the AWAFc Order of Conditional Disapproval. These criteria are so harsh that, if used as a precedent for future Commission action, they could prevent approval of intermodal rate-making authority for any conference.

These criteria also exceed the boundaries of the Commission's statutory authority. The proposed requirement that conferences demonstrate that they will offer "commercially attractive rates covering a wide variety of commodities" (see Order at pp. 14-15) would invest the Commission with authority over rates in the U.S. foreign commerce which we statutorily do not possess. The condemnation of the commercial feasibility of JKAG's proposed geographical routings (see Order at pp. 12-14) second-guesses the parties' judgment and implies Commission authority over route selection and licensing, another authority we do not possess.

The Commission's June 17 Order reaches the only reasonable result possible in the instant case - disapproval. However, the Order's cumbersome rationale for arriving at this result shows that the Commission has not yet established fair, reasonable, and relevant criteria for evaluating applications for intermodal authority.

**FEDERAL MARITIME COMMISSION**

(46 C.F.R. PART 510; DOCKET NO. 80-44)  
**LICENSING OF INDEPENDENT OCEAN FREIGHT  
FORWARDERS  
PUBLICATION OF APPLICATIONS**

*June 17, 1981*

- ACTION:** Discontinuance of proposed rulemaking
- SUMMARY:** On July 7, 1980, the Federal Maritime Commission published a notice of proposed rulemaking (46 F.R. 45599) to eliminate the requirement of publishing in the Federal Register notice of the filing of applications for independent ocean freight forwarder licenses. After full consideration of the issues and comments from interested parties, the Commission has decided not to adopt the proposed rule.
- DATE:** Effective June 22, 1981

**SUPPLEMENTARY INFORMATION:**

This proceeding was instituted by Notice of Proposed Rulemaking, published on July 7, 1980, to eliminate from section 510.6 of the Commission's General Order 4 (46 C.F.R. 510) the requirement of publishing in the *Federal Register* notice of the filing of applications for independent ocean freight forwarder licenses. Section 510.6 currently reads as follows:

**510.6 Publication of applications.**

After application has been filed, the Commission shall cause to be published in the FEDERAL REGISTER a notice of the filing of each application, stating the name and address of the applicant and if the applicant is a corporation, association, or partnership, the names of the officers or members thereof. Parts 1 and 2 of the application shall be public information and available for inspection at the office of the Commission in Washington, D. C.

In its Notice of Proposed Rulemaking, the Commission stated that there is no statutory requirement for such publication in the *Federal Register* and that the rule requiring such publication had been adopted to allow interested parties to comment on the eligibility of applicants for independent ocean freight forwarder licenses. The Commission also stated that, since interested parties seldom commented on such applications and in an effort to eliminate an apparently unnecessary regulation and to improve cost-effectiveness, it was proposed to delete the *Federal Register* notice requirement.

The proposed rulemaking generated four comments. Two individual forwarders and one forwarder association (I.C. Harris & Company, Arthur J. Fritz & Co., and the Customs Brokers and Forwarders Association of Miami, Inc.) oppose deletion of the *Federal Register* notice of applications. In general, those commentators believe that application notices in the *Federal Register* constitute an important source of information which enables the freight forwarder industry to monitor prospective entrants into the industry. Those commentators point out that the notice requirement serves to protect the integrity of the ocean freight forwarder profession by enabling knowledgeable individuals to inform the Commission of facts concerning the eligibility of particular applicants, which facts may not otherwise come to light, but which would be of value to the Commission in processing applications for licenses.

As to the issue that few comments have been received as a result of the notice requirement, one of the commentators explained that most applicants have established themselves through years of experience while in the employ of other freight forwarders and may be worthy of entrance into the profession under their own licenses. Such applicants naturally would not generate comment. It is only in the case of the odd applicant who, perhaps unknown to the Commission, should not be granted a license that the notice requirement serves its intended purpose. The commentator also points out that it is important just to have the opportunity to inform the Commission concerning applicants for licenses.

The fourth and final commentator, the National Customs Brokers & Forwarders Association of America, Inc., did not object to the proposal *per se*. However, it recommended that the same information currently published under the notice requirement be made available to it so that it has an opportunity to furnish information, when available, that may be helpful in the processing of applications.

After thorough consideration of the comments received, it is the Commission's belief that the proposal to eliminate the publication of applicants in the *Federal Register* should not be adopted and that any alternate method of making this information available to the public would place a greater burden upon the staff. Accordingly, this proposed rulemaking proceeding will be discontinued.

**THEREFORE, IT IS ORDERED**, That the proposed rulemaking in Docket No. 80-44 is hereby discontinued; and

IT IS FURTHER ORDERED, That notice of this Order be published in the *Federal Register*.

By the Commission.\*

(S) JOSEPH C. POLKING  
*Acting Secretary*

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\**Commissioner Daschbach dissents.* I would delete the requirement that filing of applications for independent ocean freight forwarders licenses be published in the *Federal Register* and would instead adopt the proposal of the National Customs Brokers and Forwarders Association of America, Inc. that a monthly list of such applications be furnished to interested parties by the Commission on a subscription basis.

**FEDERAL MARITIME COMMISSION**  

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**DOCKET NO. 80-81****KELCO, DIVISION OF MERCK & COMPANY****v.****JOHNSON LINE**  

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**NOTICE***June 25, 1981*  

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Notice is given that no appeal has been taken to the May 20, 1981 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  
*Acting Secretary*

## FEDERAL MARITIME COMMISSION

DOCKET NO. 80-81

KELCO, DIVISION OF MERCK &amp; COMPANY

v.

JOHNSON LINE

## SETTLEMENT APPROVED; COMPLAINT DISMISSED

*Finalized June 25, 1981*

This is a motion to approve a settlement agreement between the complainant, Kelco, Division of Merck & Company, a shipper, and the respondent, Johnson Line, a common carrier by water between United States Pacific Coast Ports and Ports in the United Kingdom, Ireland, Scandinavia, Continental Europe and the Mediterranean. The motion, filed by respondent on behalf of both parties, also asks that, upon approval of the settlement, the complaint be dismissed.

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

## BACKGROUND

On November 26, 1980, Kelco filed a complaint against Johnson Line alleging that the respondent violated section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3),<sup>1</sup> in connection with two shipments, described in the bills of lading as synthetic resin, which Johnson Line was alleged to have carried from Los Angeles, California, to Rotterdam, The Netherlands, on November 8, 1978, and January 8, 1979.<sup>2</sup>

The complaint asks for reparation in the amount of \$15,722.67, with interest, pursuant to the provisions of section 22 of the Shipping Act, 1916, 46 U.S.C. 821.<sup>3</sup> The amount sought for the first shipment is

<sup>1</sup> Section 18(b)(3) provides as pertinent:

No common carrier by water in foreign commerce or conferences of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

<sup>2</sup> There were two crates of wooden office furniture, weighing 200 pounds and measuring 40 cubic feet included in the second shipment. These two crates are not at issue in this proceeding.

<sup>3</sup> Section 22 was not mentioned in the complaint, but it is not necessary to do so explicitly. All complaints are deemed to involve section 22. See *Saipan Shipping Company, Inc. v. Island Navigation Co., Ltd.*, 18 SRR 223, 227 (1978). Section 22 provides, as pertinent:

\$7,584.04. The alleged overcharge for the second shipment is \$8,138.62.<sup>4</sup>

Each shipment consisted of two forty-foot containers packed with drums of products described on accompanying packing lists as one or another type of Kelzan, Kelcoloid, Dariloid, Keltone, Kelcosol or Kelgin. There were 720 drums weighing 38.565 kilos and measuring 71.557 cubic meters in the first shipment. In the second shipment there were 444 drums weighing 37.771 kilos and measuring 82.233 cubic meters.

The complaint alleges that the various trademark products described in the packing lists are, in fact, natural, and not synthetic, resins. Attached to the memorandum of argument annexed to the complaint are documentary materials in support of the contention that the shipments were improperly rated as synthetic resins.

At the time of both shipments the ocean freight rate on synthetic resins was \$292.25 W.<sup>5</sup> At the same time, there was an emergency rate of \$111.00 W for natural resins.<sup>6</sup> Also, at the same time, there was a rate of \$206.75 W for alginates.<sup>7</sup>

In its answer of December 15, 1980, Johnson Line denied that it was the owner or operator of the vessel which carried the first shipment. It also denied that there was any overcharge on the second shipment and therefore no violation of statute and no liability to complainant. Prior to the time the complaint was filed, Johnson Line rejected Kelco's claims because of the Pacific Coast European Conference's tariff rule (Rule 19.1) barring consideration of claims requiring verification of cargo description before the cargo leaves the carrier's possession. In apparent awareness that a tariff rule of this type, which, in effect, infringes on the rights granted by section 22 is invalid insofar as it governs filing of claims before the Commission, *Kraft Foods v. Federal Maritime Commission*, 538 F.2d 445 (D.C. Cir. 1976), Johnson Line does not rely on this rule in its defense of the complaint.

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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 reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. 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.

<sup>4</sup> The computation made by complainant incorrectly failed to include a currency adjustment factor of 11.50%, then in effect. Had it been included the amount of reparation sought would have been reduced to \$7,596.13.

<sup>5</sup> Pacific Coast European Conference Tariff No. FMC-16, 2nd revised p. 187-A. Item No. 581.1060.

<sup>6</sup> *Id.* Item No. 292.2400.

<sup>7</sup> *Id.* 7th revised p. 89, Item No. 581.990. The trademark items are alginates. The documentary material attached to the argument purports to show that alginates are natural resins.

## THE SETTLEMENT AGREEMENT

Confronted with the uncertainty and expense of litigation of at least three complex factual issues some of which would involve the need for cross-examination of expert witnesses,<sup>8</sup> the parties agreed to settle the proceeding. Following the conditions enunciated by the Commission for settlement of section 18(b)(3) complaint proceedings in *Organic Chemicals (Glidden-Durkee) Division of SCM Corporation v. Atlantrafik Express Service*, 18 SRR 1536a (1979) (*Organic Chemicals*), the parties submitted a signed settlement agreement entitled Agreement of Settlement and Mutual Release<sup>9</sup> and a Joint Affidavit<sup>10</sup> setting forth the reasons for the settlement and attesting that the settlement is a bona fide attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, as amended.

Under the terms of the settlement agreement, Johnson Line will refund to Kelco the difference between freight charges based on the synthetic resin rate and the natural resin rate for the second shipment (giving effect to the currency adjustment factor, see n. 4, *supra*). Thus, Johnson Line agrees to pay \$7,596.13 in full settlement of the two claims which comprise the complaint, without admitting liability or admitting to any violation of law.<sup>11</sup>

## DISCUSSION AND CONCLUSION

In *Organic Chemicals*, the Commission reaffirmed the principle that the law encourages settlements and that every presumption is indulged in that favors their correctness, fairness and validity. However, in section 18(b)(3) cases the Commission insisted upon a balancing of the policy of settlement against the possibility of discriminatory rating practices which might result if settlements are conditionally approved in the absence of a finding of violation. Nevertheless the Commission enunciated a policy that parties should have the opportunity to settle disputes but emphasized that in order to prevent abuses, certain conditions had to be met. Those conditions are, *Organic Chemicals, supra*, 18 SRR at 1539-1540:

1. A signed agreement is submitted to the Commission;
2. The parties file with the settlement agreement an affidavit setting forth the reasons for the settlement and attesting that

<sup>8</sup> Those issues are: (1) whether the respondent was the owner or operator of the vessel which carried the first shipment; (2) whether the commodity actually carried was a synthetic or natural resin; and (3) whether the commodity actually carried, if not a synthetic resin, was a natural resin or algin.

<sup>9</sup> The Agreement of Settlement and Mutual Release is attached as Appendix I.

<sup>10</sup> The Joint Affidavit is attached as Appendix II.

<sup>11</sup> If not approved, the settlement agreement will be null and void and of no effect whatsoever for any purpose.



the settlement is a *bona fide* attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, or of the Intercoastal Shipping Act, 1933, as amended, as the case may be;

3. The complaint on its face presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable.

The signed agreement and affidavit meet the requirements of *Organic Chemicals*. See also, e.g., *Ellenville Handle Works, Inc. v. Far Eastern Shipping Company*, 23 F.M.C. 707 (1981); *Celanese Corporation, Inc. v. The Prudential Steamship Company*, 23 F.M.C. 1 (1980). I find that the agreement reflects a rational, valid and fair solution of the dispute and obviates the need for further extensive and expensive litigation. The complaint presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable without such further litigation. It appears that the settlement is a *bona fide* attempt by the parties to terminate the controversy and not a device to obtain transportation at other than the applicable rates or charges or otherwise circumvent the requirements of the Shipping Act, 1916, as amended.

Accordingly, it is ordered that the settlement be approved and the complaint be dismissed with prejudice. It is further ordered that within ten (10) days after this order becomes final the parties file an affidavit of compliance with the terms of the settlement.

(S) SEYMOUR GLANZER  
*Administrative Law Judge*

APPENDIX I  
BEFORE THE FEDERAL MARITIME COMMISSION

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KELCO, DIVISION OF MERCK &  
COMPANY

v.

Docket No. 80-81

JOHNSON LINE

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AGREEMENT OF SETTLEMENT AND  
MUTUAL RELEASE

IT IS HEREBY AGREED, by and between the undersigned, Kelco, Division of Merck & Company ("Kelco"), Complainant in Commission Docket No. 80-81, and Rederiaktiebolaget Nordstjernan ("Johnson Line"), Respondent in said Docket, that Docket No. 80-81 will be terminated by mutual accord on the terms and conditions hereinafter set forth and for the reasons stated in the accompanying Memorandum in Support of Settlement and Motion to Dismiss:

1. Johnson Line will pay to Kelco the sum of Seven Thousand Five Hundred and Ninety Six dollars and Thirteen cents (\$7,596 &  $\frac{13}{100}$ ).

2. Kelco will, in consideration of the action of Johnson Line as provided in paragraph "1" above, withdraw its Complaint in Commission Docket No. 80-81, and will refrain from further pursuing its claims in this proceeding.

3. Neither Kelco, Johnson Line, nor any successor or assignee in interest of either such party, will initiate any new claim against the other party arising in connection with the complaint in this proceeding except for enforcement of any provision of this Agreement of Settlement; and Kelco and Johnson Line each hereby releases the other from, without limitation, all sums of money, accounts, actions, suits, proceedings, claims, and demands whatsoever which either of them at any time had or has up to the date of this Agreement of Settlement against the other for or by reason of any act, cause, matter, or thing arising from the transactions giving rise to this proceeding.

4. It is understood and agreed that this Agreement of Settlement and Mutual Release is in full accord and satisfaction of all disputed claims in this proceeding, Docket No. 80-81.

5. This Agreement of Settlement will be submitted for any necessary approval to the appropriate governmental authorities, and will become effective and binding upon the parties when such final approval is obtained.

6. It is further understood and agreed that this Agreement of Settlement is in no sense to be understood as constituting any admission of liability of any party, or of any admission of any violation of law by any party.

7. This Agreement of Settlement and Mutual Release constitutes the entire agreement between the parties.

8. In the event this Agreement of Settlement and Mutual Release is disapproved by the Commission, or is approved on conditions which are unacceptable to either party, then this Agreement will be null and void *ab initio* and of no effect whatsoever for any purpose.

DATED: April 2, 1981

KELCO, DIVISION OF MERCK & COMPANY

BY

*Title: Manager of Distribution  
and Sales Service*

REDERIAKTIEBOLAGET  
NORDESTJERNAN  
("JOHNSON LINE")

BY

*Title: Vice President,  
Axel Johnson Corp.*

APPENDIX II  
THE FEDERAL MARITIME COMMISSION RECEIVED

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KELCO, DIVISION OF MERCK &  
COMPANY

v.

Docket No. 80-81

JOHNSON LINE

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## JOINT AFFIDAVIT

The undersigned, A. W. Risch, and William F. Horton, being respectively the Manager of Distribution and Sales Service of Kelco, Division of Merck & Company and Vice President, Axel Johnson Corp., of Rederiaktiebolaget Nordstjernen ("Johnson Line"), depose and state as follows:

1. This affidavit is made in connection with the accompanying Agreement of Settlement and Mutual Release in this proceeding.

2. Said Agreement of Settlement in Commission Docket No. 80-81 is a reasonable commercial settlement of this proceeding.

3. The complaint in this proceeding, on its face, presents a genuine dispute, raising genuine issues, and the facts and information critical to the resolution of the dispute are not reasonably ascertainable without further lengthy and costly litigation.

4. The above-mentioned Agreement of Settlement is a *bona fide* attempt to avoid the time and expense of such litigation and to terminate this controversy; and said Agreement is not a device to obtain transportation at other than the proper rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, as amended.

(S) A.W. RISCH

*Name: A. W. Risch*

Sworn to before me, a Notary Public, this 2nd day of April, 1981.

(S) LINDA L. WEISHOHN

*Notary Public**My Commission Expires: Dec. 16, 1983*

[SEAL]

(S) WILLIAM F. HORTON  
*Name: William F. Horton*

Sworn to before me, a Notary Public, this 10th day of April, 1981.

(S) JOHN F. JACOBS  
*Notary Public*  
*My Commission Expires: October 7, 1982.*

[SEAL]

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-76**  
**HEIDELBERG EASTERN, INC.**

v.

**CONTAINER OVERSEAS SERVICE, INC. AND**  
**CONTAINER OVERSEAS AGENCY, INC.**

**ORDER ADOPTING INITIAL DECISION**

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*June 26, 1981*

This proceeding was instituted by the filing of a complaint by Heidelberg Eastern, Inc. against Container Overseas Service, Inc. and Container Overseas Agency, Inc. alleging an overcharge on a shipment of "Photographic Equipment" transported from New York to Denmark and seeking reparations in the amount of \$9,194.00. On May 7, 1981 Chief Administrative Law Judge John E. Cograve issued an Initial Decision finding for Complainant and awarding reparation in the amount of \$9,794.\* No exceptions to the Initial Decision have been filed. The Commission, however, has determined to review the Initial Decision pursuant to Rule 227(d) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.227(d)).

Upon review, the Commission has determined that the Presiding Officer's findings and conclusions are correct. The Initial Decision will accordingly be adopted with the modification discussed below.

The Presiding Officer did not include interest on the reparation awarded. In order to make the Complainant "whole" and compensate it for the loss of the use of freight charges improperly assessed, the Commission believes that interest on the amount of reparations awarded should have been included as an element of damages. *U. S. Borax & Chem. Corp. v. Pac. Coast European Conf.*, 11 F.M.C. 451, 470 (1968). The Commission will therefore modify the Presiding Officer's award to include interest at a rate of 12% per annum from November 28, 1978, the date the excess freight charges were paid by Complainant. *Allied Stores Int., Inc. v. United States Lines, Inc.*, 22 F.M.C. 839 (1980).

**THEREFORE, IT IS ORDERED,** That the Initial Decision served on May 7, 1981 in this proceeding is adopted and made a part hereof.

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\* The Presiding Officer inadvertently stated the improperly assessed rate to be "\$158.00 per cubic foot." The evidence of record indicates that the rate assessed was \$158.00 per 40 cubic feet.

FURTHER, IT IS ORDERED, That Respondents pay to the Complainant Heidelberg Eastern, Inc., reparation in the amount of \$9,794 plus interest at the rate of 12% per annum from November 28, 1978.

By the Commission.

(S) JOSEPH C. POLKING  
*Acting Secretary*

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-76**  
**HEIDELBERG EASTERN, INC.**

v.

**CONTAINER OVERSEAS SERVICE, INC. AND**  
**CONTAINER OVERSEAS AGENCY, INC.**

---

Respondent found to have violated section 18(b)(3) of the Shipping Act. Reparation awarded.

*Albert S. Lefkowitz* for complainant.

*Janison Foreman* for respondents.

**INITIAL DECISION<sup>1</sup> OF JOHN E. COGRAVE,**  
**ADMINISTRATIVE LAW JUDGE**

*Adopted June 26, 1981*

Complainant, Heidelberg Eastern, Inc., charges respondents, Container Overseas Services, Inc., (COS) and Container Overseas Agency, Inc., with violations of sections 18(b) and 18(b)(3) of the Shipping Act, 1916, which are said to arise out of a shipment of "Photographic Equipment" from New York to Denmark.<sup>2</sup> Respondent Container Overseas Services requested and was granted a thirty-day extension of time within which to answer the complaint. In my notice granting the extension, I directed the parties to consult with each other and attempt to arrive at a stipulation of fact and authenticity of documents which would allow the case to be handled by the shortened procedure provided in Subpart K of the Commission's Rules of Practice and Procedure. (46 C.F.R. 502.181 *et seq.*) The consultations were to be initiated by respondent, and the parties were to notify me by December 15, 1980, of the results of their consultations.

On December 22, 1980, counsel for complainant advised me that he had not heard from respondent but that he saw no reason why the matter could not be submitted on documents alone. In a telephone conversation with Mr. Janison Foreman, the Vice President of COS, I

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<sup>1</sup> 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).

<sup>2</sup> The shipment in question was in foreign commerce, and thus section 18(a), which applies only to the offshore domestic commerce, is inapplicable here. Complainant appears to have realized the error and has abandoned the 18(a) allegation on brief.



was told that attempts were made to discuss the case with counsel for complainant but they were unsuccessful and that he did not have an attorney. Mr. Foreman also said that he was having difficulty gathering documentary evidence and that he would greatly appreciate being given time to put together his defense because he felt complainant was in error. All of this was confirmed by letter. On February 19, 1981, I issued a procedural notice which provided:

1. By March 16, 1981, complainant shall file a memorandum of facts and of arguments separately in compliance with Rule 182 . . . .
2. By March 27, 1981, respondent shall file its answer to the complainant and its memorandum of facts and of arguments separately stated in compliance with Rule 183 . . . .
3. By April 10, 1981, complainant shall file its reply memorandum in compliance with Rule 184 . . . .

Complainant has complied with my order, but respondent has not. I have heard nothing further from respondent to date. The following facts are established by the documentary evidence submitted by complainant.

On November 24, 1978, Container Overseas<sup>3</sup> accepted two containerized shipments of photographic equipment and issued a bill of lading bearing the heading "Container Overseas Service, Inc." The bill of lading described the shipment as two "40' containers" of "Photographic Equipment" -- 11500#, measuring 4000 cu. ft. The bill was numbered 0592/0593,<sup>4</sup> but was not freighted. Container Overseas charged complainant \$16,194.00 or \$158.00 per cubic foot. Complainant paid the total freight.

Attached to the complaint is a page from the Container Overseas Services, Inc., Freight Tariff No. 2, showing that the rate on Photographic Equipment from U.S. Atlantic ports to Scandinavian ports was at the time of the shipment in question \$64.00 per 40 cu. ft. At 4000 cubic feet, the total freight should be \$6,400, not the \$16,194 paid by complainant. Respondents have offered no explanation for their application of the \$158.00 rate. They have offered no evidence to show either that the \$158.00 was applicable or that the \$64.00 rate was inapplicable.

<sup>3</sup> Complainant uses "Container Overseas" to mean both respondents, Container Overseas Service and Container Overseas Agency.

<sup>4</sup> There also is attached to the complaint a copy of the Shipper's Export Declaration showing the shipment to be "Photographic Equipment."

Accordingly, on the record before me I find that respondents have violated section 18(b)(3) of the Shipping Act. Complainant is hereby awarded reparation of \$9,794.<sup>5</sup>

(S) JOHN E. COGRAVE  
*Administrative Law Judge*

Washington, D.C.  
May 7, 1981

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<sup>5</sup> Complainant actually asks for only \$9,194.00, apparently because a sampling of competitive tariffs showed the rates on Photographic Equipment to range from \$65.00 to \$70.00. However, section 18(b)(3) requires that the proper tariff rate be applied -- in this case the \$64.00 rate.

**FEDERAL MARITIME COMMISSION**

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DOCKET NO. 81-21

BEKAERT STEEL WIRE CORPORATION

v.

SEA-LAND SERVICE, INC.

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**ORDER ADOPTING INITIAL DECISION***June 26, 1981*

This proceeding was instituted by the filing of a complaint by Be-kaert Steel Wire Corporation against Sea-Land Service, Inc. alleging an overcharge and seeking reparations on a shipment of empty bobbins (spools) carried by Sea-Land from New Orleans to Tokyo. On May 11, 1981 Chief Administrative Law Judge John E. Cogrove issued an Initial Decision finding for Complainant and awarding reparation in the amount of \$5,474.93. No exceptions to the Initial Decision have been filed. The Commission, however, has determined to review the Initial Decision pursuant to Rule 227(d) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.227(d)).

Upon review, the Commission has determined that the Presiding Officer's findings and conclusions are correct. The Initial Decision will accordingly be adopted with the modification discussed below.

The Presiding Officer did not include interest on the reparation awarded. In order to make the Complainant "whole" and compensate it for the loss of the use of freight charges improperly assessed, the Commission believes that interest on the amount of reparations awarded should have been included as an element of damages. *U.S. Borax & Chem. Corp. v. Pac. Coast European Conf.*, 11 F.M.C. 451, 470 (1968). The Commission will therefore modify the Presiding Officer's award to include interest at a rate of 12% per annum from August 18, 1980 and August 26, 1980, respectively, the dates the excess freight charges were paid by Complainant. *Allied Stores Int., Inc. v. United States Lines, Inc.*, 22 F.M.C 839 (1980).

**THEREFORE, IT IS ORDERED,** That the Initial Decision served on May 11, 1981 in this proceeding is adopted and made a part hereof.

**FURTHER, IT IS ORDERED,** That Respondent Sea-Land Service, Inc. pay to the Complainant Bekaert Steel Wire Corporation reparation in the amount of \$5,474.93 plus interest at the rate of 12% per annum on \$697.29 from August 18, 1980, and on \$4,477.64 from August 26, 1980.

By the Commission.

(S) JOSEPH C. POLKING  
*Acting Secretary*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 81-21

BEKAERT STEEL WIRE CORPORATION

v.

SEA-LAND SERVICE, INC.

Reparation awarded under section 18(b)(3) of the Shipping Act, 1916.

*Russell W. Deitch* for Bekaert Steel Wire Corporation.

*John M. Ridlon* for Sea-Land Service, Inc.

## INITIAL DECISION<sup>1</sup> OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

*Adopted June 26, 1981*

The Bekaert Steel Wire Corporation alleges that it was overcharged by Sea-Land Service, Inc., on a shipment of empty bobbins (spools) carried by Sea-Land from New Orleans to Tokyo. Complainant has requested and respondent has consented to the shortened procedure provided for in Subpart K of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.181 *et seq.*).

According to complainant, it was "due to an honest error in classification" that Schedule B number 207.0025 was used on the Shipper's Export Declaration instead of the correct Schedule B number of 657.2180. Number 207.0025 covers *wooden* bobbins while number 657.2180 covers *steel* bobbins. Based upon the Export Declaration classification, Sea-Land rated the shipment under Item No. 207.0025.80 of the Pacific Westbound Conference Tariff PWC-708A applicable to wooden bobbins as follows:

67.961 cu. meters at \$144.00/cu. meter	\$ 9,786.38
67.961 cu. meters at \$ 14.50/cu. meter	985.44
\$9,786.38 at 6% (currency surcharge)	587.18
Total	\$11,359.00

Complainant argues that what it actually shipped were steel bobbins which should have been rated under Item 657.2180.80 of the Conference's tariff as follows:

67.961 cu. meters at \$ 68.00/cu. meter	\$ 4,621.35
67.961 cu. meters at \$ 14.50/cu. meter	985.44

<sup>1</sup> 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).

\$4,621.35 at 6% (currency surcharge)

277.28

Total

\$ 4,884.07

Attached to its complaint are Bekaert's specification sheets showing the specifications of steel bobbins and a copy of the export declaration in which, although the bobbins are described as steel, the wrong Schedule B number was used.

In its answering memorandum, Sea-Land agrees that the articles actually shipped were empty steel bobbins. By affidavit, Richard B. Hopkins, a Sea-Land rate audit supervisor, "after being duly sworn," says that he is personally familiar with the claim of Bekaert and he has reviewed "all documentation, billings, tariff provisions and other pertinent information regarding this claim," and he states:

On the basis of all available documentation, information from the shipper, and information contained in the Complaint and overcharge claim lodged with Sea-Land Service, I have determined the claim of Bekaert is justified and correct.

As the Commission said in *Western Publishing v. Hapag Lloyd, A.G.*, 13 SRR 16 (FMC 1972):

. . . The description on the bill of lading should not be the single test in what claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description.

When the cargo has left the custody of the carrier, a complainant must establish the nature of the actual shipment by a preponderance of the evidence. *Pacific Freight Audit, Inc. v. American President Lines*, 22 F.M.C. 207 at 209 (1979); *Pan American Health Organization v. Moore McCormack Lines, Inc.*, 22 F.M.C. 98 (1979). On the basis of the evidence of record, I conclude that complainant has met its burden of proof; that the commodity actually shipped was steel bobbins, and that complainant is entitled to reparation.

Accordingly, Sea-Land Service, Inc., is ordered to pay Bekaert Steel Wire Corporation reparation in the amount of \$5,474.93.<sup>2</sup>

(S) JOHN E. COGRAVE  
Administrative Law Judge

Washington, D.C.  
May 11, 1981

<sup>2</sup> There is a typographical error in paragraph III of the complaint, and reparation should be \$5,474.93 instead of \$5,473.93.

**FEDERAL MARITIME COMMISSION**

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**DOCKET 80-43****BEHRING INTERNATIONAL INC.****INDEPENDENT OCEAN FREIGHT FORWARDER****LICENSE NO. 910**

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**ORDER OF ADOPTION***June 30, 1981*

On April 20, 1981, the Commission determined to review the Presiding Administrative Law Judge's Initial Decision in the above-captioned matter. Upon review the Commission determined that the Initial Decision is well reasoned and supportable both in law and in fact.

**THEREFORE IT IS ORDERED** That the Initial Decision served March 17, 1981 in this proceeding is adopted as the decision of the Commission.

By the Commission.

(S) JOSEPH C. POLKING  
*Acting Secretary*

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-43****BEHRING INTERNATIONAL, INC.****INDEPENDENT OCEAN FREIGHT FORWARDER****LICENSE NO. 910**

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An investigation was begun to determine whether past payments of "excess compensation" from certain ocean carriers to respondent freight forwarder showed that respondent had violated sections 15 and 16 of the Shipping Act, 1916, by carrying out unapproved agreements, passing on such compensation to shippers, or otherwise obtaining transportation at less than applicable charges, whether respondent was fit to retain its forwarder's license, and whether civil penalties should be assessed. In large measure because of respondent's cooperation with the Commission's staff, evidence has been developed on which to base a just and reasonable settlement and on which it can be found that respondent is eminently fit to retain its license.

There is evidence, largely developed by respondent itself, that respondent did receive compensation different from that published in a certain few carriers' tariffs from 1976 to 1978; however, respondent voluntarily terminated the practice long before this case began, never passed on such compensation to shippers so as to violate anti-rebating law, and never violated its strict fiduciary duties to its shipper customers.

In lieu of continuing with expensive litigation, respondent and the Commission's Bureau of Investigation and Enforcement have entered into a settlement agreement under which respondent will pay \$70,000 in penalties and will, among other things, institute strong measures to prevent recurrence. The settlement meets all applicable criteria of reasonableness and is approved.

The record strongly supports a finding of respondent's fitness to retain its license. Respondent has long enjoyed a fine reputation for first-class service, has fully cooperated with the Commission's staff, has long ago voluntarily terminated the practices in question, which, moreover, have never been definitively held to be unlawful, and has behaved impeccably in this proceeding. Under the circumstances, even suspension of its license would be a gross travesty. Moreover, rejection of the settlement would chill future enforcement efforts by discouraging regulated persons from cooperating with the Commission's staff, and would provoke needless, expensive litigation in this and future Commission proceedings.

*Edward Schmeltzer and George J. Weiner* for respondent Behring International, Inc.

*John Robert Ewers, Joseph B. Slunt, Charna J. Swedarsky, and Charles C. Hunter* for the Bureau of Investigation and Enforcement.



APPROVAL OF PROPOSED SETTLEMENT AND INITIAL  
DECISION<sup>1</sup> OF NORMAN D. KLINE, ADMINISTRATIVE LAW  
JUDGE

*Adopted June 30, 1981*

This is an investigation begun by the Commission's Order of Investigation and Hearing, served June 27, 1980. The Commission began this investigation because, as stated in the Order, its staff had developed information which allegedly indicated that respondent Behring International, Inc., an ocean freight forwarder licensed by the Commission since February 7, 1964, or its officers had received sums of money from ocean carriers in excess of the compensation normally paid by carriers to forwarders as published in carriers' tariffs for certain shipments occurring between 1975 and 1977. The Commission questioned whether receipt of such "excess compensation" constituted a number of violations of the Shipping Act, 1916. Specifically, the Commission questioned whether it may have reflected an agreement between Behring and certain carriers which required approval under section 15 of the Act, may have resulted in Behring's receiving transportation for less than applicable rates or charges if Behring passed allegedly "excess compensation" to its shipper principals, in violation of section 16, Initial Paragraph, or even if not passing on such compensation to its shippers, may nevertheless have enabled Behring to obtain transportation for less than applicable charges, also in violation of that provision of law. Finally, the alleged receipt of "excess compensation" from carriers caused the Commission to question whether civil penalties should be assessed against Behring under section 32(a) of the Act and whether Behring's license should be suspended or revoked on a finding of unfitness because of willful violations of the law cited or such other conduct that may show Behring to be unfit.<sup>2</sup>

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<sup>1</sup> 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).

<sup>2</sup> The precise language of the Commission's Order framing the issues described is as follows:

1. Whether Behring violated section 15, Shipping Act, 1916, by entering into and carrying out without Commission approval any agreement subject to the terms of section 15 providing for the receipt of payments from ocean carriers in excess of the amount of ocean freight forwarder compensation specified in the ocean carrier's applicable tariffs;
2. Whether Behring violated section 16, Initial Paragraph, by directly or indirectly passing on any portion of monies received by it or its officers from ocean carriers in excess of authorized ocean freight forwarder compensation to its shipper principals thus obtaining ocean transportation--on behalf of its principals--at less than the applicable rates or charges;
3. Whether Behring violated section 16, Initial Paragraph--even if it did not pass any or all of monies received by it or its officers from ocean carriers in excess of authorized ocean freight forwarder compensation to its shipper principals--by obtaining transportation by water at less than the applicable rates and charges;
4. Whether civil penalties should be assessed against Behring pursuant to section 32(e), Shipping Act, 1916, for violation of the Shipping Act, 1916, and/or the Commission's

Although the formal investigation commenced on June 27, 1980, as noted, the Commission had heard about alleged receipt of "excess compensation" by Behring some time before institution of its formal order. On or about January 18, 1979, the Commission had obtained information concerning similar allegations in connection with a number of freight forwarders. Acting upon such information, on January 18, 1979, the Commission served an order pursuant to section 21 of the Act directing employees of Behring and 15 other forwarders to provide more information concerning alleged "excess compensation." The Commission expressed concern that the alleged practices might be violative of the Shipping Act, as described above, and desired the information to determine whether this was the case and whether further proceedings should be instituted.<sup>3</sup> Behring and several other forwarders asked the Commission to reconsider its section 21 order without success and thereafter four forwarders, including Behring, requested review of the order by the United States Court of Appeals for the District of Columbia Circuit. After the matter had been briefed to that Court but prior to argument, the Commission withdrew the Order and moved for voluntary dismissal of the pending Court proceedings, stating that "[t]he Commission has recently obtained information which makes further responses from certain of these employees no longer necessary." (See Order, November 19, 1979, p. 1.) The Court granted the Commission's motion, as it affected Behring, by order of January 2, 1980. Thereafter the Commission initiated formal investigations against Behring and at least three other forwarders involved in the section 21 proceedings.<sup>4</sup>

Even before the proceeding against Behring was docketed, Behring cooperated with Commission investigators by providing a large amount of information relating to its receipt of "excess compensation." Moreover, Behring was discussing means to furnish even more information to the Commission when the Commission decided to commence this proceeding on June 27, 1980. The Commission's Bureau of Investigation and Enforcement confirms these facts. (See Stipulation, dated February 23, 1981.) The Commission, however, decided to commence

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Rules and Regulations, and, if so, the amount of any such penalty which should be imposed taking into consideration factors in possible mitigation of such a penalty;

5. Whether Behring's independent ocean freight forwarder license should be suspended or revoked for:
  - a. willful violations of the Shipping Act, 1916, pursuant to section 44(d) of the Shipping Act, 1916,
  - b. such conduct as the Commission finds renders Behring unfit to carry on the business of forwarding in accordance with section 510.9(e) of General Order 4.

<sup>3</sup> See Section 21 Order, *Independent Ocean Freight Forwarders-Payment Received for the Securing or Booking of Cargo in Excess of the Compensation Provided for in the Effective Common Carrier Tariff on File with the Federal Maritime Commission*, January 18, 1979, p. 2.

<sup>4</sup> See, e.g., Docket Nos. 80-20, 80-57, 80-65, investigating Kuehne & Nagel Inc., Cosmos Shipping Co., Inc., and Daniel F. Young, Inc. (Orders served April 3, August 29, and September 19, 1980, respectively).

formal proceedings, stating in its Order that the information already assembled indicated that one carrier had paid a vice-president of Behring about \$27,719 in non-tariff compensation from July 16, 1975 through January 19, 1977, in connection with shipments wherein Behring had acted as forwarder.

After the commencement of formal proceedings, Behring continued its policy of cooperating with the Commission's staff. Discussions began forthwith aimed at facilitating discovery requests directed against Behring and at formulating a record for settlement which would avoid costly trial-type hearings. The record fully demonstrates the willingness of Behring to aid the Commission's staff in ascertaining relevant facts pertaining to the activities of Behring in which certain carriers at certain times in the past had paid Behring compensation above that published in the carriers' tariffs. Because of Behring's cooperative attitude, furthermore, massive amounts of records relating to the years 1975 through 1977 were obtained by Behring and assembled into meaningful form complete with tabular summaries of relevant shipments and payments.

As a result of Behring's cooperation with the Bureau and its willingness to develop evidence from its old records in response to the Bureau's requests, the parties have developed the necessary evidentiary record, have negotiated and submitted a settlement agreement, and have submitted legal memoranda supporting the agreement. The evidentiary record thus compiled has also enabled me to issue an initial decision on the only issue in the case which, because of Commission precedent, requires decision rather than settlement, namely, the issue of Behring's fitness to retain its license.<sup>5</sup> This evidentiary record consists of the following: 1) Behring's letter dated September 16, 1980, setting out the terms it offered for settlement; 2) the Bureau's letter dated November 14, 1980, clarifying or conditioning certain of those terms; 3) a stipulation showing that Behring cooperated with the Commission's staff prior to inauguration of this proceeding; 4) a proposed settlement agreement based upon undertakings by Behring to pay \$70,000 to the Commission and not accept non-tariff compensation from any ocean common carriers in the future; and 5) two affidavits from Merrill P. O'Neal, President of Behring, setting forth uncontested facts concerning the disposition of non-tariff compensation which Behring had for a limited time in the past received from four carriers, and attaching tabular summaries and detailed information about Behring's long history and the many services it performs for shippers.

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<sup>5</sup> As noted later in this decision, the Commission, in an interim order in another forwarder case, has stated that issues of fitness, unlike other issues, cannot be settled. See, *Independent Freight Forwarder's License--E. L. Mobley, Inc.*, Order, 21 F.M.C. 845 (1978).

## FACTUAL BACKGROUND

Because of the complexities involved in assembling and reconstituting old transactions from Behring's records, it is not possible to establish the precise amount of the "excess compensation" which four carriers had at certain times in the past paid Behring. However, certain facts can be established with reasonable certainty in large measure owing to Behring's efforts to reconstruct these events from various sources in its records and from its employees, in an effort to provide the Commission with as full a record as is humanly possible to assemble after the passage of so much time. In summary, it appears that Behring's records disclose that non-tariff compensation in the aggregate amount of approximately \$115,000 was paid by four carriers, Waterman Steamship Company, Lloyd Brasileiro, P & O Strath Services, and Djakarta Lloyd, to Behring during the period January 1976 through February 1978 on approximately 500 shipments transported in various trades between July 1975 and August 1977. It should be noted, however, that this sum reflects payments from a relatively small number of carriers compared to the total number of carriers for whom Behring handled the shipments and that all such payments ceased in early 1978, more than two years prior to the institution of the present investigation. (See Bureau's Memorandum of Proposed Settlement, February 23, 1981, pp. 7, 8.)

The record shows that only these four carriers, out of the many with whom Behring did business, had the habit of paying compensation in excess of that which their tariffs had published. Of the four, Waterman paid \$83,764.54 on 312 shipments between June 1976 and February 1978; Djakarta Lloyd paid \$16,279.87 on 22 shipments between May 1976 and August 1976; P & O Strath Services paid \$4,877.91 on 68 shipments between August 1976 and April 1977; and Lloyd Brasileiro paid \$10,301.94 on 86 shipments between January 1976 and October 1977. (See summary tables attached to affidavit of Merrill P. O'Neal, President of Behring, February 23, 1981.)<sup>6</sup> These amounts represented

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<sup>6</sup> These data appear to have been put together after considerable effort by Behring and because of the passage of time and difficulties of reconstructing past events from Behring's records, do not purport to be perfect. The Commission's Bureau, however, acknowledges that they are reliable "ball park" figures. However, the Bureau states that based upon information which it has, the nature of which is not shown in the record, the figures relating to Lloyd Brasileiro and Waterman may need to be adjusted upward to some extent. The Bureau and Behring have attempted to resolve the discrepancies in figures but have not been able to do so and the Bureau recognizes that Behring's records may not be able to explain the differences. In other words, it may not be possible to determine final figures more precisely than has been done. The Bureau does not question Behring's good-faith efforts to resolve these discrepancies. On the contrary, the Bureau correctly states that the presence of such difficult factual issues is a factor favoring settlement, *i.e.*, an issue very difficult or costly or impossible to resolve through litigation. See Bureau's Memorandum, p. 7 n. 1. On Behring's part, Behring explains the difficulty it encountered in constructing its tables from old records and memories of employees. In several instances Behring even added figures for compensation in an effort to be complete even though the records were not clear and such additions were against its own interests. See affidavit of Merrill P. O'Neal, February 23, 1981, paragraph 5 n. 1.

two and one-half percent of the freight charges except for a few shipments for Djakarta Lloyd amounting to three and three-quarters percent. (As noted in the above footnote, the Bureau indicates that some of the payments from Lloyd Brasileiro may actually have amounted to five percent and that some payments from Waterman may have exceeded two and one-half percent, contrary to the evidence submitted by Behring, but the Bureau does not question Behring's good-faith beliefs in its data nor recommend continued litigation as the means to resolve this particular difference.)

In view of the Commission's concern that receipt of the "excess compensation" from carriers may have resulted in rebating or other benefits to shipper customers of Behring or may have caused Behring to be influenced in its selection of carriers against the best interests of its shipper customers, further analysis of the above transactions is necessary. As the evidence submitted by Behring, which the Bureau does not essentially challenge except as noted earlier, shows, Behring did not rebate or otherwise pass this compensation through to shippers and did not violate its obligations as a forwarder to select the best carriers available for its shipper customers regardless of the four carriers' past practice of paying "excess compensation."

On the question whether Behring rebated any of this "excess compensation," Mr. O'Neal, President of Behring, explains why this did not happen and why such rebating would have been nonsensical. Behring, a forwarder for many years, follows a policy of not refunding to shippers any compensation received from carriers because this would be a clear violation of FMC requirements. (O'Neal affidavit, February 23, 1981, paragraph 5.) This statement is self-serving but it is corroborated by other facts which show that rebating would not be economical and would not be good business practice. This is because the cost of recording such rebating in Behring's books would outweigh any advantage to such practice because such cost exceeds the amount of compensation in the large majority of shipments, which compensation comprised no more than \$100. Thus, for Lloyd Brasileiro, 56 out of the 86 shipments involved non-tariff compensation of \$100 or less; for Waterman, 186 out of 312 shipments; for Djakarta Lloyd, 14 out of 22; for P & O Strath, 58 out of 68. (O'Neal affidavit, paragraphs 5 and 6.) Even on larger shipments, when compensation exceeded \$100, the amount was not substantial and Behring's President states persuasively that a reputable forwarder like Behring would not insult a substantial shipper customer by attempting to "buy" the customer's patronage by offering minimal reductions in compensation derived from what the carriers were paying. This situation is totally unlike that in which carriers induce large shippers to book cargo by making offers in reductions of freight which could amount to thousands of dollars. (*Id.*, paragraph 7.)

There are even more reasons which demonstrate that Behring did not and would not have passed any carrier compensation through to its shipper customers. One reason is that larger shipments which Behring handled typically involved project cargoes that required specialized forwarding services to ensure that various portions of the shipment were assembled from various points in the United States for subsequent consolidated shipment to destinations overseas. Coordinating such project shipments is a time-consuming, expensive operation on which Behring could not afford to pay back part of its compensation. Another reason is the fact that Behring has 27 offices in various locations throughout the world. Employees at the field offices would quote fees to shippers for forwarding services without always knowing in advance how a particular shipment would be ultimately routed. For example, although a shipment might be booked initially for a Lloyd Brasileiro sailing, the cargo might be delayed and might miss the sailing, requiring that it be booked on another carrier. Behring would not therefore authorize its field employees to offer reduced fees to shippers, even if it were completely proper to do so, when there was no guarantee that the cargo would ultimately move via a carrier paying "excess compensation" to Behring. (*Id.*, paragraphs 8, 9.)

Behring offers convincing evidence that the fact that at one time four carriers paid more compensation to forwarders than that published in their tariffs did not cause Behring to select those carriers when it was not in the best interests of Behring's shipper customers to do so. That is because in many instances the shipper chooses the sailing best suited to the shipper's needs on the basis of objective data provided by Behring relating to sailing and arrival schedules, national flag requirements, reliability of the carrier, and cheapest routing. All of this has nothing to do with the fact that four carriers happened to pay "excess compensation" to forwarders at certain times in the past. Behring's records, moreover, corroborate these statements, showing that the four carriers did not enjoy any particularly outstanding share of carryings in particular trades on shipments handled by Behring. For example, in 1976, the full year encompassing the largest total of non-tariff compensation by the four carriers, in the U.S. East and Gulf Coast/Brazilian trade, the largest single share of shipments handled by Behring went to Delta Line, not Lloyd Brasileiro (42.2 percent for Delta compared to 31.7 percent to Lloyd, with 17.2 percent to Moore McCormack and 8.9 percent to Netumar Lines). (*Id.*, paragraph 11.) Lloyd was unable to attract a greater share than Delta even though Lloyd enjoyed the status of the Brazilian national flag line enjoying benefits of Brazilian cargo preference laws and offered a greater frequency of service than either Moore McCormack or Netumar. Similarly, as for the other three carriers paying "excess compensation," Waterman, P & O Strath, and Djakarta Lloyd, in 1976 in the U.S. East and Gulf Coast/Persian Gulf

trade, Waterman and P & O Strath carried only 8.2 and 4.3 percent of total shipments, respectively, while the remaining 87.5 percent were shared by 22 other lines. (*Id.*, paragraph 12). Waterman carried this relatively small percentage even though it was a principal American-flag carrier in the trade and many shipments moving to that area were required to be carried on American vessels under cargo preference laws. In the Singapore, Indonesia and Malaysia trade, finally, Behring booked less than one percent of all 1976 shipments with Djakarta Lloyd, the remaining 99 percent moving via a dozen other lines. All of these facts hardly show that Behring was steering shipments to the four carriers offering "excessive compensation" at that time. (*Id.*) Moreover, Behring's records show that a significant portion of its shipments were booked via conference carriers rather than on nonconference carriers which offered higher compensation to forwarders. (*Id.*) Again, this fact confirms Behring's statements that it did not allow the practices of the four carriers paying "excess compensation" to influence its choice of carriers.

To summarize, there is no evidence that during the period between 1976 and 1978, when four carriers out of the many doing business with Behring paid "excess compensation" to Behring, that Behring passed any of this compensation on to its shipper customers in any way, nor that Behring engaged in any rebating or gave any benefits to its shipper customers because of the practice of the four carriers, nor that Behring in any way departed from its fiduciary duties toward its shipper customers in selecting carriers because of the peculiar practices of these carriers. Furthermore, as the Bureau acknowledges, whatever the legality of the practice of receiving such compensation from the four carriers, Behring voluntarily terminated the practice in early 1978, more than two years prior to the institution of this formal proceeding, about a year before the Commission issued its section 21 orders and, as far as the record shows, without any prompting from the Commission's staff, which, in early 1978, might not have known anything about these practices of the four carriers.

#### APPROVABILITY OF THE PROPOSED SETTLEMENT

My first task is to determine whether the settlement proposed by the parties should be accepted. Thereafter, I must determine whether Behring should be found to be fit and should retain its license. I find that the settlement should be approved and that Behring is emphatically fit to retain its license without suffering suspension or revocation.

Both parties have submitted well-argued memoranda which cogently demonstrate that the proposed settlement is based upon relevant criteria applicable to such agreements and would be a just and reasonable means to terminate that portion of the litigation to which it pertains. Behring recites principles of settlement law which the Commission has

developed which are consistent with the law of settlement generally. This law encourages settlements in lieu of expensive litigation and engages in presumptions that favor their correctness, fairness, and validity. Behring notes that these principles were codified to some extent by enactment of Public Law 96-25 in 1979 and in the Commission's regulations implementing that law, General Order 30, 46 C.F.R. 505. Behring argues that the proposed settlement meets the standards governing settlements generally based upon the weighing of costs of litigation against costs of settlement but more particularly follows certain specific criteria set forth in the Commission's regulations concerning litigative probabilities, cost of collecting claims, effects on enforcement policy, and settlements for a combination of reasons. In these respects, Behring points out that the questions of law involved in this proceeding have not been decided previously and accordingly that there is real doubt that the Bureau's position would ultimately prevail. Furthermore, the amount of penalty to which Behring agrees, \$70,000, is substantial compared to the amount of non-tariffed compensation received in the past, thus giving the Commission considerable money notwithstanding the real doubts that exist as to whether the Bureau could ever establish that violations of the several sections of law enunciated in the Commission's Order did occur as a matter of fact and of law. Behring argues, furthermore, that the settlement would avoid substantial costs of collecting the claims, *i.e.*, of pursuing this litigation to ultimate conclusion both from Behring's point of view and from that of the Commission's staff. (Further litigation would entail development of evidence at painstaking trial-type hearings at considerable cost to both sides, not to mention subsequent stages after the Initial Decision.) As for the effect of the settlement on enforcement policy, Behring shows not only that it will pay a penalty of \$70,000, which effectively eliminates any profit from Behring's receipt of non-tariff compensation, but will undertake strict measures to prevent recurrence of the practices under investigation. Furthermore, by its policy of cooperation and assistance in developing critical evidence and in formulating a careful settlement agreement, Behring states that it has assisted the Commission by providing a model by which future cases involving forwarders can be resolved without the expense of protracted litigation. Thus, Behring contends that there are a "combination of reasons" fully supporting approval of the proposed agreement, a standard which the Commission's regulations specifically invoke for evaluation of such agreements.

The Commission's Bureau of Investigation and Enforcement strongly supports approval of the settlement for a number of carefully stated reasons. In a thoroughly researched memorandum of law supporting the settlement, the Bureau cites countless decisions of the Commission encouraging settlements rather than expensive litigation as a satisfactory means of terminating formal proceedings. The Bureau demonstrates,



furthermore, that it has given careful consideration to numerous criteria applicable to evaluation of the reasonableness of settlements and believes it has served both the public interest in deterring future violations as well as in being fair to Behring. The Bureau also recites certain factors discussed by Behring and generally agrees, for example, that there is a lack of case law establishing clear precedent that Behring's past activities constituted violations of law and agrees that Behring's cooperation in developing evidence saved the Bureau considerable expense that would otherwise have been consumed in lengthy discovery processes. The Bureau contends that Behring's receipt of "excess compensation" was willful and suggest that if litigation were to continue, the Bureau would attempt to establish that receipt of such compensation did violate law in some fashion. However, the Bureau suggests numerous mitigating factors that convince the Bureau that further litigation is not sensible and that the settlement agreement should be approved. For example, the Bureau acknowledges that Behring did not pass any excess compensation on to shippers, did not engage in rebating, and did not allow receipt of such compensation to affect its duties to its shipper customers to serve their best interests. Moreover, the Bureau states that Behring cooperated fully with the Commission's staff, that Behring voluntarily terminated the practices in question long ago, that its agreement to pay \$70,000 as a penalty represents more than 60 percent of the amount which had been received years ago, that it has agreed to institute strong preventive internal measures to prevent recurrence, and that Behring, by observing a reasonable attitude toward the Commission and its staff, has enabled the Commission to resolve this proceeding rapidly and inexpensively so that the Commission's limited resources can be better allocated in contested cases. The Bureau, quite correctly in my opinion, contends that Behring's cooperative conduct is something that should be encouraged in future cases and that approval of the settlement, in recognition of Behring's helpfulness, will serve that purpose.

The memoranda of law which both parties have submitted to me in support of their proposed settlement are thorough and persuasive that the settlement meets all standards of approvability and should be approved promptly. Both parties have taken great pains to study applicable case law and the Commission's regulations and have cogently shown how the law and regulations apply specifically to the facts in this case. Briefly, the governing principles are as follows.

It is well settled that both the law and Commission policy encourage settlements and engage in every presumption which favors a finding that they are fair, correct, and valid. See, *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 505, 511 (1978) (Adopted by the Commission, December 29, 1978); *Organic Chemicals v. Atlantrafik Express Service*, 18 S.R.R. 1536a, 1539 (1979). This principle is especially

important in administrative proceedings and has been codified in both the Administrative Procedure Act (APA) and in the Commission's Rules of Practice and Procedure. See Rules 91 and 94, 46 C.F.R. 502.91 and 502.94, and the APA on which Rule 91 is patterned, 5 U.S.C. 554(c)(1).<sup>7</sup> The courts view this principle and its legislative history as it applies to administrative agencies "as being of the 'greatest importance' to the functioning of the administrative process." *Pennsylvania Gas & Water Co. v. Federal Power Commission*, 463 F. 2d 1242, 1247 (D.C. Cir. 1972). As the legislative history to the APA shows, furthermore, Congress encouraged agencies to make use of settlements and wished to advise private parties that "they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations. Senate Judiciary Committee, APA-Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess., at 24. The general policy favoring settlements is summarized in the following passage adopted by the Commission in the *Old Ben Coal Company* case, cited above, 21 F.M.C. at 512:

The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some laws or public policy . . . . The courts have considered in their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy. 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976). (Footnote citations omitted.)

Consistent with these policies, the Commission has in recent years approved a wide variety of settlements and discontinued numerous complaint cases under various provisions of the Shipping Act, 1916. See list and description of settled cases recited in *Del Monte Corporation v. Matson Navigation Company*, 22 F.M.C. 365, 368-369 (1979). As those cases show, it is possible to settle cases without admissions of violations

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<sup>7</sup> Section 554 of the APA provides:

- (c) 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;

of law and for amounts of reparation less than those originally sought in the complaint.

As explained in *Old Ben*, the Commission recognizes the advantages to settlements but exercises some judgment before approving them. Mainly the Commission is concerned that the settlement not contravene any law or public policy, for example, that it not be the result of fraud, duress, or mistake, that it not constitute a discriminatory device or consummate a desire to contravene tariff law embodied in section 18(b)(3) of the Shipping Act, 1916, and that if it fails under section 15, the settlement be filed for approval under that law and pertinent regulations. *Old Ben*, 21 F.M.C. at 513.

In considering settlements which parties submit with requests that their cases before the Commission be dismissed, the Commission has followed the traditional view that the settlement deserves approval if it avoids wasteful litigation and if it appears that the parties have correctly made an economical judgment that continued litigation would cost more to each side regardless of who ultimately prevailed on the merits than the amount of money which complainant had agreed to accept and respondent had agreed to pay in exchange for a release. *Old Ben*, 21 F.M.C. at 514.

The principle of encouraging settlements was furthered by the enactment in 1979 of Public Law 96-25, 93 Stat. 71, which, among other things, amended section 32 of the Shipping Act, 1916 (46 U.S.C. 831) to authorize the Commission to assess civil penalties. Following enactment of that law, the Commission issued regulations governing the compromise, assessment, settlement and collection of civil penalties. See General Order No. 30, 46 C.F.R. 505, entitled *Compromise, Assessment, Settlement and Collection of Civil Penalties Under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933*, Docket No. 79-66, 22 F.M.C. 238 (1979). The Commission explained that in formal proceedings, its Bureau "shall have full authority to enter into stipulations and settlements," provided, among other things, that such proposed settlements "be submitted to the presiding officer for approval. . . ." 46 C.F.R. 505.3. The Commission did not intend to frustrate settlements in its formal proceedings but wished to formalize the settlement in the body of the Initial Decision in lieu of making findings of violations and determining assessments of penalties when settlements were not possible. Thus, in the preamble adopting the regulations cited, the Commission stated that it "intends no extraordinary impediment to settlements . . ." and that its Bureau, "as a party to the stipulation of settlement will not be approving agreements but rather will be joining with respondents in submitting agreements for approval." Moreover, the Commission stated that "[t]he inclusion of the settlement agreement in the Initial Decision and final decision replaces findings of violations and assessment of penalties . . ." Docket No. 79-66, 22 F.M.C. 238, 240-241

(1979). The regulations set forth particular criteria by which settlements were to be formulated and evaluated. These criteria were those formulated by the Comptroller General and the Attorney General under the Federal Claims Collection Act of 1966 (31 U.S.C. 952) and are published in 4 C.F.R. 103. These criteria were not intended to be all-inclusive. The Commission specifically stated that "the criteria for compromise, settlement, or assessment may include, but need not be limited to, those which are set forth in 4 C.F.R. Part 101-105." 46 C.F.R. 505.1. Moreover, they had been followed by the Commission for some time when the Commission's General Counsel had settled claims prior to the enactment of P.L. 96-25. See *Eastern Forwarding International, Inc., Independent Ocean Freight Forwarder Application*, 23 F.M.C. 206, 213 (1980). Among the criteria that are set forth in 4 C.F.R. Part 103 are those relating to a respondent's ability to pay (103.2), litigative probabilities (103.3), cost of collecting the claim (103.4), effect on enforcement policy, *i.e.*, deterrent effect (103.5), and settlement for a combination of these stated reasons (103.7). See also *Eastern Forwarding International, Inc.*, 23 F.M.C. at 213.

The Commission does not rigidly adhere to fixed standards in evaluating reasonableness of penalty settlements. Rather it specifically recognizes the need to consider mitigating factors and has recognized that, as it develops experience in settlement cases, even more factors may enter into considerations in particular cases. Thus, in promulgating the settlement regulations, the Commission specifically refused to box itself forever into fixed standards or guidelines. See Docket No. 79-66, cited above, 22 F.M.C. at 267. As experience has developed, moreover, the Commission has been careful to consider mitigating factors when passing upon penalty settlements, for example, considering a respondent's history of good behavior, its cooperation with the Commission's staff, and its prompt remedial action. See *Continental Forwarding, Inc.-Independent Ocean Freight Forwarder Application and Possible Statutory Violations*, Docket No. 80-3, 23 F.M.C. 623, 630; *H.K. International Forwarding, Inc., Independent Ocean Freight Forwarder License Application*, 22 F.M.C. 623, 627 (1980) (cooperating with Commission staff, agreement to terminate activities in question, absence of fraud, deceit, financial misappropriations, or violations of position of trust or responsibility with respect to shipments under investigation). See also *Eastern Forwarding International, Inc.*, 23 F.M.C. at 212, (no deliberate attempt to defeat regulation, no effort to conceal activities or to defraud anyone, cooperation with the Commission's staff, full restitution of compensation received after license had been revoked). Finally, it bears noting that in this very proceeding the Commission directed the parties, when considering the issue of the amount of penalty, to take "into consideration factors in possible mitigation of such a penalty." Order of Investigation and Hearing, paragraph 4, p. 3.

**THE PROPOSED SETTLEMENT AGREEMENT MEETS ALL  
STANDARDS OF REASONABLENESS AND SHOULD BE  
APPROVED**

As I have mentioned, the parties have given careful thought to the various standards applicable to the formulation of settlements and have shown with persuasive evidence and analysis that their proposed settlement meets these standards and emphatically merits approval.

**THE SUBSTANCE OF THE PROPOSED SETTLEMENT**

A copy of the text of the proposed settlement and promissory note is attached to this Initial Decision as an Appendix. In summary it comprises the following provisions.

Behring does not admit that the past activities in which certain carriers had paid compensation to Behring other than that published in the carriers' tariffs constituted violations of law. However, it admits that it did receive such compensation in the past. However, in order to bring litigation to a conclusion and to assist the Commission in its efforts to enforce the Shipping Act, Behring promises to cooperate with the Commission in connection with other investigations, to pay a penalty in the amount of \$70,000, to implement strict measures to ensure that the old practices do not recur, to submit annual reports under oath to the Commission, to conduct periodic audits, and to waive certain defenses to subsequent actions against it if it breaches the agreement. If the agreement is approved, moreover, Behring promises to furnish copies of it or otherwise notify all of its directors, officers, and field office managers within 30 days. Both the settlement agreement and promissory note establishing method of payment appear to conform generally to the models set forth in the Commission's regulations. See 46 C.F.R. 505.7 and model agreement and promissory note attached as appendices, S.R.R. Current Service, §144:7.

**HOW THE PROPOSED SETTLEMENT MEETS APPLICABLE  
STANDARDS**

I have summarized above the contentions of both Behring and the Bureau, in which they show that criteria applicable to settlements have been carefully considered. I find that their contentions are sound and accurate. The amount of the settlement (\$70,000) reflects 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 litigation and . . . the amount of settlement to which both have agreed represents a satisfactory compromise and succeeds in terminating a seemingly interminable proceeding." *Perry's Crane Service v. Port of Houston Authority*, 22 F.M.C. 31, 33 (1979) (footnote omitted).

It is apparent that the amount agreed upon is well within a zone of reasonableness and constitutes neither an attempt to extract an exorbitant amount of money from a respondent without necessary basis in facts nor a "giveaway" in which the government's case is clearly shown to be worth much more than it has agreed to receive. As both parties acknowledge, the law relevant to the transactions in question is open to dispute and lacks a clear, definitive decision from the Commission or the courts.<sup>8</sup> Furthermore, the amount is sufficient to act as a deterrent to other forwarders and thus aids the Commission's enforcement policies. By paying \$70,000, Behring has reaped no profit from the compensation in question. The compensation only amounted to \$115,000. If we assume that to have been sheer profit above related expenses, Behring would have remitted about 50 percent in federal and state taxes. The remainder (about \$58,000) has undoubtedly been consumed by legal fees and other expenses of litigation in both the section 21 Order proceedings and the instant case. Moreover, Behring is agreeing to pay more than 60 percent of the original amount (\$70,000 out of about \$115,000) in penalties. Finally, by settling on this amount and terminating litigation, Behring has saved the Commission and the Government from expending considerable funds, such factor, i.e., costs of collecting the claim (4 C.F.R. 103.4), being one of the criteria employed by the Commission in evaluating amounts of penalties. The fact that Behring undertakes to institute strict measures to ensure against recurrence and promises to cooperate in other cases of similar nature further demonstrates that the settlement agreement serves the Commission's enforcement purposes. As both parties point out, furthermore, especially the Bureau, there are numerous mitigating factors which apply in the instant case, among which are Behring's voluntary termination of the practices in question long before this case began, the total absence of any evidence of dishonesty on Behring's part in its relations with its shipper customers and in the carrying out of its duties to its customers, the high level of cooperation with the Commission's staff both before and after the case began, and, as mentioned, the fact that legal precedent is unclear and that Behring promises to institute strict controls promptly.

I conclude, therefore, that the proposed settlement agreement meets relevant standards and emphatically deserves approval. Such approval, moreover, will have the added benefits of providing a model for future cases and will serve the very desirable purpose of encouraging forward-

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<sup>8</sup> This observation applies not only to the status of the "excess compensation" under section 16 but also to the question whether these carriers' practices in relation to Behring showed that a section 15 agreement existed in fact or in law. No case has been cited to me nor am I aware of any in which this sort of happening between a carrier and forwarder has been held to constitute a section 15 agreement. Furthermore, if the matter were to continue into litigation, it would be necessary to develop evidence demonstrating an understanding or agreement between the two entities.

ers and other respondents in future Commission cases to cooperate with the Commission's staff rather than to engulf the Commission in protracted litigation.

### THE QUESTION OF FITNESS

There now remains the issue of Behring's fitness to continue to operate under its license without suspension or revocation. This was the last issue (no. 5) framed by the Commission's Order, and, because of a previous decision of the Commission, this issue cannot be settled by the parties. See *Independent Freight Forwarder's License--E. L. Mobley, Inc.*, Order, 21 F.M.C. 845 (1978).<sup>9</sup>

The record is more than adequate to enable me to conclude that Behring is eminently fit to continue to operate under its license. Indeed, under the facts of this case including the many mitigating factors discussed above, even a suspension, much less a revocation, would, in my opinion, be a gross travesty of justice. The record amply demonstrates that Behring is a substantial and reputable company which has provided a variety of useful services for many years, that it has never before been investigated by this Commission in its many years as a licensed forwarder, and that its behavior in this proceeding has been impeccable. The Commission's Bureau, moreover, strongly, urges that Behring be found fit.

### DESCRIPTION AND HISTORY OF BEHRING'S OPERATIONS

Behring has been involved with transportation since 1917. The company was established in that year by Peter Behring and was headquartered in New York City for many years. In 1963 Behring merged with South Ports Forwarding Co. of Houston and operated as Behring-South Ports Shipping Co. until 1970. In the intervening years, the company grew steadily, adding offices in New Orleans and Los Angeles. In 1970 Behring acquired Leslie B. Canion Customs Brokers, Inc. with offices in several cities, and a year later changed the company name to the present Behring International, Inc. Another New York office was opened that year and by 1973 Behring had added other new offices in Beaumont, Texas, Lake Charles, La., Dallas, and Chicago. Beginning in 1974, Behring opened six overseas offices in Singapore, Paris, Saudi Arabia, Dubai, Manila, and London. More recently Behring opened new domestic branches in Baltimore, Edison, N.J., Tulsa, Boston, San Francisco, Seattle, Cleveland, and Camden, Del., and pres-

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<sup>9</sup> Although the Commission enunciated the doctrine that a question of fitness cannot be settled, a reading of the Order cited indicates that the Commission was concerned about the forwarder's fitness because of serious allegations that the forwarder had forged documents and believed that it had to pursue the case to conclusion to assure itself and the public that the forwarder was trustworthy. See 21 F.M.C. at 847. The present case bears no resemblance whatever to the *Mobley* case, there being no allegations nor evidence that Behring engaged in any fraudulent or similarly reprehensible conduct.

ently has 27 offices and more than 800 employees worldwide. Behring expects to employ more than 1,500 people by 1983.

In its six decades of forwarding operations and especially in its recent growth, Behring has developed a full range of services facilitating the movement of U. S. export shipments. For example, in addition to the usual preparation of shipping documents, Behring's export packing division in Houston operates a 74,000 square foot enclosed structure and 28 additional acres of paved and fenced marshalling yards capable of packing items ranging from 20-ton heavy-lift pieces to specialized vacuum packaging of perishable or moisture-sensitive goods. Behring has also created a Management Information Services division, utilizing an IBM system to develop a computerized tracing system to allow monitoring of shipments and Behring has been innovative in the use of computer software for that purpose. Behring believes itself to be unique in that it arranges forwarding of complete projects (e.g., 6,500-ton oil drilling rigs) on which it arranges component assembly in the U.S., ocean transportation, and in some cases, through its overseas offices, delivery to inland destinations.

Behring has worked to stimulate exports directly through participation in export groups for various countries (the People's Republic of China being a recent example) and has made direct approaches to foreign buyers to encourage their purchase of U.S. goods. Behring believes with apparent justification that it enjoys a reputation as one of the largest, most knowledgeable and proficient full-service forwarders in the world. In support of this statement, Behring has submitted an informational package showing its many years of service in many transportation areas, including not only ocean forwarding, which is historically the largest part of its business, but air freight services, import, customhouse services, export packing, air chartering, and even most recently, a non-vessel operating carrier service.

Behring received its present ocean freight forwarder license (No. 910) on February 7, 1964, and prior to that time had received a registration certificate (No. 566) on July 13, 1951. Up to the time of the present litigation, Behring had not been involved in proceedings questioning its fitness. There is, furthermore, no indication on this record that shippers have ever complained about any aspect of Behring's services.

#### **BEHRING IS FIT TO RETAIN ITS LICENSE**

The preceding description of Behring's operation demonstrates clearly that it is a first-class professional organization and that it enjoys a fine reputation. Nothing in this record detracts from that statement and the Bureau does not challenge Behring's fitness. From the inception of this proceeding and even before, Behring cooperated fully with the Commission's staff, even to the extent of developing evidence from its



own records which identified old transactions in which four carriers had paid "excess compensation." As has been made clear, the types of activities with which this investigation is concerned are not related to fraud or dishonesty or violation of a forwarder's high fiduciary duties. What happened is that for reasons not explained in the record, four carriers, out of the many with which Behring did business, had the practice of paying compensation to Behring during 1976 through early 1978 in amounts different from those published in the carriers' tariffs. There is no indication that Behring suggested this practice to the carriers but, in any event, Behring terminated the receiving of such compensation voluntarily long before this case began and even long before the Commission served its section 21 Order. No shipper was ever harmed by this practice nor was Behring ever diverted from its strict fiduciary duties towards its shipper customers because of the peculiar practice of the four carriers.

Although the Bureau states that Behring's receipt of the compensation in the past was "willful," even the Bureau concedes that the uncertainty as to whether the practice violated law at the time "tends to weaken the allegation that Behring acted in wanton disregard of statutory authority." (Bureau's Memorandum, p. 6.) Moreover, as Behring points out, the Commission defines "willfulness" as something which "equates with a wanton disregard from which an inference can be drawn that the conduct was in fact purposeful; a standard somewhat analogous to the tort concept of 'gross negligence.'" *Equality Plastics, Inc.*, 17 F.M.C. 217, 226 (1973). Previously, the Commission had explained with respect to the words "knowingly and willfully" that:

[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. *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B. 483, 486 (1954).

In view of the fact that, as even the Bureau concedes, the Commission had never decided or indicated that payments of compensation from carriers to *forwarders* different from that published in carrier tariffs were to be treated as unlawful (as would be payments by carriers to *shippers* which effectively reduce rates published in the tariffs) it is difficult to argue that Behring was "plainly indifferent" or showed "wanton disregard" of regulatory principles. It could be argued that to hold such a thing now may even result in retroactive policy making, which American principles of fairness and this Commission so justly condemn. For example, in *Mediterranean Pools Investigation*, 9 F.M.C.

264, 304 (1966), the Commission refused to penalize parties who had relied upon current case law which was later changed, stating:

The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the Act, and who was unable to know when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing the law abhors. *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141 (9th Cir. 1952).<sup>10</sup>

If Behring's conduct was not "willful" when it received compensation more than two years before the case began, there could be no question of revocation or suspension of Behring's license. The law simply forbids such a drastic sanction unless Behring "has been given . . . opportunity to demonstrate or achieve compliance with all lawful requirements" and if such opportunity had been given "before the institution of agency proceedings." Administrative Procedure Act, 5 U.S.C. 558(c). See discussion of this principle in *E. Allen Brown*, 22 F.M.C. at 596-597. This is the so-called "second chance" doctrine enjoyed by persons holding licenses and it is not clear to me whether Behring had been given such an opportunity before this case commenced. However, it is not necessary to decide the question whether Behring's activities were "willful" or not. Even if they were "willful" the record strongly supports a finding of Behring's fitness and Behring's cooperative attitude, including its promise to institute strict measures to ensure non-recurrence of the questionable practices, satisfies any reasonable compliance effort. Moreover, the Commission has continually considered mitigating factors when fashioning sanctions and has attempted to tailor just and reasonable solutions to the facts in each case in the belief that section 44 (the Freight Forwarder Law) and its regulations are based on remedial, not punitive purposes, avoiding the drastic sanction of revocation or harmful suspension of licenses when possible to achieve regulatory purposes short of such action. In two recent cases the Commission explained its policy in this regard: *E. L. Mobley, Inc.*, cited above, 21 F.M.C. 845, 847 (1979); and *E. Allen Brown*, 22 F.M.C. 585, 586 (1979), stating:

\* \* \* 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

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<sup>10</sup> The Securities and Exchange Commission has only recently issued a decision in which it also followed the principle that licensees should not be penalized when, at the time they acted, the agency had not clearly enunciated the legal principles which governed their conduct. In the case, the S.E.C. reversed its judge and refused to discipline two attorneys practicing before the agency. See, *In the Matter of William R. Carter and Charles J. Johnson, Jr.*, SEA Release No. 17597, February 28, 1981, 1981 CCH SEA, p. \_\_\_\_\_.

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. 21 F.M.C. at 847.

\* \* \*

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. . . . 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. . . .

*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, 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. (Emphasis added.)* 22 F.M.C. at 598.

As should be clear from a reading of this decision, there is considerable "evidence of mitigation," and, as the Bureau states, the Commission measures the impact of past violations upon a person's fitness by exploring the "context in which the violations occurred." *Cargo Systems International (CSI)--Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916*, 22 F.M.C. 56, 71 (1979). I have cited numerous mitigating factors, e.g., the unclear state of the law at the time of the practices in question, Behring's early, voluntary termination of the practices, the lack of any showing that the practices affected Behring's strict duties toward its shipper customers, the high level of cooperation which Behring showed toward the Commission's staff both before and after this proceeding began, the agreement to institute strict measures of control promptly, the considerable savings in Commission funds caused by a termination of protracted litigation, Behring's long history without blemish. Furthermore, the context in which the old practices occurred was one in which four carriers appear to have conducted their business in a peculiar way for their own reasons with no showing that Behring instigated these practices, which, in any event, the Commission had not declared to be unlawful in any reported decision at the time.

The Bureau argues that the extreme sanction of revocation could be invoked in a case in which the future conduct of the forwarder could not be trusted. In other words, if, by the nature of the violations committed and the circumstances surrounding that conduct, it could be anticipated that a licensee would continue to engage in violative conduct, that licensee could be found to be unfit to continue to hold its license. See *Independent Ocean Freight Forwarder Application--Alvarez Shipping Co., Inc.*, 16 F.M.C. 78 (1978); *G. R. Minon--Freight Forwarder License*, 12 F.M.C. 75 (1968). In such a situation, revocation would constitute the only effective sanction. This position is consistent with the Commission's holding that "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." *Harry Kaufman D/B/A International Shipper Co. of N.Y., etc.*, 16 F.M.C. 256, 271 (1973). In the instant case, however, the evidence is overwhelming that Behring fully intends to comply with law and Commission regulations and, indeed, intends to institute strict measures to ensure that the old activities in question will not recur. There is, therefore, absolutely no showing that any sanctions are necessary outside of the amount of penalty which Behring agrees to remit. The facts that Behring has provided a variety of first-class services to shippers for many years, that it is an innovator in the industry, and has operated without complaints for many years, certainly provide even more evidence of its fitness.

#### ULTIMATE CONCLUSIONS

I conclude, therefore, that this record shows persuasively that Behring is fit to continue operating under its license and that implementation of the terms of the settlement agreement will amply satisfy all regulatory purposes. Rejection of the settlement, however, would be extremely imprudent, would thrust the proceeding back into protracted litigation, and would chill any future efforts of the Commission's staff to encourage forwarders and other regulated persons to cooperate with the Commission, thereby fomenting unnecessary antagonism and laying the foundation for needless, expensive litigation in the future.

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

Washington, D. C.  
March 17, 1981

APPENDIX  
BEFORE THE FEDERAL MARITIME COMMISSION

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BEHRING INTERNATIONAL, INC.  
INDEPENDENT OCEAN FREIGHT  
FORWARDER FORWARDER LICENSE  
NO. 910

DOCKET NO. 80-43

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**PROPOSED SETTLEMENT OF CIVIL PENALTIES**

This Proposed Settlement has been entered into between the Bureau of Investigation and Enforcement (Bureau) and Respondent Behring International, Inc. (Behring). It is submitted to the Presiding Administrative Law Judge for approval pursuant to Rule 162 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.162, and section 502.3 of the Commission General Order 30, 46 C.F.R. 505.3, and is to be incorporated into the Final Order in this proceeding, if so approved.

WHEREAS, by Order of Investigation and Hearing dated June 27, 1980, the Commission instituted the present proceeding to determine whether Behring had violated sections 15 and 16, Initial Paragraph, of the Shipping Act, 1916, 46 U.S.C. §§814 & 815, and whereas, that Order includes the issue of whether civil penalties should be assessed for any violations of section 15 and 16, Initial Paragraph, of the Shipping Act, 1916, so found;

WHEREAS, the Order of Investigation alleges that Behring may have violated sections 15 and 16, Initial Paragraph, of the Shipping Act, 1916;

WHEREAS, Behring has admitted that it has engaged in specified conduct which may be violative of sections 15 and 16, Initial Paragraph, of the Shipping Act, 1916, but denies that such conduct violated that Act;

WHEREAS, Behring has indicated its willingness to cooperate with the Commission in other investigations involving the payment of compensation by oceangoing common carriers in excess of the rate specified in the carriers' tariffs ("non-tariff compensation") (see Appendix I & II attached hereto), and whereas, Behring's failure to so cooperate will constitute a breach of this Agreement;

WHEREAS, Behring has terminated its receipt of "non-tariff compensation," and has instituted and has indicated its willingness and commitment to maintain measures designed to eliminate, discourage, and prevent future receipt of "non-tariff compensation";

WHEREAS, the parties, in order to avoid the delays and expense which would be occasioned by further litigation of the issues specified in the Order of Investigation and Hearing, are desirous of settling expeditiously the issue of the appropriate amount to be paid by Behring in accordance with the terms and conditions of this Agreement; and

WHEREAS, section 32(e) of the Shipping Act, 1916, U.S.C. §831(e), authorizes the Commission to assess or compromise all civil penalties claims under the Shipping Act, 1916;

NOW, THEREFORE, in consideration of the premises set forth herein, and in compromise of all civil penalty claims arising from the conduct set forth in the factual record submitted in the present proceeding, Behring agrees as a condition of this settlement to comply with all requirements set forth hereinafter, subject to the stipulations, conditions and terms of settlement contained herein:

1. Behring hereby agrees, as a condition of the settlement agreement, to pay a monetary amount of Seventy Thousand Dollars (\$70,000) of which Ten Thousand Dollars (\$10,000) shall be payable thirty (30) days following approval by the Commission of this Proposed Settlement and Sixty Thousand Dollars (\$60,000) shall be payable according to the terms of the Promissory Note attached hereto as Appendix III in the following installments:

Fifteen Thousand Dollars (\$15,000), plus interest, shall be paid on or before six (6) months following approval by the Commission of this Proposed Settlement;

Fifteen Thousand Dollars (\$15,000), plus interest, shall be paid on or before twelve (12) months following approval by the Commission of this Proposed Settlement;

Fifteen Thousand Dollars (\$15,000), plus interest, shall be paid on or before eighteen (18) months following approval by the Commission of this Proposed Settlement; and

Fifteen Thousand Dollars (\$15,000), plus interest, shall be paid on or before twenty-four (24) months following approval by the Commission of this Proposed Settlement.

2. Except as provided in paragraph six (6) below, this Agreement shall forever bar the commencement or institution of any civil action or other claim for recovery of civil penalties from Behring arising from the conduct set forth and described in the factual record submitted in the present proceeding. It is understood by Behring that this Agreement shall not serve as a bar or defense to any criminal prosecution or civil litigation by the Commission or defense to any other department or agency of the United States Government for conduct engaged in by Behring, other than that reflected in the factual record submitted in the present proceeding.

3. Behring agrees to preserve and maintain at the offices of Schmeltzer, Aptaker & Sheppard, P.C., 1800 Massachusetts Avenue, N.W., Washington, D.C., through April 1, 1984, copies of all underlying oceangoing common carrier bills of lading applicable to the shipments listed in the factual record submitted in this proceeding, and upon reasonable notice, to allow appropriate Commission representatives unimpeded access to such bills of lading and to allow the removal of such bills of lading specifically requested by such Commission representatives.

4. Behring agrees to take all reasonable measures designed to discourage, prevent, and eliminate the receipt by it of "non-tariff compensation" unless the Commission, the courts or Congress find that it is lawful. These measures shall include, but need not be limited to, the following:

i. Behring's Chief Executive Officer will submit annually to the Commission a statement made under oath certifying that, to the best of his knowledge based upon inquiry, Behring had not received "non-tariff compensation" during the preceding year.

ii. Behring will review its administration and procedures and modify both to the extent necessary to safeguard, through periodic audits or other methods of control, against the occurrence of practices by Behring, its officers, employees, and agents which would result in the receipt of "non-tariff compensation."

5. Behring agrees that within thirty (30) days following the approval of this Proposed Settlement, it will either furnish copies of this Agreement, or will give affirmative notice of the terms and provisions thereof, to all of its directors, officers, and field office managers.

6. Behring hereby agrees as a condition of this Agreement that, if it breaches this Agreement, it will not interpose the Statute of Limitations as a bar or a defense in any action or proceeding instituted prior to April 1, 1986, by or on behalf of the Commission, to recover civil penalties for violations of the Shipping Act, 1916, which apply to the receipt of "non-tariff compensation," arising out of the conduct set forth in the factual record submitted in the present proceeding. In the event of such a breach by Behring, if such noncompliance shall not have been explained to the Commission's satisfaction within thirty (30) days after written notice to Behring by the Commission, the Commission shall have the option to seek enforcement of all terms and conditions of this Agreement, or to declare this Agreement null and void; provided, however, that Behring's waiver of the Statute of Limitations under this paragraph shall remain in full force and effect. In the event the Commission declares this Agreement null and void and such determination is not reversed by a court of competent jurisdiction, any

monies paid to the Commission shall remain the property of the United States, and Behring will not interpose any defense based on the Statute of Limitations in any action which the Commission may institute to recover civil penalties arising out of the conduct set forth in the factual record submitted in the present proceeding.

7. In the event changes in law or other circumstances occur during the term of this Agreement which believes warrant modification or mitigation of the Agreement, Behring may petition for this purpose.

8. It is expressly understood and agreed that this Agreement is not to be construed as an admission by Behring of the violations alleged in the Order of Investigation and Hearing by which this proceeding was instituted.

9. The undersigned counsel for Behring represents that he is properly authorized and empowered to execute this Agreement on behalf of Behring and to fully bind Behring to all of the terms and conditions herein.

Edward Schmeltzer

PAUL J. KALLER,  
*Deputy Director*  
*Bureau of Investigation*  
*and Enforcement*

George J. Weiner  
Counsel for Behring

JOSEPH B. SLUNT  
*Attorney*

CHARNA J. SWEDARSKY  
*Attorney*

CHARLES C. HUNTER  
*Attorney*

February , 1981



**PROMISSORY NOTE**

For value received, Behring International, Inc., (Behring) promises to pay to the Federal Maritime Commission (Commission) the principal sum of Seventy Thousand Dollars (\$70,000) to be paid at the offices of the Commission in Washington, D.C., by bank cashier's or certified check in the following installments:

Ten Thousand Dollars (\$10,000) on or before thirty (30) days following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-43;

Fifteen Thousand Dollars (\$15,000) on or before six (6) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-43;

Fifteen Thousand Dollars (\$15,000) on or before twelve (12) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-43;

Fifteen Thousand Dollars (\$15,000) on or before eighteen (18) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-43;

Fifteen Thousand Dollars (\$15,000) on or before twenty-four (24) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-43;

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 upon which the Commission approves the Proposed Settlement in FMC Docket No. 80-43 and be computed at the rate of twelve percent (12%) per annum on the unpaid balance.

If any payment of principal or interest shall remain unpaid for a period of thirty (30) 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, said demand and notice being hereby expressly waived.

If a default shall occur in the payment of principal or interest under this Promissory Note, Behring does hereby authorize and empower any U.S. attorney, any of his/her assistants or any attorney of any court of record, Federal or State, to appear for them, and to enter and confess judgment against Behring 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 Behring 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 thereon; and to consent to imme-

diate execution on said judgment. Behring hereby ratifies and confirms all that said attorney may do by virtue thereof.

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

BEHRING INTERNATIONAL, INC.

*By:*

*Date:*

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-46

BELCO PETROLEUM CORP.

v.

LYKES BROS. STEAMSHIP CO., INC. &  
PERUVIAN STATE LINE

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## ORDER ADOPTING INITIAL DECISION

*June 30, 1981*

This proceeding was instituted by the filing of a complaint by Belco Petroleum Corp. against Lykes Bros. Steamship Co., Inc. (Lykes) and Compania Peruana de Vapores seeking reparation for freight overcharges on seven shipments of oil well drilling supplies and equipment from Houston, Texas to Talara, Peru.

On May 13, 1981, Chief Administrative Law Judge John E. Cogrove issued an Initial Decision finding for Complainant and awarded reparation in the aggregate amount of \$11,387.22. No exceptions to the Initial Decision have been filed. The Commission, however, has determined to review the Initial Decision pursuant to Rule 227(d) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.227(d)).

Upon review, the Commission has determined that the Presiding Officer's ultimate findings and conclusions are correct. The Initial Decision will accordingly be adopted with the modification discussed below.

The Presiding Officer did not include interest on the reparation awarded. In order to make the Complainant "whole" and compensate it for the loss of the use of freight charges improperly assessed, the Commission believes that interest on the amount of reparations awarded should have been included as an element of damages. *U.S. Borax & Chem. Corp. v. Pac. Coast European Conf.*, 11 F.M.C. 451, 470 (1968). The Commission will therefore modify the Presiding Officer's award to include interest at a rate of 12% per annum payable by Lykes on the amount of \$3,343.87 awarded as reparation on two shipments covered by prepaid bills of lading Nos. 4 and 5 dated June 30, 1978, and on the amount of \$3,238.62, awarded on the shipment covered by prepaid bills of lading No. 2 dated July 14, 1978. With respect to the shipments carried by Compania Peruana de Vapores, award of reparation is modified to include interest of 12% per annum, payable from July 18, 1978, on the amount of \$3,811.24 on three shipments covered by prepaid bills

of lading Nos. C-2, 11 and 12, and from July 31, 1978, on \$993.49 on the shipment covered by prepaid bill of lading No. 17.

**THEREFORE, IT IS ORDERED,** That the Initial Decision served on May 13, 1981 in this proceeding is adopted and made a part hereof.

**FURTHER, IT IS ORDERED,** That Respondent Lykes Bros. Steamship Co., Inc. pay to the complainant Belco Petroleum Corp. reparation in the amount of \$3,343.87 plus interest at the rate of 12% per annum from June 30, 1978, and the amount of \$3,238.62 plus interest of 12% per annum from July 14, 1978.

**FINALLY, IT IS ORDERED,** That Respondent Compania Peruana de Vapores pay to Complainant Belco Petroleum Corp. reparation in the amounts of \$3,811.24 plus interest at the rate of 12% per annum from July 18, 1978, and \$993.49 plus interest of 12% per annum from July 31, 1978.

By the Commission.

(S) JOSEPH C. POLKING  
*Acting Secretary*

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 80-46**  
**BELCO PETROLEUM CORP.**

v.

**LYKES BROS. STEAMSHIP CO., INC. &**  
**PERUVIAN STATE LINE**

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Reparation granted.

*Bruce Leventhal* for Belco Petroleum Corporation.

*R. J. Finnan* appeared for Lykes Bros. Steamship Co., Inc.

**INITIAL DECISION <sup>1</sup> OF JOHN E. COGRAVE,**  
**ADMINISTRATIVE LAW JUDGE**

*Adopted June 30, 1981*

By complaint Belco Petroleum Corporation, an organization engaged in the exploration for and the production of crude petroleum, natural gas and coal, alleges that charges in excess of those lawfully applicable for transportation, in violation of section 18(b)(3) of the Shipping Act, 1916, were assessed on seven shipments of oil well drilling supplies and equipment from Houston, Texas, to Talara, Peru, from June 30, 1978, through July 31, 1978. Total reparation in the amount of \$11,387.22 is sought. Disposition under shortened procedure is requested.

The respondent, Lykes Bros. Steamship Co., Inc., and Compania Peruana de Vapores, common carriers by water in the foreign commerce of the United States, were also members of the Atlantic and Gulf/West Coast of South America Conference at the time of the alleged violations. Both have agreed to the requested shortened procedure.

Complainant, an industrial contract shipper with the conference since 1965, (Contract no. 10361), alleges it traditionally made its shipments of oil well supplies and equipment under item 1050 <sup>2</sup> which provided an Industrial Contract Rate Schedule covering cargo of a proprietary

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<sup>1</sup> 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).

<sup>2</sup> Atlantic & Gulf/West Coast of South America Conference, S. B. SA-13, Freight Tariff No. 2 FROM: U. S. Atlantic and U. S. Gulf Ports via the Panama Canal TO: West Coast Ports in Colombia and Ports in Ecuador, Peru and Chile, Page 218, Effective Date.

nature. In order to qualify for that rate schedule the complainant's bills of lading were "generally claused as follows":

The above described cargo is proprietary not for resale, and in all other respects forwarded in conformity with the provisions of conference Tariff Item 1050.

In 1978, however, the conference tariff was amended by adding a "project rate" for cargo of a proprietary nature under item 1036A, Special and Charitable Rates.<sup>3</sup> Nevertheless complainant continued to annotate its bills of lading according to the terms of item 1050 instead of item 1036A because:

[Complainant] does not employ transportation personnel nor does it have personnel familiar with freight tariffs. Accordingly, complainant and its freight forwarder were not aware of the existence of item 1036A [nor] that item 1036A often produces substantially lower freight charges than item 1050. Complainant was advised of the application of Item 1036A rates versus Item 1050 rates by its freight Auditor.

Item 1036A provides as follows:

*Talara Oilwell and Production Project*

Shipments of proprietary material and equipment to Talara or Paita will be assessed base rate of \$118.00 W/M plus all additional charges. Heavy lift charges as per tariff scale will be applicable as per tariff scale W/M as cargo is freighted. Bills of lading shall be claused as set forth in Item 1001.

Item 1001 required bills of lading covering shipments to Talara or Paita under Item 1036A to be claused as follows:

The shipper shown on this bill of lading certifies that the cargo described hereon is forwarded pursuant to the terms and conditions of tariff item No. [1036A] and that he is aware that the Shipping Act, 1916, declared it to be a violation of law punishable by a penalty for a shipper to utilize an unfair device or means to obtain transportation at less than the applicable rates.

Complainant admits that the bills of lading were improperly claused to qualify for item 1036A rates, but argues that in addition to qualifying for industrial contract rates in item 1050, it also qualifies for the lower project rate in item 1036A because it has petroleum production facilities at Talara, Peru. Moreover complainant also argues that since what is shipped determines the applicable rate rather than "an erroneous bill of lading description" as long as complainant satisfies a "reasonable burden of proof" in support of its allegation.

<sup>3</sup> Same tariff of rates as noted in fn. 2, 10th Revised Page No. 207-A, Effective Date June 26, 1978, Republished July 31, 1978.

**BELCO PETROLEUM CORP. V. LYKES BROS. STEAMSHIP 1005  
CO., INC. & PERUVIAN STATE LINE**

Lykes replies that the shipments were properly treated as industrial contract rate materials under item 1050 and denies the contention that the shipments also qualified for the project rate under item 1036A. Peruana did not answer the complaint.

Briefly, shortened procedure requires, among other things, an answering memorandum to be filed within twenty-five days after the date of service of the complaint. Thereafter, within fifteen days after the date of service of the answering memorandum the complainant's memorandum in reply may be filed. However the times for the various filings under that schedule have expired without compliance by any of the parties. Through a procedural notice served January 14, last, the times for filing respondents' answering memoranda and complainant's memorandum in reply were advanced to January 30 and February 11, respectively.

The sole issue presented here is whether the absence from the bill of ladings of the specific clause required by item 1036A precludes complainant from obtaining the lower rates provided for in that item. Respondents do not dispute the fact that the shipments in question were proprietary and the bills of lading show that the shipments were to Talara.<sup>4</sup>

In *Durite Corp. Ltd. v. Sea-Land*, 20 F.M.C. 674 (1978), the Commission found that the claimant was entitled to the lower project rate even though the claimant failed to include on the bill of lading the required statement that the cargo was proprietary. The Commission specifically noted that "there is nothing to distinguish this case from the long line of cases wherein we held what actually is shipped governs the rate to be applied. See also *Cities Service International Inc. v. Sea-Land*, 19 F.M.C. 129 (1976); *Sun Co. Inc. v. Lykes Bros. Steamship Co., Inc.*, 20 F.M.C. 67 (1977).

Since the essential facts are clear and undisputed, i.e. the cargo was proprietary and was destined for Talara, the complainant has been overcharged in violation of section 18(b)(3). Accordingly, reparation is awarded in the amount of \$11,387.22.<sup>5</sup>

(S) JOHN E. COGRAVE  
*Administrative Law Judge*

Washington, D. C.  
May 13, 1981

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<sup>4</sup> Neither respondent could of course deny that the cargo was proprietary since they freighted the bills under 1050. Lykes in its answer states that 1050 was and is the correct item. But Lykes argument is based on the absence of the 1036A certification. Complainant goes to some length to show that the part of the certification requiring knowledge of the Shipping Act is unlawful. It is unnecessary to deal with that here since the requirement is at least redundant of an axiom of law and probably shouldn't be a part of the certification at all.

<sup>5</sup> See appendix for calculation underlying award of reparation.

## APPENDIX

PROPERLY APPLICABLE FREIGHT ON SHIPMENTS VIA  
LYKES BROS. STEAMSHIP CO., INC.

B/L No. 2	Freight	147,893 lbs.	\$118.00/W	\$ 8,725.69
		1,293 cft	\$118.00/M	\$ 3,814.35
	Congestion	15%		\$ 1,881.01
			Total	\$14,421.05
B/L No. 4	Freight	2,518 cft	\$118.00/M	\$ 7,428.10
	Congestion	15%		\$ 1,114.22
			Total	\$ 8,542.32
B/L No. 5	Freight	1,871 cft	\$118.00/M	\$ 5,519.45
	Congestion	15%		\$ 827.92
			Total	\$ 6,347.37
Grand Total.....				\$29,310.74

PROPERLY APPLICABLE FREIGHT ON SHIPMENTS VIA  
COMPANIA PERUANA DE VAPORES

B/L No. C-2	Freight	1,113 cft	\$118.00/M	\$ 3,283.35
		39,962 lbs	\$118.00/M	\$ 2,357.76
	Congestion	15%		\$ 846.17
			Total	\$ 6,487.28
B/L No. 11	Freight	36,310 lbs.	\$118.00/W	\$ 2,142.29
	Congestion	15%		\$ 321.34
			Total	\$ 2,463.63
B/L No. 12	Freight	1,284 cft	\$118.00/M	\$ 3,787.80
		3,021 lbs.	\$118.00/W	\$ 178.24
	Congestion	15%		\$ 593.86
			Total	\$ 4,522.90
B/L No. 17	Freight	1,304 cft	\$118.00/M	\$ 3,846.80
	Congestion	15%		\$ 577.02
			Total	\$ 4,423.82
Grand Total.....				\$17,927.63
Total As Billed.....				\$58,625.59
Total Properly Applicable Freight .....				\$47,238.37
Overcharge .....				\$11,387.22



**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 81-32****AGREEMENT NO. 10267-5****CONTAINER CARRIERS DISCUSSION AGREEMENT**

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**ORDER OF DISCONTINUANCE***June 30, 1981*

A motion to discontinue this proceeding has been filed by proponents of Agreement 10267-5, based on their formal withdrawal of that agreement from Commission consideration. The proceeding is rendered moot by withdrawal of the agreement. Therefore, the motion to discontinue is granted.

By the Commission.

(S) JOSEPH C. POLKING  
*Acting Secretary*

**FEDERAL MARITIME COMMISSION**

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**INFORMAL DOCKET NO. 998(1)  
IDEAL TOY CORP.**

**v.**

**EVERGREEN LINE**

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**ORDER ON REVIEW**

*June 30, 1981*

The Commission determined to review the decision of Settlement Officer Donald F. Norris in which he denied the claim of Ideal Toy Corp. (Ideal) for freight overcharges collected by Evergreen Line (Evergreen) on a shipment of "pool liners" from Busan, Korea, to New York, and ordered Ideal to reimburse the \$366.28 it had received from Evergreen in settlement of the claim.

Evergreen rated the shipment as "Plastic Inflatable Pools" under Item 5920-00\* of its tariff, FMC-29 at \$86 per cubic meter. Ideal contends that the shipment should have been rated under Item 5920-20 as "Swimming Pools, Collapsible (Vinyl with Steel Wall)" at \$77 per cubic meter. Following the filing of the complaint the carrier apparently settled the matter by paying the claimed amount in full.

The Settlement Officer, however, reviewed the merits of the claim and noted that the tariff contained no provision on how to rate "parts" of specific commodities when shipped separately. Because Item 5920-00 includes "Swimming pools, collapsible" among the sports and games listed in that Item and also covers "requisites" of such sports and games, he concluded that the shipment had been properly rated and ordered Ideal to reimburse to Evergreen the amount received as settlement together with interest. For reasons stated below, the Commission finds that the Settlement Officer's decision is in error and must be reversed.

Section 22 of the Shipping Act, 1916, provides that the Commission may award reparation for injury caused by a violation of the Act "by a common carrier by water or other person subject to this Act." The definition of "other person" in section 1 of the Act does not include shippers or consignees. Therefore, section 22 confers no jurisdiction on the Commission to order the payment of reparation, in any form, by a

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\* The Settlement Officer erroneously referred to No. 9520-00.

shipper or consignee.\* As a result, the Settlement Officer had no authority to direct Ideal, a shipper, to pay to Evergreen any amount.

Further, the Commission finds that not only was Ideal improperly directed to reimburse Evergreen, but also that no amount was due Evergreen in the first instance. The determination that Ideal should make reimbursement to Evergreen was based on the Settlement Officer's theory that the omission of any provision in the tariff on how "parts" of listed commodities are to be rated when shipped separately, "is remedied to some extent" by the language of Item 5920-00, which, as mentioned, covers "requisites for indoor and outdoor sports and games" (emphasis added), while Item 5920-20, in his opinion, contains no such language. However, Item 5920-20 appears in the tariff as a subheading of Item 5920-00 and it is unclear whether the provision on "requisites" applies to all subheadings listed in Item 5920-00, including Item 5920-20.

Moreover, it is uncertain whether the term "requisites" in this instance must be read as a generic reference to the components not specifically described in the tariff of the games and sports listed in the Item, rather than an indication on how such "requisites" are to be shipped, i.e. whether separately, or together with the main components. The absence of specific language to that effect creates an ambiguity in the tariff which in accordance with established principles of tariff construction must be construed against the carrier which prepared the tariff. See *Coca-Cola, Inc. v. Atchison, T. & S.F. Ry.*, 608 F.2d 213 (5th Cir. 1979). Moreover, and in any event, the description in Item 5920-20 "Swimming Pools, Collapsible (Vinyl with Steel Wall)" of which the shipped pool liners are a component, is more specific than "Swimming Pools, Collapsible" in Item 5920-00.

Consequently, the shipment should have been rated under Item 5920-20 at \$77 per cubic meter and Evergreen's assessment and collection of freight charges on the basis of the \$86 per cubic meter rate violated section 18(b)(3) of the Shipping Act, 1916.

**THEREFORE, IT IS ORDERED,** That the decision of the Settlement Officer served in this proceeding is reversed and the settlement by which Evergreen Line delivered to Ideal a check in the sum of \$366.28 in full payment of the claimed overcharges is approved.

By the Commission.\*

(S) JOSEPH C. POLKING  
Acting Secretary

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\* See *Maritime Service Corp. v. Plaza Provision Company & Maritime Service Corp. v. Pueblo Supermarkets, Inc.*, 13 S.R.R. 524 (1973).

\* The separate opinion of Commissioner Richard J. Daschbach is attached.

*Commissioner Richard J. Daschbach's separate opinion.*

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The Settlement Officer's decisions in informal dockets do not have precedential value. Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

**FEDERAL MARITIME COMMISSION****TITLE 46 - SHIPPING****CHAPTER IV - FEDERAL MARITIME COMMISSION****SUBCHAPTER B - REGULATIONS AFFECTING MARITIME  
CARRIERS AND RELATED ACTIVITIES****GENERAL ORDER 38, AMENDMENT NO. 3****GENERAL ORDER 13, AMENDMENT NO. 9****DOCKET NO. 80-37****PART 531 - PUBLISHING, FILING AND POSTING OF TARIFFS  
IN DOMESTIC OFFSHORE COMMERCE****PART 536 - PUBLISHING AND FILING TARIFFS BY COMMON  
CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED  
STATES***June 30, 1981***ACTION:** Final Rule

**SUMMARY:** Filing of tariff material covering the movement of used military household goods and personal effects by non-vessel operating common carriers in the domestic and foreign commerce of the United States is exempted from the requirements of Part 531 and Part 536 of Title 46, C.F.R.. Such filings no longer serve any regulatory purpose. The exemptions will lessen the regulatory burden on non-vessel operating common carriers.

**DATE:** Effective July 7, 1981**SUPPLEMENTAL INFORMATION:**

The Commission instituted a rulemaking proceeding in Docket No. 80-37, on June 17, 1980 (45 FR 41024) for the purpose of considering (1) the exemption of movements of used household goods and personal effects by non-vessel operation common carriers (NVOCCs) in both the domestic offshore and foreign commerce of the United States from the Commission's tariff filing requirements; and (2) to require that rates for used household goods and personal effects established by vessel operating common carriers be stated on a weight or per container basis only and that the weight of such shipments be substantiated by a public weigher's certificate furnished by the shipper.

NVOCCs undertaking ocean transportation are subject to Federal Maritime Commission regulation in both foreign and domestic com-

merce.<sup>1</sup> Several NVOCCs also operate as motor carriers under the Interstate Commerce Act (ICA) and as inland freight forwarders exempt from regulation under other provisions of the ICA. These carriers frequently specialize in the carriage of used household goods and personal effects and maintain FMC tariffs providing for the port-to-port segments of through ocean/inland transportation services. These tariffs reflect only part of the total transportation costs incurred by the shipper.<sup>2</sup>

Since July 6, 1976, all NVOCCs providing ocean transportation for used *military* household goods and personal effects for which there was also an inland movement in the United States have been granted continuing special permission to file tariff supplements and/or revised pages for such transportation on less than the statutory 30-day notice requirement.<sup>3</sup> A waiver of the general tariff format requirements stipulated in 46 C.F.R. Parts 531 and 536 has also been granted. This action was intended to facilitate the intermodal movement of used household goods and personal effects for the Department of Defense (DOD).

The Commission has now determined to exempt *all* filing requirements for such movements, as they relate to used military household goods and personal effects. In promulgating this exemption, the Commission considered, *inter alia*, the comments of DOD which had requested the modification of existing regulations to permit it to require NVOCCs to submit their through intermodal rate quotations to DOD's Military Traffic Management Command (MTMC) and to require that these quotations be approved by MTMC before they were to be filed with the Commission, but not later than their proposed effective date. The Household Goods Forwarders Association of America, Inc., objected to DOD's petition and stated that such a proposed modification in the Commission's regulations was unwarranted.

The Commission has examined the impact of existing tariff filing regulations applicable to NVOCCs naming through intermodal rates on used military household goods and personal effects and believes these procedures are no longer serving any regulatory purpose. Since the present rules took effect in 1976, only one NVOCC conference has filed tariffs under the waiver provisions granted in Docket No. 73-4. Although this tariff contains rates covering the entire through movement, this information does not provide the Commission with any greater ability to judge the lawfulness of the port-to-port segment than

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<sup>1</sup> See *Common Carriers by Water - Status of Express Companies, Truck Lines and Other Non-Vessel Carriers*, 6 F.M.B. 245 (1961) and *Bernard Ulmann Co. v. Porto Rican Express Co.* 3 F.M.B. 771 (1952) construing the applicable provisions of the Shipping Act, 1916 (46 U.S.C. 801 et seq).

<sup>2</sup> This transportation originates or terminates at interior United States points and moves in intermodal services under through bills of lading.

<sup>3</sup> Report and Order in Docket No. 73-4, 19 F.M.C. 203 (1976). See 46 C.F.R. 536.1(c)(2), previously 536.1(b)(2).

it would have if the information were obtained after the cargo had actually moved.

Section 35 of the Shipping Act, 1916 (46 U.S.C. 834) authorizes the Commission to exempt operations of water carriers or other persons or activities from statutory requirements, where it finds that such exemption would not substantially impair effective regulation, be unjustly discriminatory or be detrimental to commerce. The Commission is satisfied that the transportation of used military household goods and personal effects by NVOCCs fall within the category of operations which can be exempted from tariff filing requirements without detrimental effects on any affected interest, particularly because MTMC, the involved shipper, has its own competitive bidding regulations.

While the instant proceeding originally considered the proposed exemption of all used household goods and personal effects, opposition to the exemption of used *non-military* household goods and personal effects, has prompted the Commission to exempt only used *military* household goods and personal effects at the present time.

The issue of revising the tariff filing regulations on used *non-military* household goods and personal effects will be deferred for possible consideration in a future proceeding. In addition, the Commission has decided not to require at this time that rates for used household goods and personal effects established by vessel operating common carriers be stated on a weight or per container basis or that the weight of each shipment be substantiated by a public weigher's certificate furnished by the shipper.

Therefore, pursuant to 5 U.S.C. 533, section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844) and sections 18(a) and (b), 35 and 43 of the Shipping Act, 1916 (46 U.S.C. 817(a), 817(b), 833a and 841(a)), it is ordered, that effective upon publication in the *Federal Register*, Title 46 Code of Federal Regulations §§ 531.1 and 536.1 are amended as follows:

1. Add a new section 536.1(f) which reads as follows:

The following services are exempt from the tariff filing requirements of the Act and the rules of this part:

\* \* \*

(f) Transportation of used military household goods and personal effects by non-vessel operating common carriers.

2. Section 536.1(c)(2) is deleted.
3. Add a new section 536.1(b)(7) which reads as follows:

The following services are exempt from the tariff filing requirements of the Act and the rules of this part:

\* \* \*

(7) Transportation of used military household goods and personal effects by non-vessel operating common carriers.

By the Commission.

(S) JOSEPH C. POLKING  
*Acting Secretary*



**FEDERAL MARITIME COMMISSION**

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**TITLE 46 - SHIPPING****CHAPTER IV - FEDERAL MARITIME COMMISSION****SUBCHAPTER B - REGULATIONS AFFECTING MARITIME  
CARRIERS AND RELATED ACTIVITIES****GENERAL ORDER 13, AMENDMENT NO. 10****DOCKET NO. 80-56****PART 536 - PUBLISHING AND FILING TARIFFS BY COMMON  
CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED  
STATES**

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*June 30, 1981***AGENCY:** Federal Maritime Commission**ACTION:** Final Rule

**SUMMARY:** The practice of filing temporary amendments to tariffs published by carriers and conferences of carriers in the foreign ocean commerce of the United States is hereby prohibited. The convenience of such filings is outweighed by the benefits accruing from their discontinuance which will eliminate an unreasonable paperwork burden for the Commission and simplify the use of foreign commerce tariffs by shippers, carriers, and other interested persons.

**DATE:** Effective September 8, 1981**SUPPLEMENTAL INFORMATION:**

The Commission's present regulations provide that changes, additions and deletions to existing tariffs shall be known as "amendments" and shall be made in permanent form, 46 C.F.R. 536.10(a)(1). However, the current regulations also allow carriers the privilege of facilitating rate changes in their tariffs through the use of temporary tariff filing methods such as telegrams, cables, or mail (in the form of letters and rate circulars) under certain conditions, 46 C.F.R. 536.10(c).<sup>1</sup>

The current proceeding was initiated in response to petitions seeking modifications to the Commission's regulations which would have fur-

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<sup>1</sup> These regulations were promulgated pursuant to a rulemaking proceeding in Docket No. 964, *General Order No. 13*, 30 F.R. 7138 (1965). Minor modifications to these rules were implemented on January 1, 1979 (see Report and Order in Docket No. 72-19, *General Order No. 13, Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States*, 42 F.R. 59265).

ther broadened the circumstances under which temporary filings could be made. On September 5, 1980, the Commission denied these petitions and commenced a separate inquiry into whether the practice of amending foreign commerce tariffs by using a temporary filing method should be continued at all, and, if so, whether the present regulations governing this practice should be tightened.<sup>2</sup> Upon consideration of the comments submitted, and for the reasons set forth herein, the Commission has decided to eliminate the privilege of amending tariffs by any means other than a permanent filing.

Comments were sought on two specific proposals: (1) elimination of temporary tariff filings, or (2) restriction of the privilege of filing temporary amendments. The elimination of the temporary filings would prohibit this form of amendment except pursuant to special permission authority as provided in 46 C.F.R. 536.15. The second option would have forbidden temporary filings intended: (a) to amend tariffs of controlled carriers as defined in section 18(c) of the Shipping Act, 1916; (b) to increase the rates in any tariff; (c) to change tariff commodity descriptions or add new commodity descriptions; (d) to change the basis of assessing freight charges; or (e) to publish temporary amendments with an expiration date. Additionally, the second alternative clarified that portion of the existing rule which prohibits one temporary amendment from amending another temporary filing.

Comments were submitted by several ocean carriers and conferences, all of which opposed the proposed rule. The National Industrial Traffic League (League), an organization of shippers and trade associations, stated that only temporary reductions should be permitted to be filed.<sup>3</sup> The League did not support total discontinuance of temporary amendments.

Commentators on the proposed rule addressed the following issues.

*Mail Service* - Without the means of telegraphing amendments to the Commission, tariff filers would have to rely upon the U.S. Postal

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<sup>2</sup> During the past several years, the Commission has observed that temporary tariff filings were being used to amend many publishing carriers' rules and regulations rather than their rates. A Foreign Tariff Advisory Notice was mailed to all carriers and conferences with tariffs on file which reminded them of the filing requirements of section 536.10(c), stating that the Commission would strictly enforce this rule. The petitions for amendment of the temporary tariff filing rules were the result of these enforcement activities.

The rulemaking petitions generally maintained that the existing rules are harsh, burdensome, and not sufficiently streamlined to permit immediate implementation of certain tariff material. The use of the permanent method of amending tariffs was claimed to be unresponsive. The Petitioners, therefore, requested an expansion of the use of temporary tariff filings. The Commission did not accept this position because the rationale, purpose and justification for temporary tariff filings did not support the filing of temporary tariff amendments except to reduce the level of a specific commodity rate or the level of a class rate when filed under section 18(b) of the Shipping Act, 1916, (46 U.S.C. 817(b)).

<sup>3</sup> The League's position was that any means of amending a tariff which would result in a reduction should be encouraged, including temporaries amending temporaries and new commodity descriptions filed by temporary amendments.

Service or commercial courier services. It was contended by several conferences<sup>4</sup> that the U.S. mail service is unreliable and that first class service is too slow. They claimed that the cost of express mail or courier service was disproportionately greater than the average cost of a TELEX, stating that these added costs will ultimately be passed on to shippers in the form of increased freight rates whenever competitive conditions permit. They further contended that the delay and related problems associated with filing permanent tariff pages create inconvenience and economic harm.

*Special Permission Requests* - The proposed rulemaking mentions that special permission relief for waiver from the tariff filing rules is available to facilitate an amendment which is critical to the operations of either carriers or shippers.

Commenting conferences<sup>5</sup> asserted that the alternative of continually requesting special permission to file by TELEX is cumbersome and uncertain. They claimed that there is no rational apparent basis for distinguishing between amendments in rate levels, which are permitted to be filed by TELEX and amendments relating to charges, surcharges, and rules, which are not.

*Emergency, Special and Project Rates* - Commentators also asserted that the discontinuance of the temporary filing procedure, as it relates to special, emergency and project rates, would place added burdens on carriers as well as shippers. Carriers would lose the opportunity to receive and carry cargo on short notice, such as emergency supplies moving to developing countries. The carriers state<sup>6</sup> that special, emergency and project rates necessitate a TELEX filing with an expiration date. They claimed that prohibiting the filing of expiration dates in connection with special rates, which are temporary responses to immediate market problems, would penalize shippers who have urgent needs for such rate reductions.

*Financial Impact* - Certain commentators<sup>7</sup> contended that the proposed changes would place substantial financial burdens upon them.

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<sup>4</sup> Trans-Pacific Freight Conference of Japan/Korea; Japan/Korea-Atlantic and Gulf Freight Conference; Associated Latin American Conference, et al.; Far East Conference; Atlantic and Gulf-Indonesia Conference, et al.; Pacific Coast European Conference; North Europe/U.S. Pacific Coast Freight Conference; Latin America/Pacific Coast Conference; and Pacific Coast/River Plate Brazil Conference.

<sup>5</sup> Trans-Pacific Freight Conference of Japan/Korea and Japan/Korea-Atlantic and Gulf Freight Conference.

<sup>6</sup> Waterman Steamship Corp.; Pacific Coast European Conference; North Europe/U.S. Pacific Freight Conference; Latin America/Pacific Coast Conference; Pacific Coast/River Plate Brazil Conference; and Pacific Westbound Conference.

<sup>7</sup> Trans-Pacific Freight Conference of Japan/Korea; Japan/Korea-Atlantic and Gulf Freight Conference; Associated Latin American Conference; Australia-Eastern U.S.A. Conference, et al.; Pacific Coast European Conference; North Europe/U.S. Pacific Freight Conference; Pacific Coast/River Plate Brazil Conference; and Pacific Westbound Conference.

These carriers alleged that the temporary filing restrictions would force them to hire and pay local tariff agencies on a continuing basis to prepare and file tariff amendments. They argued that, even with correct technology, the process of preparation, reproduction, dissemination and filing of permanent tariff pages still requires a minimum of fifteen to twenty days. The proposed rule would therefore reimpose delays and paperwork burdens which the Commission had successfully eliminated some fifteen years ago.

*Increases and Surcharges* - Commentators to the rulemaking<sup>8</sup> questioned the Commission's rationale in proposing to allow rate reductions to be filed by TELEX but not increases or surcharges. They alleged that the fifteen to twenty days' delay required between the date of the decision to amend a tariff and the day the amendment is finally filed with the Commission unnecessarily delays the effective date of surcharges and rate increases. It is also contended that surcharges are subject to frequent and abrupt changes and are directly related to the cost of providing freight service. Unless carriers are able to react to these cost changes quickly, by appropriately adjusting a surcharge, either the carrier or its shippers will experience financial losses, they claimed.

#### DISCUSSION AND CONCLUSIONS

Prior to 1961, common carriers were only required to file their export rates with the Federal Maritime Board within a period of thirty days after they had become effective. The enactment of section 18(b) of the Shipping Act, 1916, required ocean common carriers<sup>9</sup> to file both import and export rates, adhere to the level of rates lawfully on file, give notice of changes to the filed rates and charge rates only in effect.

The temporary method of amending tariffs involves the double examination of each amendment. The filings are received as TELEX's, letters, rate advices and circulars. Upon receipt, the temporary amendment is date stamped, hole punched and sorted. Since a single temporary amendment may involve many pages or several tariffs, it commonly must be reproduced. The temporary amendment is next examined for conformity to the statute and is then compared to the superseded or amended material. If accepted, the temporary amendment is placed in a tariff binder until it is replaced by a permanent tariff filing (twenty or thirty days, depending upon whether the temporary amendment came from an overseas source). Upon receipt of the permanent filing to replace the temporary amendment, the examiner must typically sort

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<sup>8</sup> Far East Conference; Australia-Eastern U.S.A. Shipping Conference; Trans-Pacific Freight Conference of Japan/Korea; and Japan/Korea Atlantic and Gulf Freight Conference.

<sup>9</sup> Surface land carriers and air carriers had long before been required to publish and adhere to filed rates by the Interstate Commerce Act and Civil Aeronautics Act.

through many seemingly identical messages to locate the referenced temporary filing. The content of the permanent page is then compared with the temporary amendment to ensure that the two comport (*i.e.*, same effective date, rate level, etc.). If the permanent page is accepted, the temporary amendment is removed and destroyed. In cases where the permanent page is deficient, the temporary filing remains in the binder until it is properly replaced.

The Commission did not have a TELEX terminal for temporary tariff filing purposes until the late 1960's. The installation of a TELEX terminal for tariff filings was, in part, premised on the arguments that: (1) temporary filings constituted a very small portion of all tariff filings; (2) temporary filings were almost always reductions and therefore, in the shippers' benefit; (3) temporary filings would not impose unmanageable burdens on the Commission's staff; and (4) the carrier industry was very desirous of the opportunity to fully utilize this method of amending tariffs.

The carrier industry initially utilized temporary filings via TELEX in the same manner they had used the more expensive telegrams/cables, *i.e.*, for extraordinary conditions dictating immediate rate relief in the form of a reduction. Soon, however, the industry realized that the temporary TELEX tariff amendment could also be used to provide thirty or ninety days' statutory notice for an increase in rates, as well as the immediate notice of a reduction.

When the Commission permitted temporary tariff filings in the initial tariff filing rules, the volume of tariff amendments was small compared to their current extensive magnitude. In a four-month period in 1965, for instance, there were but thirty-two hand-delivered messages. Today the Commission averages 115 messages per day, affecting 244 individual tariff pages. Well in excess of 100,000 temporary rate changes are now filed annually. Single TELEX messages over ten feet in length are not rare. Moreover, whereas the staff examined a total of 83,776 tariff pages in 1965, 384,992 pages were filed with the Commission in 1979. A five to sixfold increase in workload has been experienced.

Tariff examination is a labor intensive operation. The burden imposed upon Commission staff by temporary methods of amending tariffs is magnified when these temporary filings are characterized by inferior quality. During the period September, 1980, through January, 1981, twenty-eight percent of all tariff rejections involved a temporary amendment while these filings represented less than ten percent of the total number of tariff amendments.

The elimination of temporary filings via TELEX may prove inconvenient to some overseas domiciled carriers pending further development of electronic data processing technology, which enables carriers to make their permanent filings expeditiously and cost-effectively. However, it is anticipated that the basic needs of these carriers can be

satisfied by vendors of tariff filing services, data processing services, sufficient prior planning involving lead times in tariff production, courier services or Express Mail Service. Such methods may be more costly than TELEX, but it is more reasonable that carriers wishing to accomplish rapid tariff amendments bear this cost directly. Moreover, in cases where good cause can be shown, the Commission is empowered to waive its tariff rules, including the specific prohibition against temporary tariff filings adopted herein (see 46 C.F.R. 536.15 and 46 U.S.C. 817(b)(3)).

Accordingly, Part 536 of the Rules will be amended to eliminate the acceptance of any type of temporary tariff filing. Thus, all amendments to tariffs filed by carriers and conferences of such carriers in the foreign commerce of the United States must, unless special permission is otherwise granted, be made in accordance with the remaining provisions of the Commission's General Order No. 13, 46 C.F.R. Part 536.

Therefore, it is ordered, that pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553) and sections 18(b), 22 and 43 of the Shipping Act, 1916 (46 U.S.C. 817(b), 821 and 841(a)), effective sixty (60) days from the date this notice is published in the *Federal Register*, Title 46 Code of Federal Regulations § 536.10(c) is deleted.

By the Commission.\*

(S) JOSEPH C. POLKING  
*Acting Secretary*

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\* Commissioner Peter N. Teige's dissenting opinion is attached.

*Commissioner Peter N. Teige dissenting.*

The law requires ocean carriers to file their tariffs with the Commission before they can be effective. The Government, having placed this obligation on the ocean carriers, has a duty to make this procedure as speedy and efficient as possible. In today's fast-moving commercial world, rate changes or new commodity rates must be filed and put into effect quickly. The Commission has been accommodating this need for many years by permitting telex filings, followed by the receipt by mail of the actual tariff pages. This process has become burdensome for the Commission, particularly as available personnel shrinks due to budget cuts.

Nevertheless, I would keep this function in place until we have explored all other in-house alternatives to its abandonment, including efforts to improve productivity in the Bureau of Tariffs through re-allocation of personnel, firmer supervision and job reorganization of a time and motion nature.

I recognize that the whole tariff system is in need of simplification and technological improvement. But these changes will take time. With proper leadership the changes will come without punishing the industry by terminating the present telex filing system.

The Commission's action is a step backwards that will materially inconvenience carriers and the shipping public, particularly where foreign-based conferences are involved.